INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NO. 25-ICA-216

ZURICH AMERICAN INSURANCE COMPANY,
Defendant Below, Petitioner

v.

HOMESITE INSURANCE COMPANY OF FLORIDA,
Plaintiff Below, Respondent

And

J.F. ALLEN COMPANY, INC.
Defendant Below, Respondent

RESPONDENT'S BRIEF

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ZURICH'S ASSIGNMENTS OF ERROR

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. The sole claim asserted against J.F. Allen was for negligent hiring/retention of an independent contractor.

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

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

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

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

STATEMENT OF THE CASE

Pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure, Respondent Homesite Insurance Company of Florida ("Homesite") corrects the following inaccuracies of the Statement of the Case included in the Petitioner's Brief filed by Zurich American Insurance Company ("Zurich").

I. ZURICH'S MISQUOTES OF THE INSURING AGREMENT OF THE ZURICH AUTO POLICY

Page 3 of the Petitioner's Brief accurately quotes the insuring agreement of the Zurich Business Automobile Policy, Policy Number BAP 5098870-12 (the "Zurich Auto Policy")[1]:

> 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".

[1] The Zurich Auto Policy is found at **AR0332-0428**; the relevant insuring agreement is found at **AR0370**.

However, when the insuring agreement is restated twice more on Page 3 of the Statement of the Case in the Petitioner's Brief, it is misquoted by leaving out the words "because of 'bodily injury'".[2] Zurich is free to argue that those four words are not important to a proper analysis of the Zurich Auto Policy's insuring agreement. However, those four words were critical to the Circuit Court's analysis of the insuring agreement.[3] Therefore, they should not be omitted from any quote of the Zurich Auto Policy's insuring agreement.

II. AXIS DID NOT DETERMINE THAT ITS POLICY'S AUTO EXCLUSION DOES NOT APPLY; IT PARTICIPATED IN SETTLING A DISPUTED CLAIM AFTER ISSUING, BUT NEVER RETRACTING, A RESERVATION OF RIGHTS

On pages 7 and 9 of the Petitioner's Brief, Zurich's Statement of the Case asserts that Axis Surplus Insurance Company ("Axis"), which had issued an excess liability insurance policy (the "Axis Excess Policy")[4] to J.F. Allen Company, Inc. ("J.F. Allen"), determined that an auto exclusion contained in the Axis Excess Policy does not apply to the underlying lawsuit by Debra D. Green in the Circuit Court of Harrison County, West Virginia (the "Green Lawsuit"). This is simply not true.

On December 14, 2023, Axis issued a Reservation of Rights to J.F. Allen.[5] In its Reservation of Rights, Axis clearly outlines two reasons why there may not be liability insurance coverage for J.F. Allen under the Axis Excess Policy regarding the Green Lawsuit, the first of

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[2] This misquoting of the Zurich Auto Policy's insuring agreement to omit the words "because of 'bodily injury'" continues into the Summary of Argument (page 12) and the Argument (page 16) of the Petitioner's Brief. As stated above, Zurich is free to argue the importance (or from Zurich's perspective, the lack of importance) of those words; but given the Circuit Court's reliance on those words for its insurance coverage determination, an accurate quote of the Zurich Auto Policy's insuring agreement should contain these four words.

[3] **AR0012**.

[4] The Axis Excess Policy (**AR0513-0553**).

[5] **AR1111-1118**.

which is the operation of the auto exclusion in question.[6] Axis never retracted its Reservation of Rights.

Later, in April of 2024, Axis (along with various other insurers and J.F. Allen) financially participated in a Confidential Settlement of the Green Lawsuit.[7]

There is no factual basis for Zurich's assertion that Axis determined that the auto exclusion contained in the Axis Excess Policy does not apply to the Green Lawsuit.[8]

SUMMARY OF ARGUMENT

Contrary to Zurich's arguments, The Circuit Court did not fail to give effect to the "legally must pay as damages" portion of the Zurich Auto Policy's insuring agreement. Rather, the Circuit Court's analysis gave effect to all of the relevant portions of the insuring agreement.

Zurich argues that the "legally must pay as damages" portion of the insuring agreement is premised on the specific theory of liability that has been asserted against the insured. Since J.F. Allen was sued for negligent hiring/retention of Nu Creek and Mr. Marple as contractors, and this alleged misconduct did not involve J.F. Allen's ownership, maintenance or use of an auto, the insuring agreement does not apply here, according to Zurich.

However, there is simply no textual basis for that argument. Nothing in the insuring agreement differentiates between different theories of liability that can lead to the "insured" being legally liable to pay damages.

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[6] **AR1114**, **AR1116**.

[7] **AR 1243-1255**.

[8] Moreover, there is no logical basis for Zurich's decision to discuss the Axis Excess Policy or the Homesite Excess Policy in its Petitioner's Brief. Zurich's appeal regards the Circuit Court's insurance coverage determination regarding the Zurich Auto Policy. The Circuit Court made it clear in its Order (**AR0002-0014**) that its analyses of the Zurich Auto Policy and the Homesite Excess Policy were separate and distinct analyses; one did not depend on the other (**AR0008-0009**). It therefore makes no sense for Zurich to devote space in its Petitioner's Brief to any attempts to prove that there is coverage for J.F. Allen under the Homesite Excess Policy. That is a question properly reserved for the separate appeal by Homesite, 25-ICA-213.

Instead, the insuring agreement obligates Zurich to pay all sums an "insured" legally must pay as damages. But this requirement does not apply to all types of damages. Zurich is only obligated to pay those sums if the "insured" is legally obligated to pay such damages because of "bodily injury" or "property damage". Further, the insuring agreement does not apply to all types of "bodily injury" or "property damage". In order to trigger the insuring agreement, the insurance must apply to such "bodily injury" or "property damage"; and the "bodily injury" or "property damage" must have been caused by an "accident"; and the "bodily injury" or "property damage" must have resulted from the ownership, maintenance or use of any auto.

Applying the Zurich Auto Policy's insuring agreement to the uncontroverted facts of the instant matter, it is clear that the insuring agreement is triggered. Due to the Confidential Settlement of the Green Lawsuit, J.F. Allen is legally obligated to pay damages to Ms. Green. Those damages are due to "bodily injury", which is defined under the Zurich Auto Policy as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these." The damages Ms. Green sought in the Green Lawsuit, from all of the defendants (including J.F. Allen), were wrongful death damages for the death of Mr. Green. There are no applicable exclusions, so the Zurich Auto Policy applies to the damages in question. The "bodily injury" (i.e., the death of Mr. Green) was caused by an "accident". The "bodily injury" (again, the death of Mr. Green) resulted from Mr. Marple's use of the Nu Creek vehicle, which caused the auto accident in which Mr. Green died. Therefore, the insuring agreement of the Zurich Auto Policy applies to the damages J.F. Allen is obligated to pay to Ms. Green as part of the Confidential Settlement of the Green Lawsuit.

In reality, Zurich's arguments are an attempt to have the Zurich Auto Policy's insuring agreement only apply if the insured's liability results from the insured's ownership, maintenance

or use of an auto. But the clear weight of authority across the United States is contrary to Zurich's position. The majority view is that, when an insuring agreement is triggered by "the ownership, maintenance or use" of any auto, it simply does not matter whether it is the insured, or someone else, who owns, maintains, or uses the auto in question. If anyone's ownership, maintenance or use of an auto causes the "bodily injury" or "property damage" in question, then the insuring agreement applies.

As such, it does not matter that Ms. Green sued J.F. Allen for negligent hiring/retention of Nu Creek and Mr. Marple as contractors, or that J.F. Allen's liability for such a tort did not depend on whether J.F. Allen owned, maintained, or used any autos. The insuring agreement applies because J.F. Allen faced liability to Ms. Green for damages (i.e., wrongful death damages for the death of her husband) for "bodily injury" (i.e., the death of Mr. Green) that resulted from Mr. Marple's use of the Nu Creek vehicle.

Zurich relies heavily on Huggins v. Tri-County Bonding Co., 175 W. Va. 643, 337 S.E. 2d 12 (1985), to support its arguments in this appeal. However, Huggins is irrelevant to the proper application of the Zurich Auto Policy's insuring agreement. Huggins deals with a different type of insurance policy from the Zurich Auto Policy; it interprets a specific exclusion that is phrased very differently from the Zurich Auto Policy's insuring agreement; and the analysis contained in the Huggins case is limited by, and to, the specific exclusion at issue there.

Contrary to Zurich's arguments, Huggins did not adopt a "theory of liability" approach to interpreting insurance policy provisions such as the Zurich Auto Policy's insuring agreement. However, regardless of the argued significance of Huggins in this regard, the Supreme Court of Appeals of West Virginia has clearly now adopted a "cause of damages" approach to interpreting

such insurance policy provisions, per American National Property and Casualty Company v. Clendenen, 238 W. Va. 249, 793 S.E. 2d 899 (2016).

The other two cases cited by Zurich as support for the "theory of liability" approach to interpreting insurance policy provisions are of no help to Zurich. The Montana case cited by Zurich is actually based on an ambiguity finding by that court, which would make coverage under the Zurich Auto Policy more likely, not less. The Kansas case cited by Zurich not only makes it clear that Kansas is in the minority in this regard (with the majority of courts applying a "cause of damages" analysis), but a concurring/dissenting opinion in that case argues that the minority view is insupportable.

Zurich is correct in its argument that the Circuit Court erred when it found the Zurich Auto Policy's insuring agreement to be ambiguous. However, an appellate court may affirm a correct decision based on any grounds supported by the record, regardless of the grounds relied upon by the Circuit Court. In this instance, the Circuit Court was correct in its finding that there is coverage under the Zurich Auto Policy for J.F. Allen as to the Green Lawsuit. Therefore, this Court should affirm the portion of the Circuit Court's April 25, 2025 Order which found such coverage to exist.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

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

ARGUMENT

I. STANDARD OF REVIEW

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

"[A]n appellate court may affirm a correct decision based on any grounds supported by the record, 'regardless of the ground, reason or theory asserted by the lower court as the basis for its judgment.'" PITA, LLC v. Segal, 249 W. Va. 26, 40, 894 S.E. 2d 379, 393 (W. Va. Int. Ct. App. 2023), quoting Humphries v. Detch, 227 W. Va. 627, 635 n. 10, 712 S.E. 2d 795, 803 n. 10 (2011); and Syl. Pt. 2, Adkins v. Gatson, 218 W. Va. 332, 624 S.E. 2d 769 (2005) (per curiam).

II. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT THE ZURICH AUTO POLICY PROVIDES COVERAGE TO J.F. ALLEN AS TO THE GREEN LAWSUIT, BECAUSE THE DEATH OF MR. GREEN, A "BODILY INJURY", WAS CAUSED BY AN ACCIDENT AND RESULTED FROM MR. MARPLE'S USE OF THE NU CREEK VEHICLE

A. THE CIRCUIT COURT'S ORDER DID NOT FAIL TO GIVE EFFECT TO THE 'LEGALLY MUST PAY AS DAMAGES" PORTION OF THE INSURING AGREEMENT; RATHER, IT GAVE EFFECT TO ALL OF THE OPERATIVE LANGUAGE OF THE INSURING AGREEMENT

The insuring agreement of 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 a covered "auto".[9]

Where provisions in an insurance policy are plain and unambiguous and where such provisions are not contrary to a statute, regulation, or public policy, the provisions will be applied and not construed. Syl. Pt. 2, Shamblin v. Nationwide Mut. Ins. Co., 175 W. Va. 337, 332 S.E. 2d 639 (1985), quoting Syl., Farmers' & Merchants' Bank v. Balboa Insurance Co., 171 W.Va. 390,

[9] **AR0370**. It is important to note that, as admitted by Zurich, all autos are covered "autos" under the Zurich Auto Policy. See page 3 of the Petitioner's Brief, as well as **AR0861** and **AR0845**.

299 S.E.2d 1 (1982), in turn quoting syl., Tynes v. Supreme Life Insurance Co., 158 W.Va. 188, 209 S.E.2d 567 (1974). Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended. Syl. pt. 4, Cox v. Amick, 195 W. Va. 608, 466 S.E. 2d 459 (1995), quoting Syllabus, Keffer v. Prudential Ins. Co., 153 W.Va. 813, 172 S.E.2d 714 (1970), syl. pt. 1, Russell v. State Auto. Mut. Ins. Co., 188 W.Va. 81, 422 S.E.2d 803 (1992), syl. pt. 1, Miller v. Lemon, 194 W.Va. 129, 459 S.E.2d 406 (1995).

As will be shown in detail below, the Zurich Auto Policy's insuring agreement is clear, plain, and unambiguous. As such, it does not require judicial construction or interpretation; it simply requires application to the uncontested facts of the instant matter. The Circuit Court did so, and correctly found that insurance coverage exists for J.F. Allen under the Zurich Auto Policy as to the Green Lawsuit.

1. Zurich's arguments

Zurich argues that, by finding that the Zurich Auto Policy's insuring agreement provides liability insurance coverage to J.F. Allen regarding the Green Lawsuit, the Circuit Court's April 25, 2025 Order failed to give effect to the "legally must pay as damages" portion of the insuring agreement (Petitioner's Brief, pages 17-18). Zurich's flawed logic is as follows:

- J.F. Allen could only be liable to Ms. Green in the Green Lawsuit under a negligent hiring/retention theory of recovery, because that is the only theory of liability under which Ms. Green sued J.F. Allen.

- If J.F. Allen was/is liable to Ms. Green under a negligent hiring/retention theory of recovery, such liability does not result from J.F. Allen's ownership, maintenance, or use of any auto; rather, it results from J.F. Allen's alleged failure to conduct reasonable screening of Nu Creek and Mr. Marple as contractors, which does not involve the use of an auto.

- The "legally must pay as damages" portion of the insuring agreement of the Zurich Auto Policy is premised on the theory of liability asserted against the insured, not the cause of the "bodily injury" in question.

- Therefore, the Circuit Court ignored the "legally must pay as damages" portion of the insuring agreement, and erroneously read the insuring agreement as being focused on what caused the "bodily injury" in question.

2. The flaws in Zurich's reasoning

There are two major flaws in Zurich's reasoning.

First, there is literally nothing in the Zurich Auto Policy's insuring agreement that differentiates between sums an "insured" legally must pay as damages due to one specific theory of liability, versus any other specific theory of liability. Zurich argues that the "legally must pay as damages" portion of the insuring agreement is premised on the specific theory of liability that has been asserted against the insured, but there is simply no textual basis for that argument.

In reality, the insuring agreement obligates Zurich to pay all sums an "insured" legally must pay as damages. But then, as addressed below, the insuring agreement more narrowly defines what types of damages trigger the insuring agreement. Nothing in the insuring agreement differentiates between damages an "insured" legally must pay due to a theory of negligent hiring/retention, versus vicarious liability, versus direct negligence, versus strict liability, versus any other specific theory of liability. Zurich is obligated to pay all such damages, regardless of the theory of liability under which the "insured" becomes liable for them. It is the language which more narrowly defines what types of damages will be covered that limits the scope of the insuring agreement.

This draws our attention to the second major flaw in Zurich's reasoning: Zurich's failure to recognize the proper sentence structure of the entire insuring agreement.

The insuring agreement obligates Zurich to pay all sums an "insured" legally must pay as damages. But does this apply to all types of damages? No. According to the insuring agreement, Zurich is only obligated to pay those sums if the "insured" is legally obligated to pay such damages because of "bodily injury" or "property damage".

Does the insuring agreement apply to all types of "bodily injury" or "property damage"? No. In order to trigger the insuring agreement, the insurance must apply to such "bodily injury" or "property damage"; and the "bodily injury" or "property damage" must have been caused by an "accident"; and the "bodily injury" or "property damage" must have resulted from the ownership, maintenance or use of any auto.

Applying the Zurich Auto Policy's insuring agreement to the uncontroverted facts of the instant matter, it is clear that the insuring agreement is triggered. Due to the Confidential Settlement of the Green Lawsuit,[10] J.F. Allen is legally obligated to pay damages to Ms. Green.[11] Those damages are due to "bodily injury", which is defined under the Zurich Auto Policy as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these."[12] The damages Ms. Green sought in the Green Lawsuit, from all of the defendants (including J.F. Allen), were wrongful death damages for the death of Mr. Green.[13] There are no applicable exclusions, so the Zurich Auto Policy applies to the damages in question. The "bodily injury" (i.e., the death of Mr. Green) was caused by an "accident".[14] The "bodily injury" (again,

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[10] **AR1243-1255**.
[11] See specifically **AR1245**.
[12] **AR0378**.
[13] **AR0317**.
[14] "Accident" is not fully defined in the Zurich Auto Policy, but rather is expanded to include "continuous or repeated exposure to the same conditions resulting in "bodily injury" or "property damage." See **AR 0378**. Under West Virginia law, "accident" in this context means an event occurring by chance; an unexpected or unforeseen event. See State Bancorp, Inc. v. U.S. Fidelity and Guar. Ins. Co., 199 W. Va. 99, 105, 483 S.E. 2d 228, 234 (1997). Under West Virginia law, the auto accident in which Mr. Green died is clearly an "accident" as that term is used in the Zurich Auto Policy.

the death of Mr. Green) resulted from Mr. Marple's use of the Nu Creek vehicle, which caused the auto accident in which Mr. Green died. The insuring agreement of the Zurich Auto Policy applies to the damages J.F. Allen is obligated to pay to Ms. Green as part of the Confidential Settlement of the Green Lawsuit.

Zurich's arguments are based on the fundamental flaw of mistaking what the "narrowing" language of the insuring agreement (i.e., because of "bodily injury" or "property damage", to which this insurance applies, caused by an "accident", resulting from the ownership, maintenance or use of a covered "auto") modifies in the sentence. Zurich's arguments are based on the notion that the "narrowing" language modifies the word "sums," as used in the phrase "all sums an 'insured' legally must pay as damages." Under Zurich's flawed logic, J.F. Allen was potentially liable to Ms. Green under a specific theory of liability: negligent hiring/retention of Nu Creek and Mr. Marple as contractors. J.F. Allen's alleged legal obligation to pay damages under that theory of recovery did not depend on J.F. Allen's ownership, maintenance or use of an auto. Therefore, under Zurich's flawed reasoning, the "sums" J.F. Allen was legally obligated to pay as damages did not result from J.F. Allen's ownership, maintenance or use of an auto, and the insuring agreement is not applicable.

But Zurich is mistaken. The "narrowing" language in the insuring agreement does not modify the word "sums." Rather, the phrase "because of 'bodily injury' or 'property damage' to which this insurance applies" modifies the word "damages." In turn, the phrase "caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto'" modifies the words "bodily injury" and "property damage."

These flaws in Zurich's reasoning infect all of its arguments in this appeal. As a result, this Court should affirm the portion of the Circuit Court's April 25, 2025 Order which found there to be coverage for J.F. Allen under the Zurich Auto Policy as to the Green Lawsuit.

3. Zurich's arguments seek the practical effect of changing the phrase "resulting from the ownership, maintenance or use of a covered 'auto'" to only mean "resulting from the insured's ownership, maintenance or use of a covered 'auto'"

Reduced to its essence, Zurich's primary argument is that the insuring agreement should only be triggered if the insured's liability results from the insured's ownership, maintenance or use of an auto. According to Zurich, since J.F. Allen's alleged liability to Ms. Green did not result from J.F. Allen's ownership, maintenance or use of an auto (but rather from J.F. Allen's alleged negligent hiring/retention of Nu Creek and Mr. Marple as contractors), the insuring agreement should not apply.

The Circuit Court did not agree with this proposition[15], and on this issue, the Circuit Court was correct. The plain language of the Zurich Auto Policy's insuring agreement 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 a covered "auto".[16]

The insuring agreement does not say "resulting from the insured's ownership, maintenance or use of a covered 'auto'." It says "resulting from the ownership, maintenance or use of a covered 'auto'."

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[15] **AR0012**.

[16] **AR0370**. As stated above, and as admitted by Zurich, all autos are covered "autos" under the Zurich Auto Policy. See page 3 of the Petitioner's Brief, as well as **AR0861** and **AR0845**.

The appellate courts in West Virginia have not directly addressed the flawed logic employed by Zurich, as shown above. However, there is nonetheless ample guidance for the proper application of the Zurich Auto Policy's insuring agreement.

The Supreme Court of Appeals of West Virginia frequently cites Allan D. Windt's treatise on insurance law, Insurance Claims and Disputes: Representation of Insurance Companies & Insureds (6th Ed. 2023), as persuasive authority regarding esoteric insurance coverage issues. Mr. Windt addresses Zurich's main argument in § 11:36 of his treatise, at footnote 1:[17]

> Sometimes the policy provides that the insured is entitled to coverage for injury "resulting from the use of a covered auto." In that event, it is irrelevant whether the insured was driving the covered auto. It is enough that the insured is being sued because of an injury that resulted from someone's use of a covered auto.
>
> Insurance Claims and Disputes, § 11:36, footnote 1 (citations omitted).

This is the majority view across the country. The minority view will be discussed below, within the context of responding to Zurich's argument that West Virginia has adopted a "theory of liability" approach, as opposed to a "cause of damages" approach, to interpreting similar insurance policy provisions (Petitioner's Brief, pages 23-28). Here, Homesite will discuss several representative cases which hold to the majority view.

In Brown v. Champeau, 537 So. 2d 1120 (Dist. Ct. App. Fla. 1989), pursuant to Florida law, a mother (Ms. Boudreau) was legally liable for auto torts committed by her minor son because she had signed an application for his driver's license. Her son caused an auto accident, and Ms. Boudreau was sued by the claimants under a theory of vicarious liability. She sought liability insurance coverage under an auto policy issued to her husband by General Accident Fire and Life Insurance Corporation ("General Accident"). The question of insurance coverage turned on the language of the insuring agreement (quoted in relevant part):

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[17] **AR0595-0596.**

> We will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident . . .
>
> 'Covered person' as used in this Part means:
>
> 1. You or any family member for the ownership, maintenance or use of any auto or trailer.

Id. at 1121-1122.

The court found coverage to exist under the policy for Ms. Boudreau, even though she was not the driver. The Court explained:

> The policy does not condition coverage on the use of a particular car or the involvement of a particular driver. Paragraph 1 does not limit coverage to a family member for *that person's* use of any auto, but refers merely to *the* use of any auto.

Id. at 1122.

In Pacific Employers Ins. Co. v. Domino's Pizza, Inc., 144 F. 3d 1270 (9th Cir. 1998), a Domino's employee fell asleep at the wheel of his personal auto, on personal time (not work time) after working unusually long hours, and caused an auto accident. The claimants alleged that Domino's was liable for the accident, due to making the employee work such long hours. Id. at 1272. Insurance coverage issues arose regarding the funding of a settlement of the bodily injury claims. As in the instant matter, Zurich had issued a business auto policy to Domino's, and the insuring agreement provided coverage for damages resulting from the ownership, maintenance or use of a covered auto. Id. at 1274. The policy did not explicitly limit coverage to the insured's ownership, maintenance or use of the auto. Id. The Zurich policy also defined covered auto to include any auto, as in the instant matter. Id. Due to the impact of a self-insured retention under the Zurich policy, Domino's argued that coverage existed under its commercial general liability policy, but not its auto policy with Zurich. Id. Its argument in this regard was based on the notion that the vehicle in question was not being operated by Domino's at the time of the accident. Id.

The United States Court of Appeals for the Ninth Circuit found that coverage existed for Domino's under its Zurich auto policy. The use of the vehicle by the Domino's employee satisfied the plain terms of the policy. Id. The Ninth Circuit reasoned:

> The injuries resulting from the accident unquestionably bear a causal relationship to use of the vehicle: the accident was caused by Duran's falling asleep at the wheel of the vehicle while driving it on the highway.
>
> Id.

In Allstate Ins. Co. v. Andrews Florist on 4th Street, Inc., 8:08-cv-2253, 2011 WL 672349 (M.D. Fla., Feb. 17, 2011), an independent contractor (Mr. Cecchini) was driving his own vehicle and delivering flowers for Andrews Florist when he negligently caused an accident, causing bodily injury to a couple (the Levesques). Id. at *1. The Levesques sued Andrews Florist. Allstate had issued a commercial auto policy to Andrews Florist. The insuring agreement of the Allstate policy stated that Allstate will:

> [P]ay all sums an "insured" legally must pay as damages . . . caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".
>
> Id. at *2.

Allstate argued that coverage for Andrews Florist did not exist under its policy, because the policy should be interpreted to only apply to the insured's ownership, maintenance or use of an auto. The court disagreed, and found that the policy provides coverage regardless of whether the insured owns, maintains, or uses the auto in question. Id. at *2. Central to the court's decision was the fact that some auto insurance policies explicitly limit coverage to the insured's use of the vehicle, but this policy did not. Id. at *2.

In Navigators Specialty Ins. Co. v. Nationwide Mut. Ins. Co., 50 F. Supp. 3d 1186 (D. Az. 2014), Titan Framing Company held a company picnic where alcohol was prohibited. An

employee nonetheless became intoxicated at the picnic and later caused a fatal auto accident. Titan was sued for negligence in connection with the accident. Id. at 1189-1190. Navigators had issued a general liability insurance policy to Titan, and Nationwide had issued a business auto policy to Titan. Id. at 1189. Navigators settled the lawsuit against Titan, and sought contribution from Nationwide. Id. at 1190.

The insuring agreement of the Nationwide auto policy said that Nationwide would pay all sums an insured must pay as damages because of bodily injury caused by an accident and resulting from the ownership, maintenance, or use of a covered auto. Id. at 1191. The Nationwide policy further defined covered auto to mean any auto. Id. at 1192.

Nationwide argued that Titan's potential liability had nothing to do with Titan's ownership, maintenance or use of an auto. Id. at 1191-1194. The court disagreed, and found that the policy, as written, did not require any sort of causal connection between Titan's use of an auto and the accident in question. Id. at 1192. The court noted that, if Nationwide had wanted to limit the insuring agreement to only provide coverage in the event of the insured's use of the auto in question, it should have used language to that effect. Id. at 1193.

The insuring agreements in all of the above-cited cases are either identical or similar to the Zurich Auto Policy's insuring agreement. In all of the above-cited cases, the insured faced liability under a theory of recovery that did not depend on the insured to have used (or owned, or maintained) the vehicle involved in the accident in question. And in all of the above-cited cases, the court in question held that the insuring agreement nonetheless applied, providing liability insurance coverage to the insured for the accident in question. As recognized by the Windt treatise cited above,[18] this is the majority view. This Court should follow the persuasive authority cited

[18] Supra, Insurance Claims and Disputes, § 11:36, footnote 1, **AR0595-0596**.

above, adopt the majority view, and affirm the specific portion of the Circuit Court's April 25, 2025 Order which found that insurance coverage exists for J.F. Allen under the Zurich Auto Policy for the Green Lawsuit.

B. THE ZURICH AUTO POLICY'S INSURING AGREEMENT APPLIES TO THE GREEN LAWSUIT BECAUSE, REGARDLESS OF THE "NEGLIGENT RETENTION OR HIRING" THEORY OF LIABILITY PURSUED BY MS. GREEN AGAINST J.F. ALLEN, THE DEATH OF MR. GREEN, A "BODILY INJURY", WAS CAUSED BY AN ACCIDENT AND RESULTED FROM MR. MARPLE'S USE OF THE NU CREEK VEHICLE, THEREBY TRIGGERING THE INSURING AGREEMENT

On pages 19-23 of the Petitioner's Brief, Zurich argues that a cause of action for negligent retention or hiring of an independent contractor is an independent claim for negligence, and does not result from the insured's use of an auto. According to Zurich, since Ms. Green only sued J.F. Allen for negligent hiring/retention of Nu Creek and Mr. Marple as contractors, and J.F. Allen's alleged negligence in this regard did not depend on J.F. Allen's use of any auto, the Zurich Auto Policy's insuring agreement does not apply to the Green Lawsuit.

As shown above, this argument has no merit. It is entirely based on the notion that the applicability of the Zurich Auto Policy's insuring agreement depends on the specific theory of liability that Ms. Green pursued when suing J.F. Allen. But this is simply not true.

The Zurich Auto Policy's insuring agreement 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 a covered "auto".[19]

There is literally nothing in the Zurich Auto Policy's insuring agreement that differentiates between sums an "insured" legally must pay as damages due to one specific theory of liability,

[19] **AR0370**. As stated above, and as admitted by Zurich, all autos are covered "autos" under the Zurich Auto Policy. See page 3 of the Petitioner's Brief, as well as **AR0861** and **AR0845**.

versus any other specific theory of liability. When Zurich argues that the "legally must pay as damages" portion of the insuring agreement is premised on the specific theory of liability that has been asserted against the insured, there is no textual basis for that argument.

The insuring agreement obligates Zurich to pay all sums an "insured" legally must pay as damages. But this does not apply to all types of damages. Zurich is only obligated to pay those sums if the "insured" is legally obligated to pay such damages because of "bodily injury" or "property damage". Moreover, Zurich is only obligated to pay those sums if the insurance applies to such "bodily injury" or "property damage"; if the "bodily injury" or "property damage" was caused by an "accident"; and if the "bodily injury" or "property damage" resulted from the ownership, maintenance or use of any auto.

Applying the Zurich Auto Policy's insuring agreement to the uncontroverted facts of the instant matter, it is clear that the insuring agreement is triggered. Due to the Confidential Settlement of the Green Lawsuit,[20] J.F. Allen is legally obligated to pay damages to Ms. Green.[21] Those damages are due to "bodily injury", which is defined under the Zurich Auto Policy as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these."[22] The damages Ms. Green sought in the Green Lawsuit, from all of the defendants (including J.F. Allen), were wrongful death damages for the death of Mr. Green.[23] There are no applicable exclusions, so the Zurich Auto Policy applies to the damages in question. The "bodily injury" (i.e., the death of Mr. Green) was caused by an "accident".[24] The "bodily injury" (again,

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[20] **AR1243-1255**.
[21] See specifically **AR1245**.
[22] **AR0378**.
[23] **AR0317**.
[24] As stated above, "accident" is not fully defined in the Zurich Auto Policy, but rather is expanded to include "continuous or repeated exposure to the same conditions resulting in "bodily injury" or "property damage." See **AR 0378**. Under West Virginia law, "accident" in this context means an event occurring by chance; an unexpected or unforeseen event. See State Bancorp, Inc. v. U.S. Fidelity and Guar. Ins. Co., supra.

the death of Mr. Green) resulted from Mr. Marple's use of the Nu Creek vehicle, which caused the auto accident in which Mr. Green died. Therefore, the insuring agreement of the Zurich Auto Policy applies to the damages J.F. Allen is obligated to pay to Ms. Green as part of the Confidential Settlement of the Green Lawsuit.

Essentially, Zurich's arguments regarding the nature of a negligent hiring/retention cause of action lead to no useful conclusions. It simply does not matter what type of cause of action Ms. Green pursued against J.F. Allen in the Green Lawsuit. Regardless of the specific theory of recovery pled against J.F. Allen in the Green Lawsuit, Ms. Green sought wrongful death damages from J.F. Allen for the death of her husband, which was the result of an automobile accident caused by Mr. Marple's use of the Nu Creek vehicle. These uncontroverted facts trigger the Zurich Auto Policy's insuring agreement.

C. THE CIRCUIT COURT'S ORDER IS NOT CONTRARY TO WEST VIRGINIA LAW, BECAUSE WEST VIRGINIA LAW FOLLOWS THE "CAUSE OF DAMAGES" APPROACH TO INTERPRETING SIMILAR INSURANCE POLICY PROVISIONS, NOT THE "THEORY OF LIABILITY" APPROACH

1. Huggins analyzes a very different insurance policy provision from the Zurich Auto Policy's insuring agreement, and is therefore not applicable here

Zurich relies heavily on Huggins v. Tri-County Bonding Co., 175 W. Va. 643, 337 S.E. 2d 12 (1985), to support its arguments in this appeal. However, as will be shown below, Huggins is irrelevant to the proper application of the Zurich Auto Policy's insuring agreement.[25]

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

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[25] Indeed, Huggins' sole relevance to either this appeal, or the Homesite appeal (25-ICA-213), is its implied recognition of the breadth of the phrase "arising out of," which was notably missing from the insurance policy exclusion at issue in Huggins. Id., 175 W. Va. at 649, 337 S.E. 2d at 17.

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

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

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

The Supreme Court agreed with Mr. Myers, and found (among other considerations) that the lack of the broad phrase "arises out of" limits the application of the exclusion contained in the Nationwide policy. Id., 175 W. Va. at 649, 337 S.E. 2d at 17. The Supreme Court cited Cooter v. State Farm Fire & Cas. Co., 344 So. 2d 496 (Ala. 1977) as a typical example of how the addition of the "arises out of" language expands the scope of the exclusion to include claims for negligent entrustment. Id., footnote 9. As quoted by the Supreme Court in Huggins, the court in Cooter stated: "The clear and unambiguous language here applicable is susceptible of but one meaning; that this homeowner's policy excludes personal liability coverage for bodily injury arising out of

the ownership and use of an automobile owned or operated by the insured." Cooter, 344 So. 2d at 499, as quoted in Huggins, footnote 9.

The insurance policy at issue in Huggins was a homeowner's policy; the Zurich insurance policy at issue here is a business auto policy. The policy provision at issue in Huggins was an exclusion; the policy provision at issue here is the Zurich Auto Policy's insuring agreement. The two policy provisions differ significantly in their wording. As such, Huggins provides no guidance for the proper application of the Zurich Auto Policy's insuring agreement.

Zurich attempts to paint Huggins as standing for the proposition that insurance coverage for a negligent entrustment cause of action against an insured does not depend on whether the injuries in question were caused by an auto accident. However, a closer look at Huggins shows that the analysis in Huggins was limited by, and to, the nature and specific wording of the insurance policy at issue in that case.

Following the Supreme Court's analysis in Huggins of the "arising out of" issue described above, the Court went on to explain why the specific policy exclusion at issue in Huggins did not exclude coverage for the negligent entrustment action at issue:

> The critical element of a negligent entrustment cause of action is the initial improper loaning of the vehicle . . . 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 . . . When the policy is viewed in these terms, **we believe an ambiguity exists** with regard to coverage for the negligent entrustment of a nonowned motor vehicle. The liability coverage which is cast in terms of "personal acts" is broad enough to cover negligent entrustment. The automobile exclusion does not by its plain terms exclude coverage on a nonowned vehicle.

Id., 175 W. Va. at 649, 337 S.E. 2d at 17-18 (emphasis added).

As shown, the Supreme Court's analysis in Huggins resulted in an ambiguity finding, due to the nature of the initial broad grant of coverage under the policy (which was for "loss from

damages for negligent personal acts," Id., 175 W. Va. at 646, 337 S.E. 2d at 15), the narrow scope of the exclusion in question (which lacked the broad "arising out of" language addressed by much of the case law, Id., 175 W. Va. at 647, 337 S.E. 2d at 15-16), and the exclusion's lack of specificity regarding coverage for nonowned vehicles (Id., 175 W. Va. at 649, 337 S.E. 2d at 17-18). As noted by the Supreme Court in Huggins, ambiguity in an insurance policy requires that it be construed liberally in favor of the insured. Id., 175 W. Va. at 649, 337 S.E. 2d at 18. Therefore, the Supreme Court found the exclusion at issue in Huggins to not be enforceable against the insured.

Contrary to Zurich's arguments, Huggins does not stand for the proposition that insurance coverage for a negligent entrustment cause of action against an insured does not depend on whether the injuries in question were caused by an auto accident. The portion of Huggins relied upon by Zurich is much more modest in its scope and application. It applies to the specific insurance policy provision at issue in that case. Beyond that, the portion of Huggins relied upon by Zurich in this regard holds no precedential value.

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

Zurich argues that Huggins should be read as generally adopting a "theory of liability" manner of viewing insurance policy provisions similar to those at issue in Huggins. A "theory of liability" manner of viewing such insurance policy provisions focuses on the type of claim being made by the claimant against the insured in order to discern whether a policy provision applies. This is to be contrasted with a "cause of damages" manner of viewing such insurance policy provisions, which focuses on the cause of the damages being sought by the claimant, rather than the specific cause of action being pursued by the claimant. In the Huggins case specifically, the "theory of liability" being pursued by the claimant against the insured was for negligent

entrustment of a vehicle to the at-fault driver, rather than negligent operation of the vehicle in question.

However, contrary to the arguments of Zurich, the Supreme Court in Huggins did not directly adopt a "theory of liability" manner of viewing such insurance policy provisions; rather, it sidestepped the issue by claiming the "cause of damages" cases cited by the insurance company on this issue were not applicable, due to differences in how the specific insurance policy at issue in Huggins was written.

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

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

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

Even if one can read Huggins as adopting a "theory of liability" approach to interpreting insurance policy provisions, that is not the current state of the law in West Virginia. The Supreme Court has now clearly adopted a "cause of damages" view of such insurance policy provisions,

according to American National Property and Casualty Company v. Clendenen, 238 W. Va. 249, 793 S.E. 2d 899 (2016).

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

The homeowner's insurance policies insuring the two mothers each contained both intentional acts and criminal acts exclusions. In one of the policies, a criminal acts exclusion stated that the liability insurance coverage did not apply to bodily injury "[a]rising out of any criminal act committed by or at the direction of **any insured**[.]" The other policy's criminal acts exclusion stated that the policy did not cover "**[p]ersonal injury** arising out of willful violation of a law or ordinance by **anyone we protect**[.]" Id., 238 W. Va. at 253, 793 S.E. 2d at 903.

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

The Supreme Court rejected this argument, and found the exclusions to be clear and enforceable against the two mothers. In its opinion, the Supreme Court relied heavily on a decision from the Court of Appeals of Louisiana: Perkins v. Shaheen, 867 So. 2d 135 (La. App. 3rd Cir.

2004). The Supreme Court included the following quote from Perkins in American National to explain the reasoning behind such an interpretation of the above exclusions:

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

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

> Here, the Neeses seek the same wrongful death damages against both Sheila and Rachel and their mothers. The focus of the intentional/criminal acts exclusions is on the cause of the damages, not the negligent supervision and negligent entrustment causes of actions alleged against Tara Clendenen and Patricia Shoaf. *Perkins*, 867 So. 2d at 139. As all such bodily injury claims arise from the intentional and criminal conduct of Sheila Eddy and Rachel Shoaf, insureds under the policy, the exclusions preclude coverage for all of the claims.
>
> American National, 238 W. Va. at 261, 793 S.E. 2d at 911.

Relevant to the question of whether this Court should employ a "theory of liability" interpretation of the Zurich Auto Policy's insuring agreement, or a "cause of damages" interpretation of the insuring agreement, there is no logical difference between the operative portions of the criminal acts exclusions at issue in American National and the operative portions of the Zurich Auto Policy's insuring agreement. In American National, the criminal acts exclusions excluded coverage for bodily injury "[a]rising out of any criminal act committed by or at the direction of **any insured**" and **personal injury** "arising out of willful violation of a law or ordinance by **anyone we protect**[.]" Id., 238 W. Va. at 253, 793 S.E. 2d at 903. The Zurich Auto Policy provides coverage for "sums an 'insured' legally must pay as damages because of 'bodily

injury' . . . caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto'."[26]

In American National, the Supreme Court interpreted the "arising out of" language as addressing the cause of the damages at issue. The cause of the damages in that case was the murder of a child by another insured. It did not matter that the insureds in question were accused of mere negligence. The exclusion still applied. In like manner, this Court should interpret the "resulting from" language contained in the Zurich Auto Policy's insuring agreement as addressing the cause of the damages at issue. The damages Ms. Green sought (and obtained, via a Confidential Settlement) from J.F. Allen were for the wrongful death of her husband in the April 20, 2022 motor vehicle accident. The cause of that death was Mr. Marple's use of the Nu Creek vehicle in the accident. Therefore, the damages that Ms. Green sought and obtained from J.F. Allen resulted from Mr. Marple's use of the Nu Creek vehicle. The theory of liability Ms. Green chose to pursue against J.F. Allen does not matter for the application of the Zurich Auto Policy's insuring agreement. What matters instead is the cause of the damages Ms. Green sought, and obtained, from J.F. Allen.

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

4. The cases cited by Zurich for application of a "theory of liability" approach to interpreting similar insurance policy provisions in West Virginia are clearly in the minority, for good reason

Zurich cites Marquis v. State Farm Fire and Cas. Co., 265 Kan. 317, 961 P. 2d 1213 (Kan. 1998), and Pablo v. Moore, 2000 MT 48, 298 Mont. 393, 995 P. 2d 460 (Mont. 2000), as support

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[26] **AR0370.**

for the proposition that other states have adopted a "theory of liability" approach to interpreting insurance policy provisions such as the Zurich Auto Policy's insuring agreement. These cases provide flimsy support for Zurich's arguments.

In Pablo, the issue was whether a policy exclusion that was triggered by the phrase "arising out of" was enforceable. The Supreme Court of Montana found the phrase "arising out of" to be ambiguous, and therefore interpreted the exclusion in the manner most favorable to the insured, which resulted in coverage for the insured. Id., 298 Mont. At 400, 995 P. 2d at 464.

Zurich should take no comfort from the Pablo decision. The parallel to "arising out of" contained in the Zurich Auto Policy's insuring agreement is the phrase "resulting from":

> 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".[27] (emphasis added).

If "resulting from" were deemed to be ambiguous (per the Pablo decision), it would be interpreted in favor of J.F. Allen, thereby establishing coverage for J.F. Allen under the Zurich Auto Policy's insuring agreement. Pablo is no help to Zurich here.

Marquis does make it clear that, in Kansas, courts are to apply a "theory of liability" approach to interpreting insurance policy provisions, rather than a "cause of damages" approach. Syl. Pt. 6, Marquis, supra. However, the opinion in Marquis (written by Justice Davis) makes it clear that Kansas is in the minority in taking this approach. Id., 265 Kan. at 329, 961 P. 2d at 1222. Even more relevant for this Court, however, is the concurring and dissenting opinion written by Justice Larson. Justice Larson makes it clear that this "theory of liability" approach started in Kansas with Upland Mutual Insurance, Inc. v. Noel, 214 Kan. 145, 519 P. 2d 737 (Kan. 1974).

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[27] **AR0370**. As stated above, and as admitted by Zurich, all autos are covered "autos" under the Zurich Auto Policy. See page 3 of the Petitioner's Brief, as well as **AR0861** and **AR0845**.

Justice Larson continues with an assessment of how out of touch the Upland case had become by the time of Marquis (1998, 27 years ago):

> When this court decided *Upland* 24 years ago, there was support around the United States for the result we reached. . . . While *Upland* may be the Kansas rule, there is considerable question that it should continue to be followed. . . . [S]ince our decision in *Upland*, the overwhelming majority of other jurisdictions have held that the negligent entrustment of an automobile which results in an accident falls under an insurance policy exclusion for accidents arising out of the use of an automobile. . . . Similarly, the majority of those courts which have addressed the question of whether a claim of negligent hiring, retention, and supervision fits within the policy exclusions where the accident complained of is an automobile accident, as is the fact situation in the case at hand, have found that the policy exclusion applies. . . . Kansas appears to be completely out of step with all the holdings around the United States with regard to our interpretation of these provisions. The overwhelming majority of states, in determining coverage, look to the underlying cause of the injury rather than the specific theory of liability alleged. The majority viewpoint presents a compelling argument. . . . The *Upland* test and theory has not survived the logic and judgment of other states. It is an unsupportable minority. It needs to be abandoned.
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> Marquis, 265 Kan. at 336-340, 961 P. 2d at 1225-1227.

As addressed above, the "theory of liability" approach to interpreting insurance policy provisions such as the Zurich Auto Policy's insuring agreement makes no sense, because it distorts the actual language of the insurance policy. The insuring agreement 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 a covered "auto".[28]

There is nothing in the Zurich Auto Policy's insuring agreement that differentiates between "sums an 'insured' legally must pay as damages" due to a negligent entrustment theory of liability, versus a direct negligence theory of liability, versus a strict liability theory of liability, versus a vicarious responsibility theory of liability, versus any other theory of liability. The actual words

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[28] **AR0370**. As stated above, and as admitted by Zurich, all autos are covered "autos" under the Zurich Auto Policy. See page 3 of the Petitioner's Brief, as well as **AR0861** and **AR0845**.

of the insuring agreement make no such distinctions. However, the insuring agreement does clearly and explicitly limit such damages to those that are "because of 'bodily injury' or 'property damage'." And the insuring agreement further limits such damages to those where the "bodily injury" or "property damage" in question was caused by an "accident", and resulted from the ownership, maintenance or use of a covered "auto".

In reality, the "cause of damages" approach to interpreting insurance policy provisions such as the Zurich Auto Policy's insuring agreement does nothing more than simply apply the plain and unambiguous policy language. This Court should do just that: simply apply the plain and unambiguous express terms of the Zurich Auto Policy's insuring agreement to the uncontroverted facts of the instant matter. Such an analysis will result in a finding by this Court that there is liability insurance coverage for J.F. Allen under the Zurich Auto Policy for the Green Lawsuit. The Circuit Court's decision in this regard should be affirmed.

D. WHILE THE CIRCUIT COURT DID ERR IN FINDING THE ZURICH AUTO POLICY TO BE AMBIGUOUS, THIS COURT SHOULD NONETHELESS AFFIRM THE CIRCUIT COURT'S ORDER, DUE TO THE ABOVE STATED GROUNDS, AS SUPPORTED BY THE RECORD

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

> At minimum, Homesite's arguments in its memorandum of law highlight ambiguities in the applicable provisions of these insurance policies. Notably, Homesite asserts that if it is correct in its interpretation, then the Zurich policy should and does provide coverage. Conversely, Homesite recognizes if it is wrong, then the automobile exclusion would not bar coverage for J.F. Allen.
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> *****
>
> Accordingly, the Court finds that regardless of its ruling on the applicable policy provisions, the insurance policies are ambiguous given these competing interpretations asserted by the parties. As such, the Court finds that both policies must be interpreted in favor of the insured on coverage.[29]

[29] **AR0013**.

Two paragraphs earlier, the Circuit Court noted J.F. Allen's argument that, because Homesite and Zurich both present reasonable arguments regarding the insurance coverage issues in this matter, the Circuit Court should find both policies to be ambiguous, interpret both policies against each respective insurer, and find coverage exists for J.F. Allen under both policies as to the Green Lawsuit.[30]

Homesite agrees with Zurich that this particular finding by the Circuit Court was clear error. Under West Virginia law, "[t]he term 'ambiguity' is defined as language 'reasonably susceptible of two different meanings' or language 'of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning[.]'" Syl. pt. 1, in part, Shamblin v. Nationwide Mut. Ins. Co., 175 W. Va. 337, 332 S.E. 2d 639 (1985). However, "[t]he mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court." Syl. pt. 1, Berkeley Cty. Pub. Serv. Dist. v. Vitro Corp. of Am., 152 W. Va. 252, 162 S.E. 2d 189 (1968).

Nevertheless, this Court should affirm the Circuit Court's finding that the Zurich Auto Policy provides liability insurance coverage to J.F. Allen regarding the Green Lawsuit. "[A]n appellate court may affirm a correct decision based on any grounds supported by the record, 'regardless of the ground, reason or theory asserted by the lower court as the basis for its judgment.'" PITA, LLC v. Segal, supra, 249 W. Va. at 40, 894 S.E. 2d at 393, quoting Humphries v. Detch, supra, 227 W. Va. at 635 n. 10, 712 S.E. 2d at 803 n. 10; and Syl. Pt. 2, Adkins v. Gatson, supra.

[30] **AR0013**.

As shown above, the Circuit Court correctly found that liability insurance coverage exists for J.F. Allen under the Zurich Auto Policy as to the Green Lawsuit. Therefore, despite the Circuit Court's error in finding the Zurich Auto Policy to be ambiguous, this Court should affirm the portion of the Circuit Court's April 25, 2025 Order which found such coverage to exist.

CONCLUSION

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

Respectfully submitted,

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INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NO. 25-ICA-216

ZURICH AMERICAN INSURANCE COMPANY,
Defendant Below, Petitioner

v.

HOMESITE INSURANCE COMPANY OF FLORIDA,
Plaintiff Below, Respondent

And

J.F. ALLEN COMPANY, INC.
Defendant Below, Respondent

CERTIFICATE OF SERVICE

I, Don C.A. Parker, hereby certify that on this 22nd day of August, 2025, I electronically filed the foregoing **"RESPONDENT'S BRIEF"** with the Clerk of Court using the West Virginia E-Filing system, which will serve a copy of the same upon the following counsel of record:

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