ICA EFiled: Aug 22 2025
04:40PM EDT
Transaction ID 76920145

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 25-ICA-213

HOMESITE INSURANCE COMPANY OF FLORIDA,

Petitioner,

v.

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

Respondents.

(On Appeal from the Circuit Court of Upshur County,
West Virginia, Civil Action No. CC-49-2024-C-16)

RESPONSE BRIEF ON BEHALF OF RESPONDENT, ZURICH AMERICAN INSURANCE COMPANY

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STATEMENT OF THE CASE

A. UNDERLYING ACTION

The instant matter is a dispute as to insurance coverage for the claims asserted against, J.F. Allen Company, Inc. (hereinafter "J.F. Allen"), in *Debra Green v. Nu Creek, LLC, et al.*, Civil Action No. 22-C-199-3, previously pending in the Circuit Court of Harrison County, West Virginia (hereinafter the "Underlying Action"). Richard Marple (hereinafter "Marple") was an employee of Nu Creek, LLC (hereinafter "Nu Creek"), and was involved in a motor vehicle accident, on April 20, 2022, which resulted in the death of Larry R. Green (hereinafter "Decedent"). As a result of the death of her Decedent, Debra Green (hereinafter "Ms. Green") filed the Underlying Action.

The Complaint in the Underlying Action asserted that Nu Creek was a "chameleon carrier," *i.e.* "a motor carrier that shuts down one trucking company and reopens with a new name and DOT number to avoid facing penalties and paying fines that are generally incurred as the result of an adverse safety history or serious collision." *AR0810 at ¶ 15.* The underlying Complaint further alleged that "[d]espite the fact that Defendant Nu Creek was operating as an illegal chameleon carrier, Defendant, J.F. Allen entered into an independent contractor agreement and retained Defendant Nu Creek to haul cargo for-hire." *AR0810 at ¶ 18.*

As to the claims against J.F. Allen, the underlying Complaint stated that, prior to hiring Nu Creek as an independent contractor, J.F. Allen had an obligation to conduct a reasonable inquiry into Nu Creek and Marple's background and knew or should have known that Nu Creek and Marple were not competent to safely do the job for which they were hired. *AR0811 at ¶ 19.* The Complaint asserted a "negligence/recklessness/wrongful death" claim against Marple (*AR0813-AR0815 at ¶¶ 30-36*), a vicarious liability claim against Nu Creek (*AR0815 at ¶¶ 38-41*),

and a "negligence/recklessness/wrongful death" claim against Nu Creek (*AR0816-AR0818 at ¶¶ 43-53*).

This dispute arises from the claims asserted against J.F. Allen in Count IV of the Complaint in the Underlying Action. Count IV of the underlying Complaint is titled "negligence/recklessness/wrongful death," and asserts that "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 a commercial vehicles for-hire." *AR0818 at ¶ 56.* The Complaint further alleged that J.F. Allen knew or should have known that Nu Creek "was an illegal chameleon carrier and Defendant Marple was unfit to safely operate a motor vehicle." *AR0818-AR0819 at ¶ 57.* Therefore, the Complaint in the Underlying Action alleged that J.F. Allen was legally required to pay damages for its negligent hiring/retention of Nu Creek and Marple as an independent contractor.

B. INSURANCE POLICIES AND POLICY LANGUAGE

1. ZURICH AUTO POLICY

At the time of the April 20, 2022 accident, J.F. Allen was insured under a Commercial Auto Policy issued by Zurich, bearing Policy No. BAP 5098870-13 (hereinafter the "Zurich Auto Policy"). *AR0824-AR920.* The Zurich Auto Policy provides, in pertinent part:

> **SECTION I – COVERED AUTOS**
>
> Item Two of the Declarations shows the "autos" that are covered "autos" for each of your coverages. The following numerical symbols describe the "autos" that may be covered "autos". The symbols entered next to a coverage on the Declarations designate the only "autos" that are covered "autos".

AR0861. Symbol 1 represents "Any 'Auto'" *AR0861.* For "Covered Autos Liability" coverage, Item Two of the Declarations contains Symbol 1, representing that "Covered Autos" are "Any 'Auto'". *AR0845.*

The coverage granting portion of the Zurich Auto Policy provides, in pertinent part:

> 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 ownership, maintenance or use of a covered "auto".

AR0862. Thus, by operation of the definition of "covered 'autos'" through the interplay of Section I and Item Two of the Declarations, the Zurich Auto Policy provides coverage for "all sums an 'insured' legally must pay as damages [...] caused by an 'accident' and resulting from the [...] ownership, maintenance, or use of [any 'auto']."

Thus, the plain language of the Zurich Auto Policy states that the Policy covers ""all sums an 'insured' legally must pay as damages" caused by an accident **and resulting from the ownership, maintenance or use of any "auto."** However, J.F. Allen's alleged liability in the Underlying Action resulted from its purported negligent general business practices in screening/hiring independent contractors, and it did not result from the ownership, maintenance, or use of any "auto." In other words, the sums J.F. Allen legally must pay as damages did not result from J.F. Allen's ownership, maintenance, or use of any auto – and, importantly, J.F. Allen is not alleged to be vicariously liable for Marple/Nu Creek's use of its own auto. Rather, the only claim alleged against J.F. Allen in the Underlying Action – and, therefore, the only sums that J.F. Allen may be legally obligated to pay as damages – resulted from J.F. Allen's alleged deficient general business and hiring practices when it contracted with Nu Creek to have its driver, Marple, drive his **own** vehicle (and not a vehicle owned, maintained or used by J.F. Allen) to haul for J.F.

Allen as an independent contractor.[1] J.F. Allen's potential liability with respect to its hiring/retention of an independent contractor to use/operate the independent contractor's own autos is precisely a risk intended to be insured under a commercial general liability policy, and not an auto liability policy.[2]

2. ZURICH COMMERCIAL GENERAL LIABILITY POLICY

Zurich also insured J.F. Allen through a Commercial General Liability Policy, bearing Policy No. GLO 5098869-13 (hereinafter the "Zurich CGL Policy"). *AR0921-AR1003.* The claim of Ms. Green, on behalf of her Decedent, was initially submitted to Zurich, on November 3, 2022, via the General Liability Notice of Occurrence/Claim (hereinafter "First Notice"), which provided the following description of the occurrence:

> Case No. 22-C-199 – Claimant's deceased spouse, Larry Green was traveling north on WV 20 when struck by Defendant Richard Marple, owner of Nu Creek LLC, in his unloaded dump truck. Claimant says Mr. Marple was headed to J.F. Allen Company's Mashey Gap quarry (no loads had been ticketed to Nu Creek) and traveling at an excessive speed when he lost control. J.F. Allen Company is being named in the suit because we have a trucking agreement with Nu Creek LLC and should have known Nu Creek was unsafe and not legal to drive under its USDOT authority.

AR1004 (emphasis added).

Notably, the First Notice specifically (and correctly) submitted the claim to Zurich under "Policy Number GLO 5098869", which is the Zurich CGL Policy issued by Zurich to J.F.

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[1]The commercial auto liability insurance that did apply to this matter was the commercial auto insurance obtained by co-defendants, NuCreek and Marple, which was obtained to afford coverage for liability arising from NuCreek's and Marple's use of their autos. The commercial auto carrier for NuCreek and Marple properly tendered its policy limits for use in settlement.

[2]Zurich has appealed the Circuit Court's ruling with respect to coverage under its Auto Policy in *Zurich American Insurance Company v. Homesite Insurance Company of Florida, et al.*, 25-ICA-216. Zurich contends that the Circuit Court erred in finding that its Auto Policy provides coverage for the Underlying Action. Although the Zurich Auto Policy is not directly at issue in the instant appeal, Zurich provides this information concerning the Zurich Auto Policy, and other policies issued to J.F. Allen, so that this Court has the full context of the procedural history and Circuit Court's rulings below.

Allen. Thus, the claim was properly submitted by J.F. Allen under the Zurich CGL Policy, the proper policy affording coverage for J.F. Allen's alleged negligent hiring/screening practices when retaining independent contractors to work for it, and the claim was properly adjusted by Zurich in good faith under the Zurich CGL Policy throughout the entirety of the claim. Unlike Homesite, Zurich honored its obligations to its insured under its CGL policy and, during the course of settlement negotiations in the Underlying Action, tendered, in good faith, the $2 Million limits under the Zurich CGL Policy on behalf of its insured, J.F. Allen.[3]

3. AXIS SURPLUS INSURANCE COMPANY POLICY

Axis Surplus Insurance Company (hereinafter "Axis") issued an excess liability insurance policy to J.F. Allen, which is excess to the Zurich CGL Policy, bearing Policy No. P-001-000124611-04 (hereinafter the "Axis Policy"). *AR1008-AR1043.* This appeal concerns the proper application of an Automobile Liability Exclusion (hereinafter "Auto Exclusion" or "the Exclusion"), which states:

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

[3]The Zurich CGL Policy contained an Auto Exclusion. However, at no time during Zurich's adjustment of the claim under the CGL Policy did Zurich contend that the Auto Exclusion would apply to the allegations made against J.F. Allen in the underlying action because those claims related to J.F. Allen's hiring/screening practices and **not** J.F. Allen's ownership, maintenance, use or entrustment to others of "autos." Marple/Nu Creek was operating its **own** auto at the time of the accident and Marple/Nu Creek's auto liability carrier properly afforded coverage for the allegations made against Marple/Nu Creek pertaining to Marple's alleged negligent/reckless use/operation of his own auto. And, importantly, J.F. Allen was **not** alleged to be vicariously liable for Marple/Nu Creek's ownership, maintenance or use of its auto.

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.**

AR1043. Axis similarly, and in good faith, honored its obligations to its insured under its excess policy and, in the course of settlement negotiations on the negligent/hiring retention claims made against J.F. Allen, tendered its policy limit for use by J.F. Allen in settlement with the plaintiff. Axis did **not** rely upon the Auto Exclusion to deny coverage, as Homesite is attempting to do now.

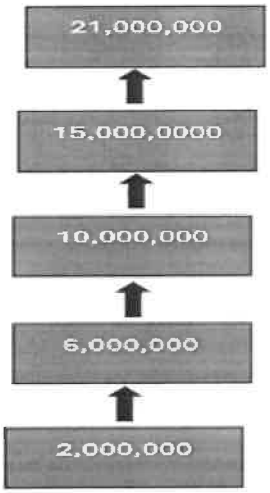
4. HOMESITE POLICY

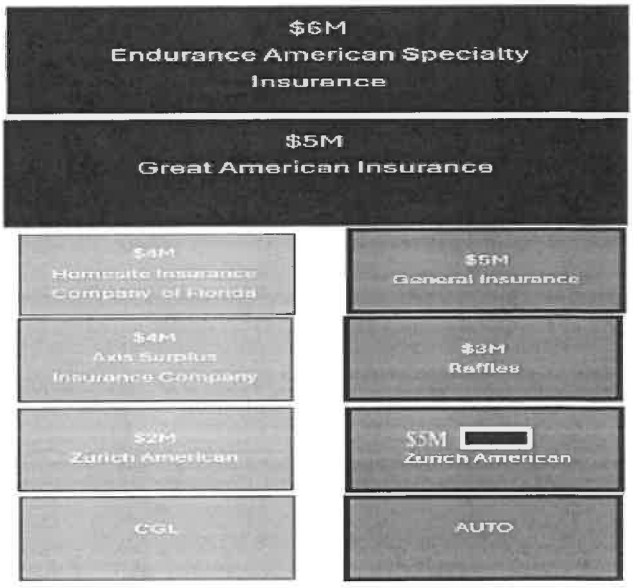
Homesite issued a policy which sits excess to, and follows form to, the Axis Policy, bearing Policy No. CXP-7558082-01 (hereinafter the "Homesite Policy"). *AR1044-AR1069.* The Homesite Policy is excess to the Axis Policy and "follows the same provisions, exclusions and limitations of" the Axis Policy, unless expressly otherwise stated. *AR1044.* Thus, the Auto Exclusion within the Axis Policy quoted above is incorporated into the Homesite Policy. Notably, despite following form to Axis in J.F. Allen's CGL tower of coverage and being plainly triggered once the two (2) carriers below Homesite in the tower tendered their limits for use in settlement, Homesite refused to offer any sums under its own second-layer excess policy. Instead, Homesite unreasonably, and in bad faith, denied coverage to J.F. Allen and forced J.F. Allen to itself contribute the amounts owed under the Homesite policy, and Homesite has sought to avoid its own plainly triggered coverage obligation by asserting that the Zurich Auto Policy should pay instead of Homesite – a position notably not taken until the final hour and after the carrier sitting under Homesite, and to which Homesite follows form, offered its own policy limit for use in settlement.

Seeking to avoid a clearly owed obligation and asserting a plainly improper "not me" defense, Homesite argued that the Auto Exclusion within the Axis Policy – an exclusion upon which Axis itself did not rely to deny coverage – precludes coverage in this case. As explained in more detail *infra*, the sole claim against J.F. Allen in the Underlying Action was that it negligently hired/retained Nu Creek as an independent contractor – a claim which plainly does not require any involvement or an auto and does not arise out of the use of an auto, but rather arises simply out of J.F. Allen's general business practices[4]. Therefore, as Axis properly determined, the Auto Exclusion in the Axis and Homesite policies does not apply.

C. INSURANCE TOWER AND SETTLEMENTS

J.F. Allen's insurance policies stack as follows:





[4]Zurich and Axis both properly determined that a claim of accidental bodily injury arising from an insured's general business practices plainly falls under a Commercial General Liability ("CGL") policy. Zurich properly, and in good faith, defended J.F. Allen against these claims under its primary CGL policy, and both Zurich and Axis properly, and in good faith, tendered their respective CGL policy limits for use in settlement.

Zurich tendered the $2 million policy limits of the Zurich CGL policy issued to J.F. Allen. Additionally, Axis did not deny coverage pursuant to its Auto Exclusion and, instead, tendered its $4 million in insurance coverage to J. F. Allen for use in resolving the Underlying Action. Despite $6 million in settlement monies being paid by two (2) different insurers under two (2) policies in J.F. Allen's CGL tower, Homesite now seeks to avoid payment of its $4 million limits by arguing that coverage should first also be provided by J.F. Allen's Auto tower of coverage. Despite Homesite following form to the Axis Policy, and Homesite's layer of coverage being plainly triggered by Axis offering its own policy limit, Homesite took the position that, by operation of the language of the Axis Policy, the Homesite Policy does not provide coverage. Axis properly reached the opposite conclusion and paid its policy limits in good faith. Notably, Homesite is the lone carrier in J.F. Allen's CGL tower of coverage to deny coverage and is the only carrier in this action that has paid zero sums to protect its insured.

D. DECLARATORY JUDGMENT ACTION IN CIRCUIT COURT

On February 13, 2024, instead of participating in good faith in settlement negotiations of the underlying action after both Zurich and Axis offered their respective policy limits, Homesite unreasonably denied coverage, improperly forced J.F. Allen to use its own funds in settlement, and Homesite filed a *Declaratory Judgment Complaint* in the Circuit Court of Upshur County, seeking a declaration of legal rights and responsibilities owed to J.F. Allen under its second-layer excess policy and Zurich's Auto Policy. *AR0015-AR0028.* The Court entered an *Order Establishing Briefing Schedule Regarding Early Dispositive Motions on Insurance Coverage Issues*. In accordance with said Order, Homesite filed its *Motion for Summary Judgment* and *Memorandum of Law in Support of Summary Judgment* on October 18, 2024. *AR0168-AR0173, AR0174-AR0204*. Zurich filed its *Motion for Summary Judgment* and *Memorandum of*

Law in Support of Motion for Summary Judgment and Response in Opposition to Plaintiff Homesite Insurance Company of Florida's Motion for Summary Judgment on November 18, 2024. *AR0768-AR0775, AR0776-AR0805.* J.F. Allen filed its *Motion for Summary Judgment* and *Response in Opposition to Homesite Insurance Company's Motion for Summary Judgment and Memorandum of Law in Support of its Motion for Summary Judgment on its Counterclaim* on November 18, 2024. *AR0748-AR0751, AR0752-AR0767.* Homesite filed its *Reply Memorandum of Law in Support of Its Motion for Summary Judgment, and in Opposition to the Motions for Summary Judgment Filed by J.F. Allen and Zurich* on November 26, 2024. *AR1070-AR1090.* Zurich filed its *Brief in Reply to Homesite Insurance Company of Florida's Opposition to Motion for Summary Judgment Filed by Zurich American Insurance Company and Reply to J.F. Allen's Opposition Response and Motion for Summary Judgment.* on December 16, 2024. *AR1130-AR1152.* J.F. Allen also filed its *Reply in Support of Its Motion for Summary Judgment* on the same date. *AR1120-AR1129.* After the issues were fully briefed by the parties, the Court held oral argument on the pending motions on March 25, 2025. *AR1153-AR1233.*

On April 25, 2025, the Circuit Court entered its *Order* addressing the parties' various motions for summary judgment. *AR0001-AR0014.* As to the Homesite Policy, the Court properly concluded that the Auto Exclusion relied upon by Homesite does not preclude coverage for J.F. Allen for the claim asserted against it in the Underlying Action. *AR0009 at ¶ 8.* The Circuit Court properly reasoned that "[t]he claim, suit or loss against J.F. Allen in the [Underlying Action] was one of negligent retention of an independent contract[or]" and that "[i]n order to be liable in that suit, J.F. Allen was neither alleged to have owned, maintained, operated, use[d] or entrusted an auto." *AR0010 at ¶ 10.* The Circuit Court further properly found that "J.F. Allen's liability was premised upon acts independent of the automobile accident." *AR0010 at ¶ 10.*

The Circuit Court further supported its conclusion that the Homesite Policy applied by noting that West Virginia law recognizes that a claim of negligent hiring or retention is a separate and distinct cause of action. *AR0010 at ¶ 11.* Further, the Circuit Court found that in *Huggins*, the Supreme Court of Appeals of West Virginia 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 Circuit Court also correctly recognized that in *Huggins* 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. The Circuit Court further noted that *Huggins* reasoned 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." *AR0011 at ¶ 12.* Thus, the Circuit Court concluded that because the Auto Exclusion focuses on the nature of the claim and not the cause of the injury or damage, the exclusion was not triggered in the Underlying Action and, therefore, was not a bar to insurance coverage for J.F. Allen. *AR0011 at ¶ 13.*

As to the Zurich Auto Policy, the Circuit Court's Order provided very little analysis but stated that "Zurich's insuring agreement focuses exclusively on 'bodily injury … caused by an 'accident' and resulting from … use of a covered 'auto.'" *AR0012 at ¶ 19.* The Circuit Court concluded that the Zurich Auto Policy provided coverage because the "Zurich insuring clause is focused on the bodily injury caused by an accident, as opposed to the insured's conduct" and "it is undisputed that the bodily injury [in the Underlying Action] was caused by an automobile crash." *AR0012 at ¶ 20.* The Circuit Court failed to address (and wholly ignored) the fact that the Zurich Auto Policy's insuring agreement states that coverage is only provided for "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 ownership, maintenance or use of 'any auto.'" The Circuit Court's Order failed to recognize that the "all sums an insured legally must pay as damages" portion of the insuring clause focuses on the theory of liability asserted against the insured and not the cause of bodily injury. The Circuit Court also failed to address the *Huggins* decision in relation to the Zurich Auto Policy, despite the same being discussed in relation to the Homesite Policy. Likewise, despite recognizing that "[t]he claim, suit or loss against J.F. Allen in the [Underlying Action] was one of negligent retention of an independent contract[or]" and that "[i]n order to be liable in that suit, J.F. Allen was neither alleged to have owned, maintained, operated, use[d] or entrusted an auto" in relation to the Homesite Policy, the Circuit Court - without explanation - failed to apply this same sound reasoning to the Zurich Auto Policy.

The Circuit Court also found that the Homesite Policy and Zurich Auto Policy were both ambiguous based solely on the fact that the parties had offered competing interpretations of the clauses at issue. *AR0013.*

Homesite appeals the portions of the April 25, 2025 Order which found that the Homesite Policy provides coverage for the Underlying Action. Zurich asserts that the Circuit Court properly concluded that the exclusion relied upon by Homesite is inapplicable and, therefore, coverage is provided under the Homesite Policy.

III. SUMMARY OF ARGUMENT

The Circuit Court properly held that the Homesite Policy provides coverage for the Underlying Action as the Auto Exclusion is inapplicable to the claim of negligent hiring/retention asserted against J.F. Allen. Contrary to Homesite's argument, the Circuit Court correctly relied upon *Huggins v. Tri-County Bonding Co.*, 175 W. Va. 175 W. Va. 643, 337 S.E.2d 12 (1985). In

Huggins, the Court recognized the independent nature of a claim for negligent entrustment, stating that "the critical element of a negligent entrustment cause of action is the initial improper loaning of the vehicle—improper in the sense that it is given to a person who is known to be likely to cause an unreasonable risk of harm to others" and "the driver's negligent operation is not the critical factor in a negligent entrustment action, although it is necessary to complete the causal connection between the original negligent act (the entrustment) and the ultimate injury." *Id.* at 649, 17. The claim for negligent entrustment is analogous to the claim for negligent hiring/retention herein.

The Circuit Court also was correct in finding that *Huggins* adopted a "theory of liability" approach. The "cause of injury" approach looks to whether the injury or damages arose from the use of an auto. On the other hand, the "theory of liability" approach looks to whether the specific cause of action (or theory of liability) asserted against the insured involves the use of an auto. In *Huggins*, the Court rejected the insurer's argument that its policy protected against occurrences that cause a liability, and not against theories of liability. The Court reasoned, in part, that there is nothing within the policy that stated as such and the policy did, in fact, make distinctions according to theories of liability. The Axis Policy (to which Homesite follows form) also makes distinctions based on theories of liability, as it excludes claims for asbestos, cyber liability, employment-related practices, pollution, etc. There is also nothing within the Axis Policy which states that the Exclusion applies regardless of the theory of liability asserted against the insured. The Circuit Court correctly relied on *Huggins* in applying a "theory of liability" approach to the Exclusion and rejecting Homesite's argument in favor of the "cause of damage" doctrine.

Homesite's reliance on *Nat'l Prop. & Cas. Co. v. Clendenen*, 238 W. Va. 249, 254, 793 S.E.2d 899, 904 (2016) is also misplaced. In that case, the plain language of the exclusions at issue were triggered by whether "bodily injury," "property damage," or "personal injury" were

caused by intentional acts of the insured or violation of the law. Unlike the exclusions in *American National* that were triggered by the cause of the injury, the Auto Exclusion on which Homesite relies is triggered by the theory of liability pled against the insured in the "claim" or "suit" - and **not** by the cause of the "bodily injury" or "personal injury." Homesite's argument that *American National* somehow overruled *Huggins* is also completely erroneous. The *American National* court did not even mention *Huggins* or cite to *Huggins* whatsoever as *Huggins* addressed a different type of exclusion containing different triggering language.

The Circuit Court was also correct in its conclusion that the specific language of the Auto Exclusion does not apply to the negligent hiring/retention claim in the Underlying Action as the Exclusion is focused on the theory of liability asserted against the insured, not the cause of damages. The Exclusion specifically excludes claims for negligent entrustment, but contains no specific exclusion for claims for negligent hiring/retention. Further, Homesite's interpretation would render the exclusion for negligent entrustment unnecessary and superfluous since a claim for negligent entrustment would always arise from the use of an auto.

The fact that the Exclusion conditions its applicability on whether the "claim," "suit," or "loss" arises from the use of an auto also supports the Circuit Court's conclusion. As set forth below, either through their plain meaning or by way of their definitions in the Axis Policy, the definitions of the terms "claim," "suit," or "loss" all invoke the theory of liability asserted against the insured. The theory of liability asserted against J.F. Allen was negligent hiring/retention, a claim which does not require the use of an auto, or any involvement of an auto whatsoever.

Contrary to Homesite's argument, the Circuit Court did not hold that the Auto Exclusion only applies to the insured's operation of an auto. The Circuit Court found that the Auto

Exclusion focuses on the nature of the claim pled against the insured rather than on the cause of the ultimate injury or damage.

Last, the Circuit Court was correct in its conclusion that the Auto Exclusion is ambiguous. Zurich agrees with Homesite that the Circuit Court incorrectly reasoned that the Exclusion was ambiguous solely based on the disagreement among the parties as to its proper interpretation. However, this Court can affirm the judgment of the lower court on any reason apparent in the record. As explained in further detail below and for all the reasons stated above, the Auto Exclusion is ambiguous as reasonable minds can disagree as to its meaning. Furthermore, it is an exclusion to coverage which must be strictly construed against Homesite and in favor of the existence of coverage.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Zurich submits that oral argument pursuant to Rule 19 of the Rules of Appellate Procedure is appropriate because this matter involves assignments of error in the application of settled law and involves a narrow issue of law.

V. STANDARD OF REVIEW

"[A] Circuit Court's entry of declaratory judgment is reviewed *de novo*." *Orville Young, LLC v. Bonacci*, 246 W. Va. 26, 31, 866 S.E.2d 91, 96 (2021) (quoting Syl. pt. 3, Cox v. Amick, 195 W. Va. 608, 466 S.E.2d 459 (1995)). "This is so because 'a declaratory judgment action [...] resolve[s] legal questions,' [...] given that the purpose of a declaratory judgment""

> is to avoid the expense and delay which might otherwise result, and in securing in advance a determination of legal questions which, if pursued, can be given the force and effect of a judgment or decree without the long and tedious delay which might accompany other types of litigation.

Id.

VI. ARGUMENT

I. The Circuit Court properly found that the Homesite Policy's Auto Exclusion does not preclude coverage for the claim of negligent hiring/retention against J.F. Allen, which does not arise out of the use of an auto.

Before rebutting Homesite's specific arguments regarding the Auto Exclusion at issue, a brief discussion of the general principles of interpretation and application of insurance policies is necessary. First, "[w]hen deciding cases concerning the language employed in an insurance policy, we look to the precise words employed in the policy of coverage." *Boggs v. Camden-Clark Mem'l Hosp. Corp.*, 225 W. Va. 300, 304, 693 S.E.2d 53, 57 (2010). "As a general rule, we accord the language of an insurance policy its common and customary meaning." *Id.* "On the other hand, '[w]henever the language of an insurance policy provision is reasonably susceptible of two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning, it is ambiguous.'" *Id.* (quoting Syl. Pt. 1, *Prete v. Merchants Prop. Ins. Co. of Indiana,* 159 W.Va. 508, 223 S.E.2d 441 (1976)).

Furthermore, Homesite relies on an exclusion to coverage in asserting that it owes no duty to indemnify its insured, J.F. Allen. "Where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated." Syl. Pt. 8, *Nat'l Union Fire Ins. Co. of Pittsburgh v. Miller,* 228 W.Va. 739, 724 S.E.2d 343 (2012) (citations omitted). "An insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, placing them in such a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured." *Russell v. Bush & Burchett, Inc.,* 210 W.Va. 699, 559 S.E.2d 36, 42 (2001). Regardless of whether the language is ambiguous or unambiguous, "[a]n insurance company seeking to avoid liability through the operation of an

exclusion has the burden of proving the facts necessary to the operation of that exclusion." Syl. Pt. 3, *Farmers & Mechanics Mut. Ins. Co. of W. Virginia v. Cook*, 210 W.Va. 394, 557 S.E.2d 801, 803 (2001) (citing Syl. Pt. 7, *National Mutual Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987)).

With these principles in mind, for all the reasons set forth below, the Circuit Court properly concluded that the Homesite Policy affords coverage for the Underlying Action and the Auto Exclusion is inapplicable.

A. The Circuit Court properly relied on the *Huggins* case in support of its conclusion that the Homesite Policy provides coverage for the negligent hiring/retention claim asserted against J.F. Allen.

1. *Huggins* is analogous to the instant appeal and Homesite simply ignores those portions of *Huggins* which are contrary to its position.

In arguing that the Circuit Court erred in relying on the *Huggins* case, Homesite offers a narrow summary of the same, ignoring several key principles contained therein. Contrary to Homesite's assertions, *Huggins* supports the Circuit Court's conclusion that the Auto Exclusion on which Homesite relies is inapplicable to the claim of negligent hiring/retention, which does not arise out of the ownership, maintenance, operation, use, entrustment to others or loading or unloading of any auto. Quite obviously, the elements of a claim premised upon negligent hiring/retention do not require any connection to, or involvement of, an auto.

In *Huggins*, the Supreme Court of Appeals of West Virginia addressed whether an insurer was obligated to defend its insured under a homeowner's policy for a claim of negligent entrustment. *Huggins*, 175 W. Va. 643, 337 S.E.2d 12. The plaintiff alleged that the insured had negligently entrusted his son with a vehicle and that his son caused an accident when operating the vehicle. The insurer denied coverage under the homeowner's policy, relying in part on an

exclusion which stated that the policy did not apply to "the ownership, maintenance, operation or use [...] of land motor vehicles."

Homesite is correct that the insured argued that in the cases relied upon by the insurer, the exclusionary language was broader because it was prefaced with the phrase "arises out of the ownership, maintenance, operation or use, including loading or unloading of a land motor vehicle." *Id.* at 645-647, 13-14. Homesite is also correct that in finding that the automobile exclusion was not applicable, that the Court did rely, in part, on the fact that the exclusion lacked the phrase "arising out of" the ownership, maintenance, or use of the vehicle. *Id.* at 649, 17. The entirety of the Court's analysis on this point was a mere two (2) sentences:

> There still remains the question of whether the son's use of the vehicle forecloses coverage. We find it does not in the face of the broad liability coverage and the lack of any expansive language such as used in other homeowners policies where the language in the automobile exclusion contains the phrase "arising out of" the ownership, maintenance, or use of the vehicle.

Id.

However, Homesite has conveniently ignored the additional bases for the Court's decision in *Huggins*, likely because they are directly contrary to Homesite's arguments herein. After addressing the "arising out of" language, the *Huggins* court stated as follows with respect to negligent entrustment claims:

> Furthermore, the critical element of a negligent entrustment cause of action is the initial improper loaning of the vehicle—improper in the sense that it is given to a person who is known to be likely to cause an unreasonable risk of harm to others.
>
> Thus, the driver's negligent operation is not the critical factor in a negligent entrustment action, although it is necessary to complete the causal connection between the original negligent act (the entrustment) and the ultimate injury.

Id. (citations omitted). The Court noted that "[w]hen the policy is viewed in these terms, we believe an ambiguity exists with regard to coverage for negligent entrustment of a nonowned motor

vehicle" and again stated that "the operation and use of a vehicle is not a critical component of a negligent entrustment theory." *Id.* at 649, 17-18.

Homesite fails to address the glaring similarities between the Court's statements in *Huggins* regarding the independence of the claim for negligent entrustment from the operation of the vehicle and the claim for negligent hiring/retention at issue herein. *Huggins*' conclusion regarding the independent nature of a claim for negligent entrustment is directly applicable to the claim for negligent hiring/retention asserted against J.F. Allen. The critical element of a negligent retention of an independent contractor claim is the initial improper screening, hiring or retention of the contractor – improper in the sense that the contractor is known or should be known to likely cause an unreasonable risk of harm to others (with an auto or in any other capacity). Thus, Marple's negligent operation of his own vehicle, through his own company, NuCreek[5], is not the critical factor in the negligent hiring or retention of an independent contractor claim - although it is necessary to complete the causal connection between the negligent hiring/retention and the ultimate injury. Because Marple's negligent operation of his own vehicle would be considered separate from the negligence of J.F. Allen in hiring/retaining NuCreek and Marple, under West Virginia law, the alleged negligence of J.F. Allen is wholly independent from Marple's alleged negligent use/operation of his own auto.

Homesite cites a number of cases which it contends support its conclusion that the "arising out of" language in its exclusion bars coverage for the negligent hiring/retention cause of action herein. Homesite's argument ignores the fact that the Auto Exclusion on which it relies requires that the claim, suit, or loss asserted against the insured arise out of the use of an auto – not whether the bodily injury or property damage arise out of the use of an auto. The Auto

[5]A company with its own auto liability insurance, which participated in the underlying settlement.

Exclusion on which Homesite relies 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.

AR538 (emphasis added). The cases cited by Homesite are distinguishable in this regard or otherwise factually distinguishable.

Nutter addressed whether a policy exclusion which barred coverage for "injury … that result[s] from … [f]ireworks displays or exhibitions" applied to preclude coverage for the claims asserted against the insured. *Nutter v. St. Paul Fire & Marine Ins. Co.*, 780 F. Supp. 2d 480, 483 (N.D.W. Va. 2011). Unlike the Homesite Auto Exclusion, the *Nutter* exclusion was triggered if the injury resulted from a specific cause. Homesite's Auto Exclusion on the other hand is focused on whether the claim, suit, or loss, *i.e.* theory of liability, against the insured arises out of the use of any auto.

Cooter is distinguishable for the same reason. In *Cooter*, the exclusion at issue was also focused on whether the injury arose from the use of an auto, stating that the policy did not apply to "bodily injury […] arising out of the […] use" of an automobile. *Cooter v. State Farm Fire & Cas. Co.*, 344 So. 2d 496, 497 (Ala. 1977). It was in this context that the Alabama Supreme Court 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." *Id.* at 499. Unlike the *Cooter* exclusion, the Auto Exclusion relied upon by Homesite is not focused on whether the injury arises from the use of an auto but whether the claim, suit, or loss arises from the use of an auto.

Rich addressed whether the claims asserted against an insured arose out of the

insured's profession as a lawyer and addressed the language of an insuring clause, not an exclusion to coverage for claims, suits, or losses arising from the use of an auto. *Rich v. First Mercury Ins. Co.*, 482 F. Supp. 3d 511, 519-520 (S.D.W. Va. 2020).

Norfolk Southern addressed a policy which provided coverage for additional insureds, "but only with respect to liability arising out of 'Your Work', 'Your Product' and to property owned or used by you." *Norfolk S. Ry. Co. v. Nat'l Union Fire Ins. of Pittsburgh, PA*, 999 F. Supp. 2d 906 (S.D.W. Va. 2014).

Thus, the cases cited by Homesite, which apply West Virginia law, are plainly distinguishable from the case at hand. Accordingly, the Circuit Court properly relied on *Huggins* to reach its conclusion that the Auto Exclusion on which Homesite relies is inapplicable to the negligent hiring/retention claim asserted against J.F. Allen.

2. Contrary to Homesite's argument, *Huggins* adopted a "theory of liability" approach and rejected the "cause of damages" approach which Homesite seeks herein.

Homesite, attempting to avoid the clear application of *Huggins* to the issue at hand, argues that *Huggins* actually did not adopt a "theory of liability" approach. Homesite argues that *Huggins* only rejected the "cause of damages" approach due to the policy using the term "negligent personal acts" as opposed to "occurrences." While true that this was one consideration in *Huggins*, the Court also specifically rejected the insurer's argument against application of the "theory of liability" approach (the same argument now advanced by Homesite):

> A final point raised by Nationwide is that its policy protects against occurrences that cause a liability, and not against theories of liability. Consequently, it argues that if a loss for which the insured is liable was caused by an occurrence involving a land motor vehicle, there is no coverage regardless of the theory upon which the liability is grounded. Nationwide does not point to anything in its own policy that says this, but instead relies on the holdings of other courts construing other policies.
>
> However, the cases that make the distinction between "occurrences" and "theories" of liability are generally those where the insurance policy expressly limits coverage

> to "occurrences" as that term is defined in those policies.14 The Nationwide policy does not have such an express limitation but instead uses the broad term "negligent personal acts."
>
> Furthermore, Nationwide's policy does make distinctions according to theories of liability. For instance, the policy expressly excludes coverage if the liability is based on intentional acts or if the liability is premised on professional negligence. Thus, the argument that the policy only covers occurrences and not theories of liability is without merit.

Huggins, 175 W. Va. at 649-650, 337 S.E.2d at 18 (citations omitted) (emphasis added). Additionally, the Court noted that there was nothing within the policy that stated that the exclusion was applicable regardless of the theory upon which liability was grounded. *Id.*

The Axis Policy (to which Homesite follows form) also makes distinctions according to theories of liability, excluding claims for asbestos, cyber liability, employment-related practices, pollution, etc. just like the policy at issue in *Huggins*. *AR526-AR529.* Furthermore, there is nothing within the Homesite Policy which states that the Exclusion is applicable regardless of the theory of liability asserted against the insured. Accordingly, Homesite's attempts to diminish the applicability of the court's reasoning in *Huggins* are misplaced and without merit.

For all these reasons, the Court should follow the "theory of liability" approach adopted in *Huggins* and find that Homesite's Auto Exclusion does not apply as J.F. Allen's liability in this instance, premised upon a theory of alleged negligent hiring/retention of an independent contractor, plainly did not arise out of the ownership, maintenance, use or entrustment of an auto.

3. Contrary to Homesite's argument, *American National* did not adopt a "cause of damages" approach.

Homesite's assertion that *Am. Nat'l Prop. & Cas. Co. v. Clendenen*, 238 W. Va. 249, 254, 793 S.E.2d 899, 904 (2016) overruled *Huggins* and adopted a "theory of liability" approach is erroneous. In *American National*, two (2) teenagers murdered a former friend. The

parents of the deceased brought suit against the teenagers' parents to recover damages in connection with their daughter's death. *Id.* at 252, 902. The plaintiffs' theories of liability alleged against the parents were that the parents were negligent in their supervision of the teenagers and negligently entrusted the vehicle used to drive the victim on the night of the murder. *Id.* at 253-254, 902-903. However, the "cause" of the decedent's "bodily injury" was an intentional murder.

At issue, were two (2) insurance policies, which contained exclusions for intentional acts and violations of the law. The first policy stated, in pertinent part:

> **SECTION II EXCLUSIONS**
>
> 1. **Coverage E—Personal Liability and Coverage F—Medical Payments to Others** do not apply **to bodily injury** or **property damage**:
>
> a. Which is expected or intended by **any insured** even if the actual injury or damage is different than expected or intended;
>
> [...]
>
> p. Arising out of any criminal act committed by or at the direction of **any insured**;

The second policy stated:

> **We** do not cover under *Bodily Injury Liability Coverage, Property Damage Liability Coverage, Personal Injury Liability Coverage, and Medical Payments To Others Coverage*:
>
> 1. **Bodily injury, property damage** or **personal injury** expected or intended by **anyone we protect** even if:
>
> a. the degree, kind or quality of the injury or damage is different than what was expected or intended; or
> b. a different person, entity, real or personal property sustained the injury or damage than was expected or intended.
>
> **We** do not cover under *Bodily Injury Liability Coverage, Property Damage Liability Coverage, or Personal Injury Liability Coverage*:
> ....
> 9. **Personal injury** arising out of willful violation of a law or ordinance by **anyone we protect**.

Id. at 254, 904.

Thus, distilled to their essence, the relevant language of the exclusions in *American National* was as follows:

> [This insurance] does not apply to bodily injury or property damage [...] [w]hich is expected or intended by any insured[.]
>
> [This insurance] does not apply to bodily injury or property damage [...] [a]rising out of any criminal act committed by or at the direction of any insured[.]
>
> We do not cover [...] [b]odily injury, property damage or personal injury expected or intended by anyone we protect[.]
>
> We do not cover [...] [p]ersonal injury arising out of a willful violation of law or ordinance by anyone we protect.

Id. By their plain language, the exclusions in *American National* were triggered by the cause of the "bodily injury", "property damage" or "personal injury" - which was expected or intended by any insured or which arose out of a violation of law.

On the other hand, the Auto Exclusion on which Homesite relies is not triggered by the "bodily injury" or "property damage" arising from the use of an auto:

> 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 (emphasis added). Homesite essentially requests that this Court rewrite the Auto Exclusion to read as follows:

> The policy does not apply to any bodily injury or property damage arising out of the ownership, maintenance, operation, use, entrustment to others or loading or unloading of any auto.

However, Homesite cannot insert language into its exclusion which does not exist under the guise of interpretation. Unlike the exclusions in *American National*, the Auto Exclusion is triggered by the theory of liability in the "claim" or "suit," and not by the cause of the "bodily injury" or "personal injury."

It was in this context that the *American National* decision stated:

> 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.

Id. at 261, 911 (emphasis added). Unlike the exclusions in *American National*, the focus of the Auto Exclusion at issue is not on the "cause of damages." Instead, the focus of the Exclusion is the theory of liability of the "claim" or "suit" asserted against the insured. Here, the claim asserted against J.F. Allen is a garden variety negligence claim regarding its hiring/screening practices for independent contractors and the allegations made against J.F. Allen simply do not involve the use of an auto.

Homesite quotes *American National* as follows:

> In American National, the criminal acts exclusions excluded coverage for claims "[a]rising out of any criminal act by or at the direction of **any insured**" and "arising out of willful violation of a law or ordinance by **anyone we protect**[.]"

Homesite's Brief at 17 (emphasis in original). From there, Homesite argues that its Auto Exclusion contains the same "arising out of" language. However, Homesite has selectively quoted the exclusions at issue in *American National*. As noted above, the exclusions in *American National* are triggered by whether the cause of the bodily injury, property damage or personal injury was expected or intended, and not by the theory of liability upon which the "claim" is based – as Homesite's brief suggests. On the other hand, the Auto Exclusion is triggered by the theory of liability upon which the claim or suit asserted against the insured is based. *American National* does not support Homesite's position. Instead, *American National* illustrates the importance of specific policy language, the plain meaning thereof, and the difference between policy exclusions

premised upon the cause of damages and those premised upon the theory of liability asserted in the suit/claim. The exclusion at issue is plainly a "theory of liability" exclusion. Had Homesite intended for the exclusion to apply regardless of the theory of liability asserted against the insured, it could have stated as such within the exclusion, as the policy in *American National* did.

Homesite also argues that *American National* shows that the Supreme Court "has now clearly adopted a 'cause of damages' approach of interpreting such insurance policy exclusions" and no longer follows the "theory of liability" approach utilized in *Huggins*. However, *American National* did not discuss *Huggins* or even cite to *Huggins* a single time. It was not necessary for *American National* to discuss *Huggins* because *Huggins* addressed a different type of exclusion containing different triggering language. Therefore, *American National* did not overrule *Huggins* as Homesite improperly suggests.

Homesite's reliance on Allan D. Windt's treatise on insurance law also misses the mark for the same reason. Homesite relies on the following passage from *Insurance Claims and Disputes: Representation of Insurance Companies & Insureds* (6th Ed. 2023):

> 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.
>
> *****
>
> 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.

Id. at § 11:22 (emphasis added). The problem with Homesite's reliance on this passage is that the Auto Exclusion on which it relies is not written so as to exclude coverage for "bodily injury" or "property damage" arising from the use of an auto but instead focuses on the theory of liability asserted against the insured by using the terms claim, suit, or loss. Indeed, in the following section, Windt states: "[I]f an exclusion is written to eliminate coverage for injuries arising out of or occurring by reason of certain events or causes, there should not be coverage regardless of the theory of liability alleged against an insured." *Id.* at § 11:22A. As is explained in substantial detail above, Homesite's exclusion is **not** written to eliminate coverage for injuries arising out of certain events or causes, but rather is plainly written to exclude certain theories of liability. Windt's treatise passage cited to by Homesite is neither instructive nor persuasive here as it addresses entirely different exclusionary language not found in the Homesite Policy.

Thus, for all these reasons, neither the *American National* case nor Windt's insurance treatise support the applicability of the Auto Exclusion on which Homesite relies.

B. The Circuit Court properly found that the specific language of the Auto Exclusion does not apply to the negligent hiring/retention claim herein and focuses on the theory of liability asserted against the insured, not the cause of the damages sought by the claimant.

Initially, it should be noted that any analysis as to whether the Auto Exclusion is applicable to the Underlying Action should begin with the language of the exclusion itself, which states, in pertinent 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**.

AR0553 (emphasis in original).

The fact that the Auto Exclusion specifically excludes claims for negligent entrustment runs directly contrary to Homesite's interpretation and proves that the Exclusion does not apply to claims for negligent hiring/retention. First, "[t]he doctrine of *expression unius est exclusion alterius – i.e.*, the express mention of one thing implies the exclusion of another—is applicable to the construction of any written document, including statutes and contracts." *Westfield Ins. Co. v. Paugh*, 390 F. Supp. 2d 511, 519 (N.D.W. Va. 2005)(citing *Ward v. Smith*, 140 W.Va. 791, 808, 86 S.E.2d 539, 549 (1955)("The doctrine *expressio unius est exclusion alterius*, that the express mention of one thing implies the exclusion of another, is applicable to the contract between the parties."); *Bischoff v. Francesa*, 133 W.Va. 474, 488, 56 S.E.2d 865, 873 (1949)(It is "well recognized and long established principle of interpretation of written instruments that the express mention of one thing implies the exclusion of another, *expressio unius est exclusio alterius*.").

The Auto Exclusion specifically excludes claims for negligent entrustment, but specifically does **not** exclude claims for negligent hiring/retention of a third-party within the exclusion's purview. Therefore, negligent hiring/retention claims are not barred by the Auto Exclusion.

Additionally, Homesite's interpretation of the Automobile Exclusion would render portions of the Auto Exclusion meaningless. The Auto Liability Exclusion specifically provides that the Policy does not provide coverage for claims arising from the "entrustment to others" of motor vehicles. If the Auto Exclusion applies in the manner Homesite contends, it would not have been necessary for the Exclusion to specifically state that it applies to a claim for negligent entrustment. If Homesite's interpretation were adopted, the Exclusion would always apply to a claim for negligent entrustment (regardless of whether the insured is operating a motor vehicle)

because such a claim would arise from the use of an auto. In other words, if Homesite's interpretation were adopted, the language specifically excluding claims for negligent entrustment would be rendered superfluous and unnecessary as claims for negligent entrustment would always be barred by the general language excluding claims which arise from the use of any automobile.

It is axiomatic that when interpreting a contract, courts should interpret the contract as a whole and give effect to all provisions. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995)(It is a "cardinal principle of contract construction ... that a document should be read to give effect to all its provisions."); *Jackson Nat'l Life Ins. Co. v. Baker*, 339 F. Supp. 3d 563, 568 (N.D.W. Va. 2018), *rev'd and remanded sub nom. Baker v. Baker*, 793 F. App'x 181 (4th Cir. 2019)("It is a fundamental rule of contract interpretation that courts must give effect to every clause and term rather than leave a portion of the contract meaningless or reduced to mere surplusage."). This principle also applies to the specific setting of insurance policies. *Lopez v. Erie Ins.*, No. 23-ICA-338, 2024 WL 4500977, at *4 (W. Va. Ct. App. Oct. 16, 2024)("When a court interprets a contract, it reads it as a whole, with all policy provisions given effect."); *Soliva v. Shand, Morahan & Co.*, 176 W. Va. 430, 432, 345 S.E.2d 33, 35 (1986) (Insurance policies "should be read as a whole with all policy provisions given effect.").[6]

Homesite's argument regarding the terms "claim, suit or loss" also fails. As noted above, the Exclusion states that the Policy does not apply to "any claim, suit, loss or any other cost or expense" arising out of the use of any automobile.

The word "claim" is undefined within the Homesite Policy or the Axis Policy. Homesite argues that the Court should therefore apply the Black's Law Dictionary (12th Ed. 2024).

[6]At the very least, the specific inclusion of claims for negligent entrustment within the Exclusion renders the Exclusion ambiguous for these reasons and, therefore, it must be strictly construed in favor of coverage.

Homesite notes that the third discrete definition of "claim" in Black's Law Dictionary is "[a] demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for." First, Homesite argues that "[n]othing in this specific definition references the type of cause of action being pursued by the claimant." However, the very definition which Homesite quotes defines claim as a "legal remedy to which one asserts a right." In this case, Plaintiff asserted a legal remedy of negligent hiring/retention, a legal remedy which does not arise out of the use of an auto. Second, Homesite is simply ignoring the portion of the definition of "claim" which runs counter to its argument. As Homesite recognizes, but decided to bury in footnote 33 of its brief, "the fourth discrete definition contained in Black's Law Dictionary makes references to the type of cause of action." Indeed, the fourth discrete definition, defines claim as "[a]n interest or remedy recognized at law; the means by which a person can obtain a privilege, possession, or enjoyment of a right or thing; cause of action." Thus, contrary to Homesite's argument, the term "claim" is focused on the theory of liability, *i.e.* the cause of action, asserted against the insured.

The definitions of "suit" and "loss" within the Axis Policy also do not support Homesite's position. The word "suit" is defined by the Axis Policy as "a civil proceeding in which a covered **loss** is alleged." *AR1028.* The word "loss" is defined in the Axis Policy as "damages the insured becomes legally obligated to pay as judgments or settlements." *AR1027.* Thus, the definition of "suit" incorporates the term "loss," and therefore, both terms include "damages the insured becomes legally obligated to pay". The "legally obligated to pay" portion of this definition directly invokes the cause of action asserted against the insured. An insured is only legally obligated to pay damages based upon the cause of action asserted against them, *i.e.* the theory of liability. In this case, the damages J.F. Allen was legally obligated to pay did not

arise from the use of an auto. J.F. Allen's legal obligation to pay damages in the Underlying Action was due to its alleged negligent hiring/retention of an independent contractor, a claim which, as noted above, does not require the use of an auto and was instead based on J.F. Allen's general business practices.

Homesite's brief fails to explain how J.F. Allen's legal liability for a negligent hiring/retention claim arose from the operation or use of an auto. Homesite generally argues that because J.F. Allen was required to pay damages in connection with an injury ultimately caused by a motor vehicle accident, the Auto Exclusion is triggered. *Homesite's Brief at 20-23.* However, Homesite fails to give effect to the express language found in its Exclusion indicating that the Exclusion will apply to "any claim, 'suit' [or] 'loss'" that arose out of the use or operation of an auto. Homesite fails to recognize the discrete cause of action pled against J.F. Allen did not require the involvement of an auto, and that any damages J.F. Allen was legally obligated to pay were as a result of the cause of action for negligent hiring/retention. A cause of action for negligent hiring/retention is an independent claim for negligence that does not arise from the use or operation of a motor vehicle.

C. The Circuit Court did not apply the Auto Exclusion such that it only applies to the insured's operation of an auto.

Homesite argues that the Auto Exclusion applies to anyone's operation of any auto, not solely the insured's operation of any auto. Homesite argues that the Circuit Court erred in "applying Homesite's 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." The problem with this argument is the Circuit Court made no such ruling.

In support of its argument, Homesite quotes Paragraph 10 of the Circuit Court's Order as follows:

> In order to trigger the exclusion, the claim, suit or loss must arise out of the 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.

AR0010 at ¶ 10 (emphasis added by Homesite). Based on the underlined text, Homesite asserts that the Circuit Court interpreted the Exclusion so as to only apply when the insured was using an auto. However, reading the underlined sentence in context makes it clear that the Circuit Court was explaining that the specific claim asserted against J.F. Allen in the Underlying Action did not require the operation of an auto for J.F. Allen to be liable. Homesite itself seems to recognize as much, stating that "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 " *Homesite's Brief at 23 (emphasis added).*

Thus, Homesite is arguing against a ruling that the Circuit Court simply never made. The Circuit Court did not hold that the Auto Exclusion only applies to J.F. Allen's use of an auto and its holding does not have that effect. Rather, the Circuit Court found that the Auto Exclusion focuses on the nature of the claim pled against the insured rather than on the cause of the bodily injury and, therefore, the Exclusion was not triggered in the Underlying Action as the negligent hiring/retention claim did not arise from the use of an auto.

Homesite goes on to cite several cases which it contends supports its position that the Exclusion applies to anyone's use of an auto and not only the insured. Again, this was not the basis for the Circuit Court's decision. Regardless, the cases cited by Homesite are distinguishable

and actually demonstrate that the Auto Exclusion is only triggered by the theory of liability asserted against J.F. Allen and not the cause of bodily injury.

First, Homesite relies on *Essex Ins. Co. v. Neely*, No. CIV. A. 5:04CV139, 2008 WL 619194, at *9 (N.D.W. Va. Mar. 4, 2008). In *Essex*, the insured was sued for a dramshop liability claim, alleging that the insured's employees overserved a patron who subsequently caused a car accident. *Id.* at *1-*2. The insured relied on an automobile liability exclusion in arguing that no coverage was afforded under the policy. The automobile liability exclusion at issue stated: "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.'" *Id.* (emphasis added). Thus, the *Essex* exclusion was triggered by "bodily injury" arising from the use of any auto. However, unlike the *Essex* policy, Homesite's exclusion is not triggered by the cause of the alleged damages – which was discussed in detail above. Rather, the Exclusion is triggered by the theory of liability asserted against the insured.

Homesite also cites *Lehrner v. Safeco Ins./Am. States Ins. Co.*, 2007-Ohio-795, 171 Ohio App. 3d 570, 872 N.E.2d 295. In *Lehrner*, the insured's employee suffered a seizure while delivering a pizza for the insured and struck two pedestrians, injuring one and killing the other. Suit was brought against the insured for negligent hiring, supervision, and retention. In arguing that no coverage was provided the insurer relied on an automobile exclusion, which stated: "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." *Id.* at 580, 302 *(emphasis added)*. The Court concluded that the exclusion applied because "[t]he policy denies coverage for a bodily injury arising out of the operation of an

automobile" and "[t]he bodily injury to the [plaintiffs] arose out of [the employee's] operation of an automobile." *Id.* at 580, 302.

Again however, Homesite fails to address the fact that its Exclusion does not hinge on whether or not the "bodily injury" or "property damage" arises from the use of an auto – as did the exclusion in *Lehrner*. In fact the Court in *Lehrner* specifically recognized this distinction:

> Coverage under the Utica policy simply is not conditioned on whether the insured's *liability* (i.e., the [the insured's] negligent hiring, etc.) arises out of the operation of an automobile. It is conditioned on whether the *injury or loss* (i.e., the injuries to the [plaintiffs]) arises out of the operation of an automobile. Consequently, as we have explained above, the proper inquiry in this case is whether the [plaintiffs'] injuries arose out of the operation of an automobile, not whether the theory of liability known as negligent hiring, supervision, and retention is specifically excluded by the Utica policy.

Id. at 585, 306. In this case, the Auto Exclusion is conditioned on whether Homesite's liability, *i.e.*, the claim, suit, or loss asserted against it, arises out of the operation of an auto. Therefore, *Lehrner* is not only distinguishable but runs directly counter to Homesite's entire argument.

Maxum Indemnity Company v. Kaur also offers Homesite no quarter. 356 F.Supp.3d 987 (E.D. Cal. 2018). In that case, a truck driving school was sued after a student was alleged to have caused a fatal accident in the operation of a tractor-trailer. The decedent's estate brought suit against the truck driving school and asserted a claim for negligent hiring, training, supervision, or retention of unfit employee, among other causes of action.

The truck driving school's insurer argued that there was no coverage based on an automobile exclusion:

> This insurance does not apply to [...] '[b]odily 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.

Id. at 991 (emphasis added). The Court found that there was no coverage as the policy explicitly excluded coverage for "'bodily injury'... arising out of the ... use ... of any ... 'auto'... including the ... training... of ... anyone in connection with the ownership, maintenance, operation, [or] use... of ... any... 'auto'."

Again, however, unlike the at issue Auto Exclusion, the exclusion in *Kaur* was conditioned upon whether the bodily injury was caused by the use of an auto, not whether the theory of liability asserted against the insured was caused by the use of an auto. Moreover, unlike the Auto Exclusion, the exclusion in *Kaur* specifically prohibited coverage for "hiring, employment, training or monitoring of [...] anyone in connection with the [...] use [...] of any [...] auto." Thus, *Kaur* does not support Homesite's argument and actually demonstrates that if the Auto Exclusion were intended to exclude claims for negligent hiring/retention, it could have specifically referenced such claims, as did the policy in *Kaur.*

Homesite's reliance on *Nautilus Ins. Co. v. JDW Inc.*, No. 2:18-CV-190-TLS, 2021 WL 5083716 (N.D. Ind. Nov. 2, 2021) is misplaced for the same reason. In that case, the insured, a bar, was sued for overserving a customer who left the bar and struck the plaintiff while driving. The plaintiff sued the bar for negligent hiring, training, and supervising. The insurer asserted that the following automobile exclusion barred coverage:

> This insurance does not apply to [...] "[b]odily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft (other than "unmanned aircraft"), "auto" or watercraft. Use includes operation and "loading or unloading".
>
> This Paragraph [...] applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft (other than "unmanned aircraft"), "auto" or watercraft.

Id. at *4.[7] Based on its specific language, the court found that the exclusion barred coverage as the claims were based on a "'[b]odily injury' ... arising out of the ... use ... of any ... 'auto.'" *Id.*

Thus, like *Kaur*, the policy in *JDW Inc.* specifically conditioned coverage on whether the "bodily injury" arose from the use of an auto, unlike the Auto Exclusion herein, which is conditioned on whether the claim, suit, or loss (*i.e.* theory of liability). The exclusion in *JDW Inc.* also specifically barred coverage for claims of negligent supervision, hiring, employment, training or monitoring or others if the occurrence that caused the bodily injury involved the use of an auto; the Auto Exclusion at issue here does not contain any such language.

The final case relied upon by Homesite suffers from the same flaws. *Scottsdale Ins. Co. v. Cent. Hotel, Inc.*, No. 421CV00052TWPDML, 2022 WL 4468406 (S.D. Ind. Sept. 26, 2022), *dismissed sub nom. Scottsdale Ins. Co. v. Davis*, No. 22-2869, 2024 WL 1670314 (7th Cir. Jan. 17, 2024). In that case, the insured hotel allegedly overserved a patron who subsequently left the hotel in his vehicle and caused an automobile accident, injuring the plaintiff. The hotel was sued for negligently serving the patron alcohol. The insurer argued that the policy did not provide coverage in light of an automobile exclusion, which stated:

> Insurance [...] does not apply to [...] [a]ny "injury or damage" arising out of the ownership, maintenance, operation, use, loading or unloading or entrustment to others of any auto.

Id. at *2. The court found that the exclusion barred coverage as the injury or damage arose out of the use of an automobile.

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[7]In describing the exclusion in *JDW Inc.*, Homesite states: "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'[.]" *Homesite's Brief at 27.* However, contrary to Homesite's representation, the exclusion in *JDW Inc.* did not apply to "claims" arising out of the use of any automobile. As quoted above, the exclusion actually stated that it applied to "bodily injury" arising out of the use of an auto.

As was the case with *Lehrner*, *Maxum*, and *JDW Inc., Central Hotel* is easily distinguishable from the case *sub judice* as the automobile exclusion was triggered by whether the "injury or damage" arose from the use of an auto, not whether the claim, suit, or loss arose from the use of an automobile.

Homesite again cites Windt, *Insurance Claims and Disputes: Representation of Insurance Companies & Insureds* (6th Ed. 2023) in support of its argument that the Auto Exclusion prohibits coverage. However, Homesite continues to fail to recognize that Windt is discussing policies that "contain an exclusion for bodily injury or property damage arising out of the use, ownership, or maintenance of an automobile" and "[t]he standard exclusion applies if the claimant's injury arose out of the use of an automobile" because "[t]he focus on the policy language is solely on the injury." *Id.* at § 11:22.

Homesite argues that the Court should follow what it characterizes as the "majority rule" in finding that its Auto Exclusion applicable herein. However, Homesite's policy does not even fall within the cases it characterizes as the majority rule. The exclusions at issue in the cases cited by Homesite, which it asserts represents the majority view, specifically conditioned the application of the exclusion on whether the injury arose from the use of a motor vehicle. The Auto Exclusion herein does not do so and instead focuses on whether the theory of liability (*i.e.* the suit, claim, or loss) arises from the use of an auto. To be clear, Homesite has not cited a single case which applied the "claim, suit, or loss" language in the manner it argues for herein.

Accordingly, the Circuit Court did not rule that the Auto Exclusion only applies if the claim, suit, or loss arose out of the insured's use of an auto and the cases relied upon by Homesite are distinguishable.

II. HOMESITE'S AUTO EXCLUSION IS AMBIGUOUS.

Zurich agrees that the Circuit Court erred by finding that the Homesite Auto Exclusion was ambiguous to the extent such ruling was solely based on the disagreement between the parties as to its proper interpretation. *Blake v. State Farm Mut. Auto. Ins. Co.*, 224 W. Va. 317, 323, 685 S.E.2d 895, 901 (2009)(citing Syl. Pt. 1, *Berkeley County Pub. Serv. Dist. v. Vitro Corp. of America*, 152 W.Va. 252, 162 S.E.2d 189 (1968)) ("The 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."). However, this Court can "affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." *Adkins v. Gatson*, 218 W. Va. 332, 337, 624 S.E.2d 769, 774 (2005)

Regardless of the Circuit Court's reasoning, the record clearly demonstrates that the Auto Exclusion on which Homesite relies is ambiguous and, therefore, must be interpreted in favor of coverage. An insurance policy is ambiguous if its language is "reasonably susceptible of two different meanings" or is "of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning." Syl. Pt. 1, *Shamblin v. Nationwide Mut. Ins. Co.*, 175 W. Va. 337, 332 S.E.2d 639 (1985).

First, the Auto Exclusion specifically excludes claims for negligent entrustment of an auto; but contains no similar specific exclusion for claims for negligent hiring/retention. Therefore, a person of reasonable intelligence could read the exclusion and conclude that it does not exclude claims for negligent hiring/retention as the same was not explicitly mentioned like negligent entrustment.

Moreover, if the Auto Exclusion applies in the manner that Homesite contends, the specific reference to a claim for negligent entrustment within the Exclusion would be unnecessary because a claim for negligent entrustment would always arise from the use of a motor vehicle. Homesite's interpretation would render the language specifically excluded claims for negligent entrustment as superfluous. Thus, a reasonable interpretation of the Exclusion would be that it does not apply in the manner Homesite suggests as that would fail to give effect to all portions of the Exclusion.

Additionally, as is clear from the cases above, many policies condition the applicability of the automobile exclusion on whether the "bodily injury" arose from the use of an auto. The Exclusion on which Homesite relies does not condition its applicability on whether the "bodily injury" arose from the use an auto accident but instead whether the claim, suit, or loss arose from the use of a motor vehicle. Thus, the fact that Homesite's Exclusion does not condition its applicability on whether the "bodily injury" arose from the use of an auto renders it ambiguous.

Many policies also specifically include claims for negligent hiring, retention, selection, etc. within their automobile exclusions, including *Kaur* and *JDM Inc.*, discussed above. However, the Auto Exclusion does not contain any specific reference to claims for negligent hiring, retention, selection, etc. and, therefore, a reasonable reader could believe that such claims are not precluded by the Auto Exclusion.

Last, the Auto Exclusion is an exclusion to coverage, which must be strictly construed against Homesite and in favor of J.F. Allen. Syl. pt. 8, *Nat'l Union Fire Ins. Co. of Pittsburgh v. Miller*, 228 W.Va. 739, 724 S.E.2d 343 (2012) ("Where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated.") (citations omitted).

For all these reasons, the Circuit Court correctly concluded that the Exclusion was ambiguous, even if its reasoning was erroneous.

CONCLUSION

Based on the plain language of the Auto Exclusion and the legal authority set forth above, including *Huggins*, the Circuit Court properly held that the Auto Exclusion does not apply to the negligent hiring/retention claim, which is a claim that does not arise out of the use or operation of an auto.

Dated this 22nd day of August, 2025.

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 25-ICA-213

HOMESITE INSURANCE COMPANY OF FLORIDA,

Petitioner,

v.

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

Respondents.

(On Appeal from the Circuit Court of Upshur County,
West Virginia, Civil Action No. CC-49-2024-C-16)

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Respondent, Zurich American Insurance Company, does hereby certify on this 22nd day of August, 2025, that a true copy of the foregoing "***RESPONSE BRIEF ON BEHALF OF RESPONDENT, ZURICH AMERICAN INSURANCE COMPANY***" was filed with the Clerk of Court using File & ServeXpress system, which will send notification of such filing to the following:

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