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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 25-ICA-216

ZURICH AMERICAN INSURANCE COMPANY,

Petitioner,

v.

HOMESITE INSURANCE COMPANY OF FLORIDA
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)

BRIEF ON BEHALF OF PETITIONER, ZURICH AMERICAN INSURANCE COMPANY

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III. STATEMENT OF THE CASE

A. UNDERLYING ACTION

The instant matter is a dispute as to potential insurance coverage for the claims asserted against Defendant herein, 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*).

The dispute in the instant case 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," asserting 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 went on to allege 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.

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 alleged negligent general business practices in screening

independent contractors and 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 hiring and screening 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. 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.[1]

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 Debra 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

[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.

should have known Nu Creek was unsafe and not legal to drive under its USDOT authority.

AR1004.

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. 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. 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.[2]

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.* The Axis Policy contains an endorsement which added the following Automobile Liability Exclusion to the Policy:

Automobile Liability

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

[2]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.

loading or **unloading** of any **auto**.

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

Loading or unloading means the handling of property:

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

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

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

AR1043. Despite this Automobile Liability Exclusion in the Axis excess policy, 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.

4. HOMESITE POLICY

Homesite issued a policy which sits excess 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 Automobile Liability 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 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 denied coverage 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.

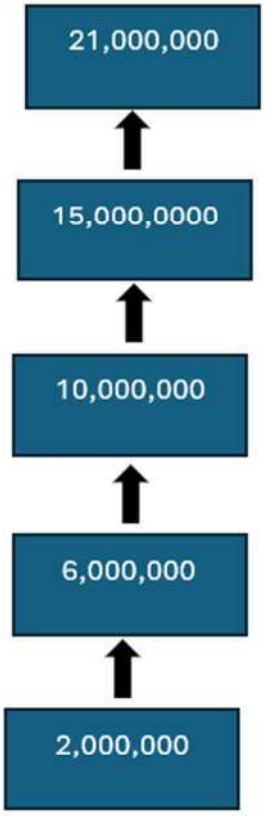
Seeking to avoid a clearly owed obligation and asserting a plainly improper "not me" defense, Homesite argued that the Automobile Liability Exclusion within the Axis Policy – an exclusion upon which Axis itself did not rely to deny coverage – precludes coverage in this case. As explained in more detail below, the Circuit Court's interpretation of the Automobile Exclusion ignores the qualifying language excluding coverage for "any claim, suit, loss or any other cost or expense arising out of" the use of an auto. 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 arise out of the use of an auto, but rather arises simply out of J.F. Allen's general business practices[3]. Therefore, as Axis properly determined, the Automobile Liability exclusion in the Axis and Homesite policies does not apply.[4]

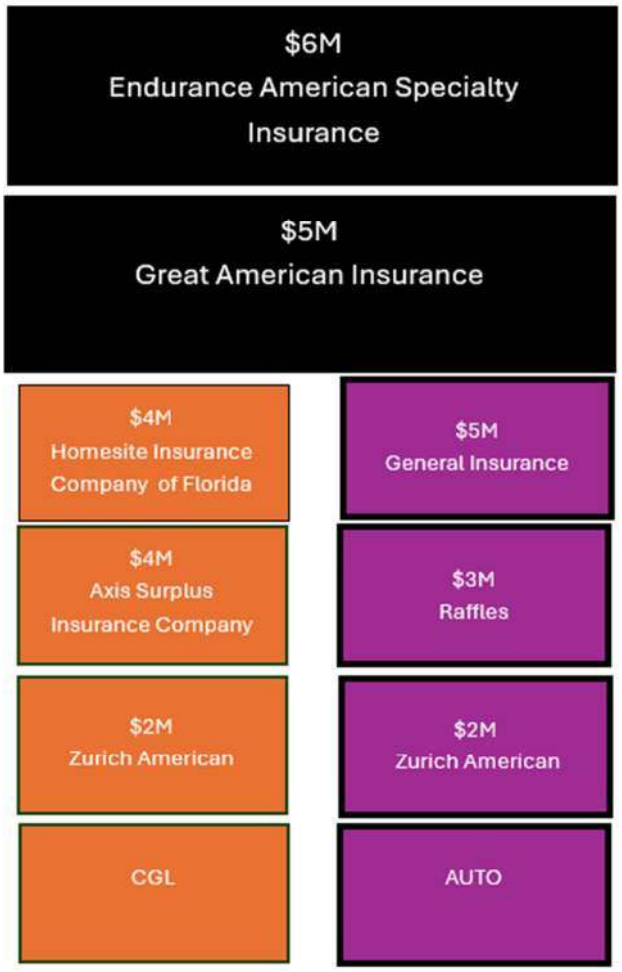
C. INSURANCE TOWER AND SETTLEMENTS

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

[3] 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.

[4] As explained in Note 4 below, the Circuit Court's ruling that the Homesite Policy provides coverage for the Underlying Action is being appealed by Homesite in a separate appeal. Zurich provides this information concerning the Homesite Policy so that this Court has the full context of the procedural history and Circuit Court's rulings below.





Zurich paid the $2 million policy limits of the Zurich CGL policy issued to J.F. Allen. Additionally, despite initially reserving rights pursuant to the Automobile Liability Exclusion in its excess policy (the same policy exclusion upon which Homesite now seeks to rely), Axis ultimately did not deny coverage pursuant to its Automobile Liability Exclusion and tendered its $4,000,000.00 in insurance coverage to J. F. Allen for use in resolving the Underlying Action. Despite $6,000,000.00 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 $4,000,000.00 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 found 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 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 noted 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. Further, the Circuit Court recognized 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 Homesite 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.*

Zurich herein appeals the portions of the April 25, 2025 Order which found that the Zurich Auto Policy provides coverage for the Underlying Action.[5]

IV. SUMMARY OF ARGUMENT

The Zurich Auto Policy does not provide coverage for the Underlying Action because the damages J.F. Allen was legally required to pay did not result from the ownership, maintenance, or use of an auto. The insuring agreement of 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 Zurich Auto Policy only applies if the damages J.F. Allen is legally required to pay resulted from the ownership, maintenance, or use of any auto. However, the sole allegation against J.F. Allen in the underlying action was that it failed to conduct a reasonable inquiry/screening into Nu Creek and Marple's background, and that J.F. Allen knew or should have known that Nu Creek and Marple were not

[5] On May 20, 2025, Homesite filed its *Notice of Appeal* in *Homesite Insurance Company of Florida v. Zurich American Insurance Company et al.*, No. 25-ICA-213. Homesite asserts that the Circuit Court in finding that its policy provides coverage and also appeals from the Circuit Court's April 25, 2025 Order. Zurich contends that the Circuit Court properly concluded that the Homesite Policy provides coverage for the Underlying Action and will address the same in response to Homesite's Brief.

competent to safely perform the job for which they were hired. Importantly, there was no claim that J.F. Allen was vicariously liable for Marple/Nu Creek's use of its own auto. The underlying action only sought to hold J.F. Allen liable for its own alleged negligent business practices in failing to properly screen Marple/Nu Creek before entering into an independent contractor arrangement with them. Therefore, J.F. Allen was not legally obligated to pay damages as a result of the operation or use of an auto. The Circuit Court's ruling failed to take into consideration the "legally obligated to pay as damages" clause of the insuring agreement, and failed to properly consider the distinct claims made against J.F. Allen in the underlying action – which occurred well before the auto accident and had nothing to do with the use or operation of any auto.

A claim for negligent hiring or retention does not result from the use of an auto and is wholly independent from the claim of negligence asserted against the driver of the vehicle and his company. The Supreme Court of Appeals of West Virginia has addressed the elements of a claim for negligent hiring or retention on several occasions and has never mentioned the requirement of the use of an auto or an auto accident. Indeed, many negligent hiring/retention claims which have been addressed by the Court did not involve any auto or auto accident whatsoever. Likewise, the Supreme Court of Appeals of West Virginia has recognized, in the context of a negligent entrustment claim that did involve an auto, that "the critical element of a negligent entrustment cause of action is the initial improper loaning of the vehicle…" and "…the driver's [subsequent] 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." The claim at issue herein for negligent hiring or retention is directly analogous to a claim for negligent entrustment in that regard. The essential element of a claim for negligent hiring/retention of an independent contractor is the initial improper

hiring/retention of the contractor; therefore, Marple's negligent operation of his own vehicle is not the critical factor in the negligent hiring or retention claim, although it is necessary to complete the causal connection between the negligent hiring/retention and the ultimate injury for which damages were sought. Thus, the negligence of J.F. Allen in hiring/retaining NuCreek and Marple is independent of Marple's negligence in the operation of his own vehicle. One may be liable for negligent hiring/retention of an independent contractor without the subsequent injury being caused by an auto accident. The Circuit Court recognized the independence of the negligent hiring/retention claim in relation to the Homesite Policy, but erred in not applying the same sound reasoning to the Zurich Auto Policy.

The Circuit Court's Order is also contrary to the *Huggins* case, which addressed whether an insurer was obligated to defend its insured under a homeowner's policy for a claim of negligent entrustment. The exclusion at issue stated that the policy did not apply to "the ownership, maintenance, operation or use [...] of land motor vehicles." The Court found that the negligent entrustment claim was not barred by the exclusion because, *inter alia*, the driver's negligent operation of a vehicle is not the critical component of a negligent entrustment theory. In doing so, *Huggins* adopted the theory of liability approach, finding that the theory of liability asserted against the insured did not involve the use of an automobile, regardless of the cause of the bodily injury or property damage. The negligent entrustment claim in *Huggins* is directly analogous to the negligent hiring/retention claim at issue herein and the Circuit Court erred in not applying *Huggins* to the Zurich Auto Policy.

Last, the Circuit Court erred when it ruled that the Zurich Auto Policy was ambiguous. The sole basis for the Court's ruling in this regard was that the Zurich Auto Policy must be ambiguous since the parties had offered competing interpretations. However, West

Virginia law is clear that the mere fact that the parties do not agree to the construction of a policy does not render it ambiguous.

For all these reasons, Zurich respectfully requests that the Court reverse the April 25, 2025 *Order*, as the Zurich Auto Policy clearly does not apply to the negligent hiring/retention claim asserted against J.F. Allen

V. 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.

VI. 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.

VII. ARGUMENT

A. The Circuit Court erred in finding that the Zurich Auto Policy provides coverage as J.F. Allen was not legally required to pay damages resulting from the ownership, maintenance, or use of an auto because the sole claim asserted against J.F. Allen was for negligent hiring/retention.

Initially, it should be noted that the following principles apply to the construction of insurance policy terms:

> In West Virginia, insurance policies are controlled by the rules of construction that are applicable to contracts generally. We recognize the well-settled principle of law that this Court will apply, and not interpret, the plain and ordinary meaning of an insurance contract in the absence of ambiguity or some other compelling reason. Our primary concern is to give effect to the plain meaning of the policy and, in doing so, we construe all parts of the document together. We will not rewrite the terms of the policy; instead, we enforce it as written. Syllabus Point 1 of *Russell v. State Automobile Mutual Insurance Company*, 188 W.Va. 81, 422 S.E.2d 803 (1992), states: "'Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.' Syllabus, *Keffer v. Prudential Ins. Co.*, 153 W.Va. 813, 172 S.E.2d 714 (1970)."

Payne v. Weston, 195 W.Va. 502, 507, 466 S.E.2d 161, 166 (1995).

The insuring agreement of 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']." *AR0862.* The terms of the insuring agreement in the Zurich Auto Policy are clear, unambiguous, and do not provide coverage for the negligent hiring/retention claim asserted against J.F. Allen in the Underlying Action for several reasons as explained below.

The language in dispute in the Zurich Auto Policy is contained in the insuring agreement portion of the Policy, as opposed to an exclusion to coverage.[6] This distinction is important as it governs the burdens applicable to the parties:

> The insured should bear the burden of first demonstrating the existence of coverage under the general insuring clause; that is, the insured should first demonstrate that, assuming no exclusions are applicable, all or a portion of the judgment is encompassed by the policy. The insurer should then have the burden of proving the applicability of a policy exclusion.

Camden-Clark Mem'l Hosp. Ass'n v. St. Paul Fire & Marine Ins. Co., 224 W. Va. 228, 237, 682

[6] On the other hand, the Automobile Liability Exclusion on which Homesite relies is an exclusion to coverage. Exclusions to coverage are "strictly construed against the insurer in order that the purpose of providing indemnity not be defeated." Syl. Pt. 11, *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W. Va. 470, 745 S.E.2d 508 (2013).

S.E.2d 566, 575 (2009). Thus, Homesite and J.F. Allen, as the parties asserting the existence of coverage, have the burden of demonstrating that the underlying action falls within the insuring agreement of the Zurich Auto Policy. For all the reasons set forth below, the Circuit Court erred in finding that the Zurich Auto Policy provides coverage.

1. The Circuit Court's interpretation of the Zurich Auto Policy fails to give effect to the "legally must pay as damages" portion of the insuring agreement.

The Zurich Auto Policy only provides coverage if the damages the insured is legally required to pay resulted from the ownership, maintenance, or use of any auto. However, if J.F. Allen was liable to the plaintiff in the Underlying Action on a negligent hiring/retention theory, such liability would not result from the ownership, maintenance, or use of any auto. In other words, for coverage to be afforded under the policy, the damages the insured must pay are required to **result from the use of any auto**.[7] The Underlying Action was simply not seeking to hold J.F. Allen liable in connection with the use of an auto. Instead, the Complaint in the Underlying Action alleged that J.F. Allen was liable to the plaintiff for failing to conduct a reasonable inquiry/screening into Nu Creek and Marple's background, and because J.F. Allen knew or should have known that Nu Creek and Marple were not competent to safely perform the job for which they were hired. *AR0818-AR0819.*

The Circuit Court's ruling effectively ignores the requirement that J.F. Allen must be found liable and "legally must pay as damages" sums that resulted from the ownership,

[7] The commercial auto liability insurance that was issued to Nu Creek and Marple DID apply because such coverage was obtained to afford coverage for liabilities arising from Nu Creek's and Marple's use/operation of their own autos. During the course of settlement negotiations, the commercial auto insurer for Nu Creek and Marple properly tendered its policy limits for use in settlement.

maintenance or use of an auto in order for the insuring agreement of the Zurich Auto Policy to be triggered.[8] The insuring agreement in the Zurich Auto Policy states:

> 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 [any] "auto".

AR0862 (emphasis added).

However, the Circuit Court's ruling effectively ignores the "legally must pay as damages" portion of the insuring agreement, which is premised on the theory of liability asserted against the insured and not the cause of the bodily injury or property damage, and rewrites the policy as follows:

> 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 [any] "auto".

On the other hand, Zurich's interpretation of the insuring agreement gives effect to all portions of the insuring agreement. *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.").

Thus, the Circuit Court erred by failing to give effect to the operative "legally must pay as damages" clause, which focuses on the theory of liability asserted against the insured and not the cause of the bodily injury itself.[9]

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[8]For this same reason, Zurich and Axis **both** determined that the Auto Exclusions found in their respective CGL policies did NOT apply to bar coverage for the underlying action.

[9] The language of some insurance policies do condition coverage on whether the bodily injury at issue was caused by the use of an automobile, as opposed to the theory of liability asserted against the insured. For example, in *Essex*, the auto exclusion at issue therein stated that the policy did not apply to "'bodily injury' or 'property damage' arising out of, caused by or contributed to by the ownership, maintenance, use or entrustment to others of any 'auto.'" *Essex Ins. Co. v. Neely*, No. CIV. A. 5:04CV139, 2008 WL 619194, at *9 (N.D.W. Va. Mar. 4, 2008). Here, the Zurich Policy does not condition coverage on whether the

2. A claim for negligent retention or hiring of an independent contractor is an independent claim for negligence, which does not result from the use of an auto and, as a result, does not trigger the insuring clause of the Zurich Auto Policy.

The Supreme Court of Appeals adopted a cause of action for negligent hiring or selection in *Thomson*, "holding that one who undertakes to hire an independent contractor who is not careful or competent can be held liable for resulting damages caused by the independent contractor if the hiring entity is negligent in the selection and retention of the independent contractor." *Kizer v. Harper*, 211 W. Va. 47, n. 10, 561 S.E.2d 368 (2001) (citing *Thomson v. McGinnis*, 195 W.Va. 465, 465 S.E.2d 922 (1995)).

Since *Thomson*, the Supreme Court of Appeals of West Virginia has discussed the elements of a negligent hiring/retention claim on several occasions, never mentioning the requirement of the use of an auto or an auto accident:

> [A] fair formulation of the inquiry upon which liability for negligent hiring or retention should be determined is: "when the employee was hired or retained, did the employer conduct a reasonable investigation into the employee's background vis a vis the job for which the employee was hired and the possible risk of harm or injury to co-workers or third parties that could result from the conduct of an unfit employee? Should the employer have reasonably foreseen the risk caused by hiring or retaining an unfit person?"
> […]
>
> [I]t appears that a primary question in determining whether an employer may be held liable, based on a theory of negligent hiring or retention, is the nature of the employee's job assignment, duties and responsibilities—with the employer's duty with respect to hiring or retaining an employee increasing, as the risks to third persons associated with a particular job increase.

McCormick v. W. Virginia Dep't of Pub. Safety, 202 W. Va. 189, 193, 503 S.E.2d 502, 506 (1998).

> [Section 411 of the Restatement of Torts] states:
> An employer is subject to liability for physical harm to third persons caused by his [or her] failure to exercise reasonable care to employ a competent and careful

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bodily injury resulted from the use of an automobile, but rather on whether the insured's legal liability resulted from the use of an automobile.

> contractor
>
> (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
>
> (b) to perform any duty which the employer owes to third persons.
>
> Restatement (Second) of Torts § 411 (1965). We concur with the sentiment that a principal is liable for harm caused by his or her failure to exercise reasonable care to employ a competent and careful contractor, and we adopt this section of the Restatement.

Sipple v. Starr, 205 W. Va. 717, 724, 520 S.E.2d 884, 891 (1999)

Based on this clear precedent, a cause of action for negligent hiring/retention is in no way dependent upon the use of an auto. In fact, many negligent hiring/retention claims which have made their way to our Supreme Court do not involve any auto accident whatsoever. *Kizer v. Harper,* 211 W. Va. 47, 561 S.E.2d 368 (2001)(cable company employee alleged that an electrician hired by homeowner's son was unlicensed, resulting in injuries); *McCormick v. W. Virginia Dep't of Pub. Safety*, 202 W. Va. 189, 503 S.E.2d 502 (1998) (landlord not liable for murder of tenant by employee due to lack of evidence); *Sipple v. Starr*, 205 W. Va. 717, 520 S.E.2d 884 (1999)(negligent hiring claim asserted after customer shot and killed by convenience store employee); *State ex rel. W. Virginia State Police v. Taylor*, 201 W. Va. 554, 499 S.E.2d 283 (1997)(estate of motorist shot to death by trucker brought wrongful death action against trucker's employer); *Thomson v. McGinnis*, 195 W.Va. 465, 471, 465 S.E.2d 922, 928 (1995)(real estate broker could be liable for negligent hiring of contractor not qualified to inspect furnaces). The elements of a claim for negligent hiring/retention are not dependent upon the use of an auto. Even if an auto ultimately causes the injury at issue, it is not a necessary element of the claim or theory of liability. The negligent/hiring retention claim asserted against J.F. Allen was dependent solely upon J.F. Allen's alleged negligent general business practices and does not involve damages

resulting from the use of an auto. The Zurich Auto Policy's insuring agreement is, therefore, not triggered. [10]

In *Huggins*, which is discussed below in further detail, the Court recognized that a cause of action for negligent entrustment is an independent cause of action, unrelated to the driver of the vehicle's negligence:

> [T]he 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.

Huggins v. Tri-Cnty. Bonding Co., 175 W. Va. 643, 649, 337 S.E.2d 12, 17 (1985) (internal citations omitted).

The claim for negligent hiring or retention of an independent contractor herein is directly analogous to the claim for negligent entrustment analyzed in *Huggins*. The critical element of a negligent retention of an independent contractor claim is the initial improper 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, 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

[10] Zurich did conclude, however, that its primary Commercial General Liability policy issued to J.F. Allen WAS triggered by the allegations made in the underlying action, and Zurich appropriately afforded a defense to J.F. Allen under that policy and, during the course of settlement negotiations, properly tendered that $2 million policy limit for use in settlement.

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 of his own auto. And, importantly, J.F. Allen was **not** alleged to be vicariously liable for Marple's use of his own auto.

Indeed, J.F. Allen's purported negligent hiring/retention occurred when it initially hired/contracted with Nu Creek/Marple, which was before the motor vehicle accident even occurred. *McCormick v. W. Va. Dep't of Public Safety*, 202 W.Va. 189, 503 S.E.2d 502, 506–07 (1998) (per curiam) ("When the employee was hired or retained, did the employer conduct a reasonable investigation into the employee's background vis a vis the job for which the employee was hired and the possible risk of harm or injury to co-workers or third parties that could result from the conduct of an unfit employee?") (emphasis added). On the other hand, Marple's purported negligence (and Nu Creek's imputed negligence through respondeat superior) occurred at the time of the motor vehicle accident.

The Circuit Court's *Order* properly recognized these concepts in relation to the Homesite Policy, stating:

- "The 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.*

- "J.F. Allen's liability was premised upon acts independent of the automobile accident." *AR0010 at ¶ 10.*

- "West Virginia recognizes that a claim of negligent hiring or retention as a separate cause of action." *AR0010 at ¶ 11.*

- "[A]lthough the negligent operation of the vehicle completes the causal connection between the original negligent act (negligent entrustment [in *Huggins*]) 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.*

Yet, the Circuit Court failed to explain why these same sound principles would not apply to analyzing coverage under the Zurich Policy for the negligent hiring/retention claim asserted against J.F. Allen.

Thus, the Circuit Court erred in finding coverage under the Zurich Auto Policy as J.F. Allen's separate liability for negligent hiring/retention is independent of that of Nu Creek/Marple's alleged negligent use/operation of an auto, and J.F. Allen's separate liability plainly did not result from the use of an auto.

3. The Circuit Court's Order is contrary to West Virginia law, which has adopted the "theory of liability" approach.

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." 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.

The Court found that coverage for the negligent entrustment claim was not barred by the automobile exclusion for several reasons. 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. However, the was not the only basis for the Court's conclusion. As explained above, the Court further recognized 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." *Id.* at 649, 17. Thus, the Court reasoned "the driver's [subsequent] 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.* The Court further noted that "the operation and use of a vehicle is not a critical component of a negligent entrustment theory." *Id.*

In reaching this conclusion, the Court considered but ultimately rejected the insurer's argument that the policy protects against occurrences that cause a liability, and not against theories of liability. *Huggins*, 175 W. Va. at 649-650, 18. The insurer argued that if a loss for which the insured is liable was caused by an occurrence involving a motor vehicle, there is no coverage regardless of the theory upon which the liability is grounded. The Court first noted that there was nothing in the policy that stated that coverage was dependent only on the occurrence that caused the injury. Further, while adopting a"theory of liability" interpretation, the Court noted that the policy does in fact make distinctions according to theories of liability by excluding coverage based on intentional conduct or professional negligence regardless of the specific occurrence that caused the injury. *Id.*

There are two main approaches utilized by courts in other states to assess whether a claim or suit is caused by the use of an auto for purposes of determining insurance coverage. 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*, our Supreme Court clearly adopted a "theory of liability" approach and rejected the "cause of injury" approach. Even leaving *Huggins* aside, the unambiguous language

of the insuring agreement itself in this case justifies the "theory of liability" approach, as coverage is conditioned on the "sums an 'insured' legally must pay as damages[.]" Notably, the Court in *Huggins* adopted the "theory of liability" approach, despite the "legally must pay as damages" clause not being included within the exclusion at issue. In this case, the "theory of liability" pleaded against J.F. Allen was negligent hiring/retention, which is independent of Marple's negligence in the operation of the automobile. And any sums that J.F. Allen must pay as damages would result from its negligent hiring/retention of NuCreek/Marple, which occurred well before the auto accident at issue and plainly did not result from the use of an auto

Additionally, like the policy at issue in *Huggins*, the Zurich Auto Policy makes distinctions according to theories of liability. For example, the Zurich Auto Policy excludes coverage based on intentional conduct or pollution, regardless of the specific occurrence that caused the injury. *AR0863, AR0865.*

West Virginia is not alone in this regard as other states also follow the "theory of liability" approach. In *Marquis*, the plaintiff was injured when she was struck by a vehicle driven by Jerry Auck. *Marquis v. State Farm Fire & Cas. Co.*, 265 Kan. 317, 961 P.2d 1213 (1998). The vehicle was owned by Sharon Auck, the wife of Jerry Auck. She was the sole owner of a cleaning business. The cleaning business was insured by a "contractor's policy." Sharon and Jerry Auck were also insured by a homeowner's policy. At the time of the accident, Jerry Auck was acting in the course and scope of his employment with the cleaning business. The plaintiff sued both Jerry Auck and Sharon Auck. Eventually, a dispute arose as to whether the "contractor's policy" provided insurance coverage for the claims of negligent hiring, retention, or supervision of Jerry Auck. *Id.* at 318-319, 1215-1216.

In that case, the homeowner's policy contained the following exclusion:

e. Bodily injury or property damage arising out of the ownership, maintenance, use, loading or unloading of: […]

(2) a motor vehicle owned or operated by or rented or loaned to any insured; or

f. bodily injury or property damage arising out of:

(1) the entrustment by any insured to any person;

(2) the supervision by any insured of any person;

(3) any liability statutorily imposed on any insured; or

(4) any liability assumed through an unwritten or written agreement by an insured;

with regard to ownership, maintenance or use of any aircraft, watercraft, or motor vehicle (or any other motorized land conveyance) which is not covered under Section II of this policy.

Id. at 327-328, 1221.

The contractor's policy contained an exclusion, stating that coverage does not apply: "to bodily injury or property damage arising out of the ownership, maintenance, use or entrustment of others of any aircraft, auto, or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and loading or unloading." *Id.* at 328, 1221.

The trial court found that the homeowner's policy barred coverage for negligent supervision, hiring, or retention claims because the language of the policy specifically included negligent supervision claims within the exclusionary language. However, as to the contractor's policy, the trial court found that the exclusion, unlike the language found in the homeowner's policy, failed to clearly and unambiguously exclude coverage for negligent supervision, hiring or retention.

On appeal, the insurer made the same argument that the Circuit Court adopted herein – that the general exclusion in the contractor's policy excludes a claim for negligent

supervision, hiring, or retention because the claims arose out of the use of an auto. However, the Supreme Court of Kansas rejected this argument, noting that "[t]he negligence alleged in this case is that of negligent supervision, hiring, or retention, which is negligence separate and distinct from negligence of the driver whose action caused the injury." *Id.* at 329, 1222. The court further noted that negligent supervision, hiring, or retention is a recognized cause of action under Kansas law and "its focus is upon the actions of someone other than the person whose negligence caused the injury." *Id.*

In *Pablo*, the Supreme Court of Montana addressed an exclusion in a CGL policy which stated that coverage was excluded for claims "arising out of the ownership, maintenance, use or entrustment to others of any aircraft, 'auto' or watercraft owned or operated by or rented or loaned to any insured." The Court found the words "arising out of" to be ambiguous when applied to a claim for negligent hiring, as demonstrated by a split of authority on the issue and the insurer's failure to define the same. The Court also rejected the insurer's argument that exclusions should be applied based on facts and not theories of liability. *Pablo v. Moore*, 2000 MT 48, 298 Mont. 393, 995 P.2d 460.

Although *Marquis* and *Pablo* addressed this issue in the context of an exclusion, their reasoning is equally applicable to the insuring agreement in the Zurich Auto Policy, which conditions coverage on the sums an insured "legally must pay as damages," *i.e.* the theory of liability approach.

Marquis and *Pablo* represent the "theory of liability" approach adopted by West Virginia courts – and an approach which more properly takes into account the actual basis upon which an insured may be found liable in order to analyze coverage under an insurance policy. The "theory of liability" approach also gives full meaning and effect to the specific language found in

the Zurich Auto Policy's insuring agreement. As explained above, the *Huggins* court adopted the same approach. Under the theory of liability rule, it makes no difference that the ultimate **injury** was caused by a third party's use of an auto because **the theory of liability pled** against the insured, J.F. Allen, is negligent hiring/retention, and is based on the independent negligence of J.F. Allen completely unrelated to the use, operation or maintenance of any auto – i.e. the damages that J.F. Allen may be legally obligated to pay would result from J.F. Allen's general business practices and do not result from the use of an auto.[11]

Thus, *Huggins* requires that the Court overrule the Circuit Court and adopt the theory of liability rule here and conclude that the Zurich Auto Policy does not provide coverage for the Underlying Action.

4. The Circuit Court erred in finding the Zurich Auto Policy to be ambiguous merely because the parties disagreed about its application.

"The term 'ambiguity' is defined as language "reasonably susceptible of two different meanings" or language "of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning [.]" *Payne v. Weston*, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995). "However, a court should read policy provisions to avoid ambiguities and not torture the language to create them." *Id.*

Moreover, contrary to the Circuit Court's Order, "[t]he mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court." *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)). Thus,

[11] And, accordingly, Zurich appropriately handled and adjusted this claim under its primary Commercial General Liability policy.

the Circuit Court clearly erred in finding that the standard Insurance Services Office language found in the insuring agreement of the Zurich Auto Policy was ambiguous solely because of the "competing interpretations asserted by the parties."

VIII. CONCLUSION

For all the reasons set forth herein and otherwise apparent to the Court, Zurich respectfully requests that the Court reverse the April 25, 2025 *Order*, as the Zurich Auto Policy clearly does not apply to J.F. Allen's alleged independent act of negligently hiring/retaining an independent contractor because such a claim plainly does not result from the ownership, maintenance, or use of an auto.

Dated this 25th day of July, 2025.

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 25-ICA-216

ZURICH AMERICAN INSURANCE COMPANY,

Petitioner,

v.

HOMESITE INSURANCE COMPANY OF FLORIDA
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/Petitioner, Zurich American Insurance Company, does hereby certify on this 25th day of July, 2025, that a true copy of the foregoing "***BRIEF ON BEHALF OF PETITIONER, 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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