NO. 25-ICA-216

IN THE
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

ZURICH AMERICAN INSURANCE COMPANY,

Petitioners,
v.

HOMESITE INSURANCE COMPANY OF FLORIDA,
and J.F. ALLEN COMPANY, INC.,

Respondents,

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

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

Rebecca D. Pomeroy, Esq. (WVSB #8800)
Christopher D. Smith, Esq. (WVSB #13050)
Bailey & Glasser, LLP
209 Capital Street
Charleston, WV 25301
Tel: 304.345.6555
Fax: 304.342.1110
bpomeroy@baileyglasser.com
csmith@baileyglasser.com

Counsel for Respondent J.F. Allen Company, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

ASSIGNMENTS OF ERROR

A. The Circuit Court correctly held that the Zurich Auto Policy provides coverage to J.F. Allen Company, Inc. ("J.F. Allen") for the wrongful death claims asserted in the Underlying Action because the insuring clause of the policy, read as a whole, provides coverage on a claim for negligent hiring/retention when it alleges bodily injury involving an auto accident.

   1. The trial court correctly determined that the Zurich Auto Policy provided insurance coverage for the Underlying Action.

   2. *Huggins v. Tri-Cnty. Bonding* did not alter or amend West Virginia law.

   3. At minimum, the Zurich's Auto Policy is ambiguous.

INTRODUCTION

The trial court correctly held that the Zurich Auto Policy provides coverage for J.F. Allen on the wrongful death claim asserted by Debra Green in the civil action she brought for the wrongful death of her husband following an automobile accident involving Richard Marple. (hereinafter the "Underlying Action"). In seeking to reverse the Circuit Court's well-reasoned decision, Zurich asks this Court to isolate a discreet section of the insuring clause by focusing on the type of claim asserted against J.F. Allen instead of viewing the insuring clause as a whole. However, when the insuring clause in the Zurich Auto Policy is read as a whole, which the law requires it to be, the result necessitates insurance coverage for J.F. Allen on the Underlying Action.

Zurich asserts that the Circuit Court failed to give meaning to the "legally must pay as damages" portion of the insuring clause. As Zurich tells it, that portion of the insuring agreement excludes claims for negligent hiring/retention of an independent contractor. Zurich's approach is wrong. Specifically, it overlooks that the insuring clause ties the legally must pay as damages clause to bodily injury caused by an accident involving a covered auto. The Circuit Court correctly declined to follow Zurich's invitation to cherry pick favorable language in its policy to limit an otherwise broad grant of insurance coverage. By correctly reading the insuring clause as a whole,

the Circuit Court's decision gives the proper meaning to the intent of the insuring clause in the policy.

Not only did the Circuit Court correctly apply the plain language of the policy, it correctly applied the Zurich Auto Policy even assuming that policy is ambiguous. Accordingly, the decision of the Circuit Court should be affirmed.

STATEMENT OF THE CASE

1. The Underlying Action

This coverage dispute arose from a wrongful death claim brought by Debra Green, on behalf of the Estate of Larry R. Green who was killed in an automobile accident involving a truck driven by Richard Marple styled Debra Green v. Nu Creek, LLC, et al., Civil Action No. 22-C-199-3 ("Underlying Action"). *AR0307-0328*. The claim against the named defendants, including J.F. Allen, sought damages for the wrongful death of Mr. Green. *AR0307-0328*. The Green Lawsuit alleged negligent hiring and/or negligence claims against J.F. Allen based on J.F. Allen's alleged use of Defendant, Nu Creek as an independent contractor despite its knowledge of Nu Creek and its driver, Defendant's Marple's driving record which created an alleged chameleon carrier relationship. *AR0323-0326*.

2. The Coverage Claim

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

J.F. Allen purchased two different policies with two different types of insurance policy provisions. *AR0008*. The Circuit Court correctly found both provide coverage. *AR0001-0014*.

With respect to the Zurich Auto Policy[1], the pertinent policy provision at issue is the insuring clause which provides:

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

AR0862. Per the declarations page, the policy does not limit coverage to autos owned or operated by J.F. Allen. Instead, the policy provides coverage for "any auto." *AR0861*. Bodily injury is defined in the Zurich Auto Policy as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these." *AR0870*.

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

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

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

> a. an arbitration proceeding in which such loss is claimed and to which the Insured must submit, or does submit with our consent; or
> b. any other alternative dispute resolution proceeding in which such loss is claimed and to which the Insured submits with our consent or the underlying insurer's consent.

[1] Zurich makes several self-serving declarations in multiple footnotes as to its perceived appropriate adjustment and handling of this claim in its opening brief. Those declarations are not pertinent to this appeal, and therefore, do not require J.F. Allen to formally respond to them other than to deny that Zurich's adjustment and claims handling were at all times was proper and preserve its claims against Zurich which are still pending before the Circuit Court.

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

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

3. Procedural History

Homesite filed the underlying declaratory judgment action on February 13, 2024. *AR0015-28*. Per a briefing order entered in the case, the parties filed cross-motions for summary judgment, with their respective responses and replies. Each of the insurance companies argued at length as to why their respective policies did not afford coverage to J.F. Allen and pointed to the coverage they each believed the other should provide. The Circuit Court heard argument on the motions for summary judgment on March 25, 2025. *AR1153-1233*.

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

SUMMARY OF ARGUMENT

The insuring clause, when read as a whole, provides coverage to J.F. Allen for the wrongful death claims asserted in the Underlying Action. Even though the claims against J.F. Allen asserted that J.F. Allen was negligent in retaining Nu Creek, LLC, the bodily injury for which those claims were asserted stemmed from an auto accident. While Zurich would like to focus on the "legally must pay as damages" section of its policy and a string of cases analyzing exclusions as opposed to insuring clauses, the insuring clause in this policy is not limited in the manner Zurich promotes. Notably, Zurich leaves out the term "bodily injury" in most instances where it references the insuring clause. Pet'r's Br., pp. 3, 12, 16, 17, and 25. In many instances, Zurich removes the "bodily injury" language in cited quotes and instead uses ellipses. That omission is no accident. When read as a whole, the policy plainly provides coverage to J.F. Allen. This Court should uphold the Circuit Court's decision correctly reading insurance policy as a whole and affording J.F. Allen coverage.

STATEMENT REGARDING ORAL ARGUMENT

J.F. Allen does not believe oral argument is necessary as this appeal involves a straightforward contractual interpretation issue. To the extent oral argument is deemed necessary, argument should be limited to Rule 19 of the Rules of Appellate Procedure as the matter involves assignments of error on the application of settled law and involves a narrow issue of law.

STANDARD OF REVIEW

The standard of review on a declaratory judgment claim is the same as that on summary judgment – *de novo*. *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995). "Because the purpose of a declaratory judgment action is to resolve legal questions, a circuit court's ultimate resolution in a declaratory judgment action is reviewed *de novo*." *Id.* at 612. Likewise, "[t]he interpretation

of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination which, like the court's summary judgment, is reviewed *de novo* on appeal." *Payne v. Weston*, 195 W.Va. 502, 506-07, 466 S.E.2d 161, 165-66 (1995).

ARGUMENT

1. The trial court correctly determined that the Zurich Auto Policy provided insurance coverage for the Underlying Action.

In its appeal, Zurich overlooks the "bodily injury" language in its insuring provision. Instead, Zurich places heightened significance on the "legally must pay as damages" language. Zurich's reading is strained, and its cabined reading narrows an otherwise broad insuring clause. That reading is contrary to West Virginia law which requires courts to "apply, and not interpret, the plain and ordinary meaning of an insurance contract." *Payne*, 195 W.Va. at 507. The West Virginia Supreme Court of Appeals has made clear that the "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." *Id*. When viewed in that light, Zurich's arguments must fail.

The Zurich Auto Policy's insuring clause is triggered when the damages the insured is legally required to pay for bodily injury results from the use of an auto. It is undisputed in this case that the auto policy provided broad coverage for the use of "any auto." *AR0861*. Consequently, the parties all agree the auto being driven by Marple in the Underlying Action is a covered auto for purposes of this case. Further, the bodily injury alleged to have been incurred was the result of the auto accident.

Zurich nonetheless contends the nature of the claim asserted by J.F. Allen should preclude coverage, arguing that the negligent hiring/retention allegations do not involve the use of an auto, and therefore, preclude coverage for J.F. Allen. While it is true that J.F. Allen's liability for the alleged negligent retention does not specifically require use of an auto, the bodily injury for which

the Underlying Action sought damages did involve the use of a covered auto. Because the Zurich policy ties the damages to the bodily injury and does not limit coverage to the theory of liability, it would be improper to give more meaning to the "legally must pay as damages" clause than the "bodily injury" language contained in the same insuring clause. However, that is what Zurich is advocating in this case. When read as whole, the insuring clause is not limited to manner Zurich advocates. Rather, the insuring clause broadly provides coverage for claims that assert negligent retention/hiring that involve bodily injury the results from the use of any auto. Accordingly, the Circuit Court's decision should be affirmed.

2. *Huggins v. Tri-Cnty. Bonding* did not alter or amend West Virginia law.

Zurich contends West Virginia has adopted a "theory of liability" approach to analyzing insurance policies. Zurich is wrong. Zurich relies heavily upon the decision in *Huggins v. Tri-Cnty. Bonding Co.*, 175 W.Va. 643, 337 S.E.2d 12 (1985) for the proposition that West Virginia has adopted a "theory of liability" approach to coverage questions. In *Huggins*, the court was called upon to resolve whether an exclusion in a homeowner's policy precluded coverage for a negligent entrustment case where the insured's son was involved in an automobile accident. *Id*. *Huggins* did not involve interpreting the insuring clause of the policy.

In *Huggins*, the exclusion the court was called upon to evaluate was of a limited nature. Specifically, the exclusion was triggered for "the ownership, maintenance, operation or use . . . of land motor vehicles." *Huggins*, 175 W.Va. at 647. Of significance to the court was the fact that the insuring coverage in that policy was quite broad compared to the limited exclusion. Ultimately, the court was persuaded that the limited exclusion did not preclude coverage in a homeowner's policy on a claim alleging negligent entrustment of a non-owned vehicle. *Id*. at 649.

While it is true the court discussed whether a negligent entrustment claim involving the use of the vehicle would trigger the limited auto exclusion, the court did not announce a new approach to analyzing coverage issues. Indeed, the court stated: "[a] policy must be interpreted on its own terms." *Id*. at 648. In a ubsequent cases, the West Virginia Supreme Court of Appeals further cautioned that,

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

American National Property and Casualty Company v. Clendenen, 238 W.Va. 249, 793 S.E.2d 899 (2016), *quoting*, *Columbia Casualty v. Westfield Insurance Company*, 217 W.Va. 250, 251-52, 617 S.E.2d 797, 798-99 (2005). Thus, it is clear that, despite both carriers involved in this coverage dispute advocating for blanket approaches to coverage disputes, the West Virginia Supreme Court of Appeals has not and will not do so.

Case law involving policy interpretation has remained consistent and clear – the terms of the policy are to be applied per their ordinary meaning. *Payne*, 195 W.Va. at 507. West Virginia simply does not follow the proposition that the inquiry begins and ends with the theory of liability as advocated by both insurance companies here. Rather, the law requires, as it always has, the interpretation of the language of the policy as a whole, not on the theory of liability advanced against the insured. *Id*. at 649.

Ultimately, the ruling in *Huggins* was based upon a perceived ambiguity in the policy language. Following a discussion on the law regarding ambiguous policy provisions, the *Huggins* Court held:

> we resolve the issue in favor of the policyholder and conclude that where a homeowner negligently entrusts a nonowned vehicle to his son who injures a third party, exclusionary language in the homeowners liability policy . . . does not exclude coverage for suits for negligent entrustment where the initial liability coverage is for "loss from damages for negligent personal acts."

Id. at 649.

The Court then addressed the argument raised by Nationwide regarding the "theory of liability," but specifically declined to accept it. In declining to follow Nationwide's argument, the Court provided:

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

Id. at 650. This language makes clear that the Court did not intend to adopt a new general approach to policy interpretation, but rather found that the policy in that particular case was not intended to be interpreted in that manner. The Court concluded that the automobile exclusion did not preclude coverage for the claim. *Id.*

Because *Huggins* did not adopt any new approach to reviewing insurance policies from a theory of liability perspective as Zurich asserts, this Court need not look at the out-of-state case law Zurich relies on to reinforce this argument. Indeed, those cases, like *Huggins*, involved exclusionary language in the policy, not the insuring clause at issue with the Zurich Auto Policy. In both cases, the courts found coverage was not specifically excluded where the underlying cases involved auto accidents and claims of negligent entrustment. *Marquis v. State Farm Fire & Cas.*

Co., 265 Kan. 317, 961 P.2d 1213 (1998); *Pablo v. Moore*, 2000 MT 48, 298 Mont. 393, 995 P.2d 460 (2000). Indeed, in both cases, the courts clearly and unequivocally scrutinized the policy language to determine whether the insurance policy language applicable to each afforded coverage or excluded it indicating that, even if the theory of liability is considered, that is only one factor in analysis. And that is how it should be because insurance coverage decisions are premised upon a review of the policy language in connection with the particular claim against the insured.

Here, Zurich overlooks the "bodily injury" part of the insuring clause in favor of the "legally obligated to pay" language. That is improper and the Circuit Court's decision should be affirmed.

3. At minimum, the Zurich's Auto Policy is ambiguous.

The Circuit Court correctly found that the Zurich Auto Policy is ambiguous. A policy's language is ambiguous when it "is reasonably susceptible of two different meanings." *Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 509 S.E.2d 1, 6 (1998). Ambiguous terms "are to be strictly construed . . . in favor of the insured." *Id.* In determining whether a provision in an insurance contract is ambiguous, West Virginia courts apply the doctrine of *ejusdem generis*, whereby "the general words [in a contract] will be limited in their meaning or restricted to things of like kind and nature with those specified." *Id.*

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

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

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

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

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

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

Second, Zurich's position highlights another ambiguity in whether the phrase "legally required to pay" is tied solely to the "theory of liability" or whether when read as a whole, the coverage decision must also consider the "bodily injury." For these reasons, this Court should affirm the Circuit Court.

CONCLUSION

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

Respectfully submitted,

Rebecca D. Pomeroy (WVSB # 8800)
Christopher D. Smith (WVSB #13050)

BAILEY GLASSER LLP
209 Capitol Street
Charleston, West Virginia 25301
Tel: 304.345.6555
Fax: 304.342.1110
bpomeroy@baileyglasser.com
csmith@baileyglasser.com

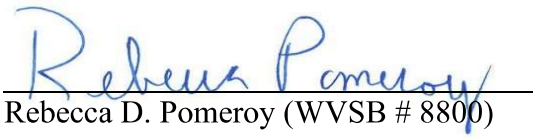
Counsel for Respondent J.F. Allen Company, Inc.

CERTIFICATE OF SERVICE

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

Tiffany R. Durst
Nathaniel D. Griffith
PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
2414 Cranberry Square
Morgantown, West Virginia 26508
tdurst@pffwv.com
ngriffith@pffwv.com
Counsel for Zurich American Insurance Company

Don C.A. Parker
Spilman Thomas & Battle, PLLC
P. O. Box 273
Charleston, WV 25321-0273
dparker@spilmanlaw.com
Counsel for Homesite Insurance Company of Florida



Rebecca D. Pomeroy (WVSB # 8800)