NO. 25-ICA-213

IN THE
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

HOMESITE INSURANCE COMPANY OF FLORIDA,

Petitioner,
v.

ZURICH INSURANCE COMPANY,
and J.F. ALLEN COMPANY, INC.,

Respondents,

From the Circuit Court of Upshur County, West Virginia
Honorable Judge Jacob E. Reger
Civil Action No. CC-49-2024-C-16

RESPONDENT J.F. ALLEN COMPANY, INC.'S RESPONSE TO PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

I. The Circuit Court correctly found that the exclusion upon which Homesite relies does not preclude coverage for J.F. Allen.

II. At minimum, Homesite's own arguments demonstrate that the exclusion as written is ambiguous, and therefore, the exclusion must be interpreted against Homesite.

INTRODUCTION

In this case, J.F. Allen Company, Inc. ("J.F. Allen") finds itself in the unenviable position of being placed between two of its insurance carriers who continue to claim, "not it", while pointing the finger at the other on who should provide coverage to J.F. Allen in a wrongful death suit. This "not it" defense continues to cause J.F. Allen real financial harm. At issue in this appeal is whether an auto exclusion can be read to exclude a claim of negligent hiring/retention against J.F. Allen where an independent contractor was involved in an auto accident that caused the death of Larry Green. While Homesite wants to focus on the terms "arising out of" and "use of any auto" language in this exclusion, it overlooks the fact that the exclusion is only triggered if the "claim, suit, loss" is premised upon the use of an auto. Because the negligent hiring/retention claim is a stand alone claim, separate from the auto accident, the exclusion's "claim, suit, loss" language is not triggered. Accordingly, the Circuit Court correctly found the Homesite policy provides coverage for J.F. Allen.

STATEMENT OF THE CASE

1. The Underlying Action

This coverage dispute arose from a wrongful death claim brought by Debra Green, on behalf of the Estate of Larry R. Green who was killed in an automobile accident involving a truck driven by Richard Marple styled Debra Green v. Nu Creek, LLC, et al., Civil Action No. 22-C-199-3 ("Underlying Action"). *AR0307-0328*. The claim against the named defendants, including

J.F. Allen, sought damages for the wrongful death of Mr. Green. *AR0307-0328*. The Underlying Action asserted negligent hiring and/or negligence claims against J.F. Allen regarding J.F. Allen's alleged use of Defendant, Nu Creek as an independent contractor despite its knowledge of Nu Creek and its driver, Defendant's Marple's driving record which created an alleged chameleon carrier relationship. *AR0323-0326*.

2. The Coverage Claim

In this case, no one disputes that J.F. Allen is owed coverage. *AR0008-0009*. Instead of providing coverage for their insured, however, J.F. Allen's insurers fight over who must pay the bill—all to the detriment of J.F. Allen. Because its insurers insist on squabbling over which one owes coverage, J.F. Allen was forced to pay significant sums of its own money to avoid potential excess liability and protect itself for a claim that its insurance carriers say is and should be covered by insurance. *AR0007*.

J.F. Allen purchased two different policies with two different types of insurance policy provisions. *AR0008*. The Circuit Court correctly found both provide coverage. *AR0001-0014*. With respect to the Zurich Auto Policy, the pertinent policy provision at issue is the insuring clause which provides in pertinent part:

> We will pay all sums an "insured" legally must pay as damages because of "**bodily injury**" . . . to which this insurance applies, caused by an "**accident**" and resulting from the . . . use of a covered "**auto**".

AR0862. Per the declarations page, the policy does not limit coverage to autos owned or operated by J.F. Allen. Instead, the policy provides coverage for "any auto." *AR0861*. Bodily injury is defined in the Zurich Auto Policy as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these." When the policy is read as a whole, as is required, the Zurich Auto Policy provides coverage for this claim.

As to Homesite, the policy provision at issue is an exclusion found in the primary excess policy issued by Axis Surplus Insurance Company. The "Automobile Exclusion" in the Axis policy provides:

> 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**.

AR0553. The term "claim" is not defined in the Axis policy. The Axis policy defines "suit" as a civil proceeding in which covered loss is alleged. *AR0538*. 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.

Id. The Axis policy defines "loss" as "damages the Insured becomes legally obligated to pay as judgments or settlements." *AR0537*.

Despite reserving rights pursuant to the automobile exclusion, Axis exhausted its policy limits for the Underlying Litigation triggering Homesite's policy which follows form to Axis. *AR0005*. Homesite denied coverage for the claim asserted in the Underlying Action and, instead asserted the Zurich Auto Policy provided coverage for J.F. Alle in the Underlying Action, thus triggering this coverage dispute.

3. Procedural History

Homesite filed the underlying declaratory judgment action on or about February 13, 2024. *AR0015-28*. Per a briefing order entered in the case, the parties filed cross-motions for summary judgment, with their respective responses and replies. Each of the insurance companies argued their respective policies did not afford coverage to J.F. Allen and pointed to the coverage they each

believed the other should provide. The Circuit Court heard argument on the motions for summary judgment on March 25, 2025. *AR1153-1233*.

On April 25, 2025, the Circuit Court entered its Order granting J.F. Allen's summary judgment finding that both the Zurich Auto Policy and the Homesite Excess Policy provide coverage for J.F. Allen in the Underlying Action. *AR0001-0014*. The Circuit Court found that, with respect to Zurich, the auto policy provides coverage because the insuring clause takes into consideration the bodily injury sustained not just the liability. *AR0012*. Conversely, the Circuit Court found that the exclusion Homesite relies upon did not preclude coverage because it was triggered by the claim, suit or loss, not whether there was an auto accident. *AR0009-0011*.

SUMMARY OF ARGUMENT

In this case, Homesite argued the Automobile Exclusion should be applied as written. *AR0185*. J.F. Allen agrees. The law does too. Homesite's proffered reading, however, does not apply the plain language of the Automobile Exclusion. Like Zurich, Homesite insists on a tortured reading of the exclusion that places primary emphasis on only a portion of the relevant auto exclusion and ignores the triggering language. When confronted with this reality, Homesite engages in a further tortured argument that the words "claim, suit, loss" only pertain to the damages awarded and ignore the type of claim asserted to maintain its position the exclusion precludes coverage. This argument further demonstrates that the exclusion was either not meant to exclude the claims against J.F. Allen or the exclusion is ambiguous. Either way, the Circuit Court was correct in finding coverage for J.F. Allen under the Homesite policy.

STATEMENT REGARDING ORAL ARGUMENT

J.F. Allen does not believe oral argument is necessary as this appeal involves a straight-forward insurance coverage issue. To the extent oral argument is deemed necessary, argument

should be limited to Rule 19 of the Rules of Appellate Procedure as the matter involves assignments of error on the application of settled law and involves a narrow issue of law.

STANDARD OF REVIEW

The standard of review on a declaratory judgment claim is the same as that on summary judgment – *de novo*. *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995). "Because the purpose of a declaratory judgment action is to resolve legal questions, a circuit court's ultimate resolution in a declaratory judgment action is reviewed *de novo*." *Id.* at 612. Likewise, "[t]he interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination which, like the court's summary judgment, is reviewed *de novo* on appeal." *Payne v. Weston*, 195 W.Va. 502, 506-07, 466 S.E.2d 161, 165-66 (1995).

ARGUMENT

I. Homesite bears the burden of establishing the auto exclusion precludes coverage for J.F. Allen.

Under West Virginia law, Homesite bears the burden of proving that an exclusion bars coverage for a particular claim. *See, e.g.*, *State Auto. Mut. Ins. Co. v. Alpha Eng'g Servs., Inc.*, 208 W. Va. 713, 716, 542 S.E.2d 876, 879 (2000) ("When an insurance company seeks to avoid . . . its duty to provide coverage, through the operation of a policy exclusion, the insurance company bears the burden of proving the facts necessary to trigger the operation of that exclusion."); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 8 (W. Va. 1998) ("When . . . the insurance company seeks to avoid liability through the operation of an exclusion, the insurance company has the burden of proving the exclusion applies to the facts of the case."). In evaluating whether an exclusion applies, the exclusion is construed strictly in favor of the insured. Syl. Pt. 5, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987), overruled, in part, on other grounds by *Potesta v. U.S. Fidelity & Gaur. Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998).

The parties all appear to agree that the language in the respective insurance policies must be given, their plain, intended meaning. The analysis, however, must also consider the nature of the claim asserted against the insured. Both Homesite and Zurich attempt to overlook this concept and instead focus on phrases contained within either the insuring provision or an exclusion to preclude coverage. As set forth below, the Circuit Court correctly found Homesite could not meet its burden.

II. The Circuit Court correctly found the exclusion Homesite relies upon does not preclude coverage for this case.

A. Homesite relied upon the very case it now claims the circuit court erred in relying.

In its opening motion, Homesite cited the *Huggins v. Tri-County Bonding Co.*, 175 W.Va. 643, 337 S.E.2d 12 (1985) case for the proposition that "the reasoning contained in the *Huggins* case strongly suggests that both the Homesite Policy's auto exclusion and the Zurich Auto Policy's insuring agreement should simply be applied as written." *AR0189-191*. When J.F. Allen pointed to language in that case which supports a finding in favor of coverage, Homesite reversed it position and attempted to distinguish *Huggins* from the current case. *AR1072*. In this appeal, Homesite continues to retreat from *Huggins* by asserting it analyzes a very different insurance policy exclusion. But Homesite cannot distance itself from its former reliance on *Huggins*—that case plainly forecloses Homesite's position. And that is exactly what J.F. Allen argued below – the exclusion in *Huggins* being entirely different did not support Homesite's coverage position and the discussion by the *Huggins* Court actually supports coverage in favor of J.F. Allen. *AR0762-763*.

The *Huggins* Court held that a homeowner's policy that included an exclusion for "ownership, maintenance, operation or use. . . of a motor vehicle" nonetheless covered a negligent entrustment of a motor vehicle claim involving an auto accident. 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. Therefore, even though the Nationwide policy excluded claims resulting from "ownership, maintenance, operation or use" of a "motor vehicle," the mere fact an auto accident was involved did not automatically trigger the auto exclusion in that case because the negligent entrustment claim was a separate cause of negligence from the actual auto accident. *Id.* 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.

Huggins' reasoning is equally applicable here. The exclusion is triggered by first looking at the "claim, suit, loss" asserted against the insured. Homesite, however, wishes to overlook that language and focus *solely* on the fact that an automobile was involved in the injury. But, just like Zurich, this cherry picking of language that suits the coverage decision is inappropriate. When read as a whole, the exclusion only applies if the "claim, suit, loss" is premised upon the use of an auto. The claim, suit, loss against J.F. Allen was negligent hiring/retention which is distinct from the auto accident—the Supreme Court recognized as much in *Huggins*. Accordingly, the decision of the Circuit Court was correct.

B. West Virginia interprets insurance policies on their face, not by theories asserted.

Like Zurich's "theory of liability" argument, Homesite declares West Virginia has now adopted a "cause of damages" approach. And just like Zurich, Homesite's argument overstates the cited case law. In *American National Property and Casualty Company v. Clendenen*, 238 W.Va. 249, 793 S.E.2d 899 (2016), the West Virginia Supreme Court of Appeals was not focused on the "cause of damages," but rather found in favor of the insurance companies because the

applicable insurance policies extended intentional acts exclusions to "anyone we protect" or "any insured." *Id.* at 261. The Court reasoned that insurance coverage could not be afforded for the negligent acts of the mothers of two teenage girls who themselves committed intentional acts. *Id.* Because the bodily injury arose from those intentional acts coupled with the specific language of the policies that extended the exclusions to "anyone we protect" or "any insured," the exclusions applied to the negligence claims against the mothers.

In rendering this decision, however, the *American National* Court did not intend to announce a new approach to insurance coverage cases, nor did it intend to "establish a 'cause of damages' approach" as advocated by Homesite. Rather, the Court made clear that extending insurance coverage decisions in such a manner would be inappropriate. It then cautioned that in declining to extend a prior holding to a blanket approach that,

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

Id. at 263, *quoting*, *Columbia Casualty v. Westfield Insurance Company*, 217 W.Va. 250, 251-52, 617 S.E.2d 797, 798-99 (2005).

Finally, the Court in *American National* did not focus on the "arising out of" language in the policies in that case in the manner Homesite advocates. The *American National* case involved two certified questions, neither of which asked the Supreme Court of Appeals to decipher the "arising out of language." Rather, the Court was asked to analyze whether language in the policy excluding intentional acts extended to insureds who did not commit the intentional act. In answering the certified question, the Court focused on the "anyone we protect" and "any insured" language in the respective insurance policies. *American National*, 217 W.Va. at 256-263. The

decision is devoid of any discussion regarding whether the "arising out of" language in those policies played any in role the ruling—and Homesite overstates the Court's holding when it contends otherwise.

C. The phrase "claim, suit or loss" were given their plain and ordinary meaning by the Circuit Court in holding the Homesite exclusion does not preclude coverage.

The "claim, suit, loss" asserted against J.F. Allen is a complaint filed by Debra Green who alleged J.F. Allen negligently hired and/or retained a contractor that caused an automobile accident that led to wrongful death damages. It is undisputed that the complaint against J.F. Allen did not involve J.F. Allen's use of a motor vehicle. Homesite, nonetheless, asserts that an auto exclusion that is only triggered by a "claim, suit, loss" is nonetheless triggered simply because an auto accident occurred.

To arrive at this flawed conclusion, Homesite begins with defining the terms "claim, suit, loss." Homesite admits the term "claim" is not defined in the applicable insurance policy. Instead, Homesite cites the portion of the Black's Law Dictionary definition of the word "claim" it deems is pertinent. (Brief 19). Per Homesite, the term "claim" means a demand for money or legal remedy. *Id.* Buried in a footnote, however, Homesite admits the Black's Law Dictionary actually has several definitions for the word "claim," one of which states the definition can also mean "the type of cause of action." Pet'r's Br., p. 20, FN 33. But according to Homesite, the "cause of action" part of the definition of claim does not apply when reading its exclusion because the other terms are defined with a focus on damages. Not only does this statement make no sense, but it also highlights the ambiguous nature of the language in the policy which must be strictly construed in favor of the insured. *Murray*, 509 S.E.2d at 6.

Homesite, nonetheless, argues that "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."

(Brief 20). If that were the case, the exclusion would have said that. Instead, it is clear the exclusion was intended to only exclude claims, suits or losses that alleged the specific instances involving an automobile. That is not present with respect to the claim asserted against J.F. Allen Indeed, Homesite previously conceded as much in summary judgment briefing. Specifically, Homesite in reference to the "claim, suit, loss" language summarized the allegations against as follows: "J.F. Allen was negligent, reckless, or otherwise guilty of wrongful acts, in its retention of Nu Creek and Mr. Marple as contractors. J.F. Allen, Zurich, and Homesite all agree that this is the case." *AR0180.*

D. The Circuit Court's decision was not limited by the ownership, maintenance, operation, use or entrustment of an automobile.

In a last-ditch effort to find fault with the Circuit Court, Homesite argues the Circuit Court erred by making its decision dependent upon a finding that the exclusion is only triggered when the insured engages in ownership, maintenance, operation, use or entrustment of an automobile. (Brief, p. 23). A review of the decision as a whole, however, demonstrates the Circuit Court did not make its decision contingent upon that fact. Homesite admits as much. Yet, Homesite then goes onto argue that the discussion somehow is critical to the decision, so much so that it amounts to error.

Homesite then goes onto discuss the holding in *Essex Insurance Co. v. Neely*, 5:04-cv-139, 2008 WL 619194 (N.D. W.Va., Mar. 4, 2008). The *Essex* case is distinguishable for two reasons. First, the exclusion in *Essex* is different than the exclusion at issue in this case. Contrary to excluding a "claim, suit, loss" like in this case, the *Essex* exclusion excluded "bodily injury" arising out of the use of an auto accident. Thus, just like many of the other cases relied upon by Homesite and Zurich, the triggering language required a "bodily injury" that arose out of an auto accident. The exclusion in this case is limited to the type of claim, not the bodily injury. Because the actual

claim asserted against J.F. Allen was independent of an auto accident, the Homesite exclusion does not apply.

Second, contrary to Homesite's recitation of the ruling in *Essex*, the Court did not find that use of a vehicle triggered the exclusion, but rather focused its analysis on the arguments raised by the parties in that case, which were focused on whether the policy excluded off-premises auto claims and/or whether the exclusion was ambiguous. The Court did not evaluate the precise issue, which is present in this case, i.e. whether the nature of the claims asserted against J.F. Allen which are garden variety negligent retention claims trigger an auto exclusion. For the reasons stated, they do not. The factual predicate for such claims is wholly independent of the automobile accident. And it was on that basis the Circuit Court found the exclusion did not preclude coverage for J.F. Allen. As such, the Circuit Court's decision should be affirmed.

III. Ambiguity

The Circuit Court correctly found that the Homesite exclusion is ambiguous. A policy's language is ambiguous when it "is reasonably susceptible of two different meanings." *Murray*, 509 S.E.2d at 6. Ambiguous terms "are to be strictly construed . . . in favor of the insured." *Id.* In determining whether a provision in an insurance contract is ambiguous, West Virginia courts apply the doctrine of *ejusdem generis*, whereby "the general words [in a contract] will be limited in their meaning or restricted to things of like kind and nature with those specified." *Id.*

The ambiguity in this case is highlighted by the competing arguments by both insurance companies. As Homesite explained in detail in its opening motion, both policies are equally susceptible to different interpretations. *AR0183-0185*. Per Homesite's initial position, to resolve the coverage decision, the Circuit Court would be called upon to determine whether the respective insurance policies were to be interpreted as including the word "insured" should be read into the

applicable insuring provisions. *Id*. According to Homesite, to find in favor of Zurich's position, the court would be required to insert the word "insured" into the insuring clause to have it read:

> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the **insured's** ownership, maintenance or use of a covered "auto".

AR00183. Homesite further noted that, in its opinion, the court would also have to rewrite the Homesite auto exclusion as follows:

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

AR00184. This type of argument is not a mere disagreement on how a policy should be interpreted. Rather, it highlights an ambiguity in both insurance policies and the scope of their intent as to each provision.

As noted above, Homesite further amplifies the ambiguity in its policy with its argument on how the term undefined "claim" should be interpreted. Homesite claims the term refers to damages while J.F. Allen and Zurich both assert it means the type of cause of action asserted in the Underlying Action. Homesite chose not to define the term in its policy. Absent that definition and this clear dispute as to how it should be interpreted, the exclusion must be deemed ambiguous. As such, the Circuit Court's decision on that issue should be affirmed.

CONCLUSION

For the reasons stated above, the Court should affirm the Circuit Court's order, uphold summary judgment in J.F. Allen's favor upheld, and award J.F. Allen its costs incurred in litigating this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 22, 2025, I electronically filed a true and exact copy of the foregoing **RESPONDENT J.F. ALLEN COMPANY, INC.'S RESPONSE TO PETITIONER'S BRIEF** with the Clerk of this Court using the File & Serve Xpress system, which will send notification of such filing to the following:

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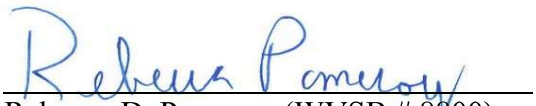

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