

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 32787

Walter Gauze, By Next Friend Mary Meade,

Appellee (Plaintiffs)

v.

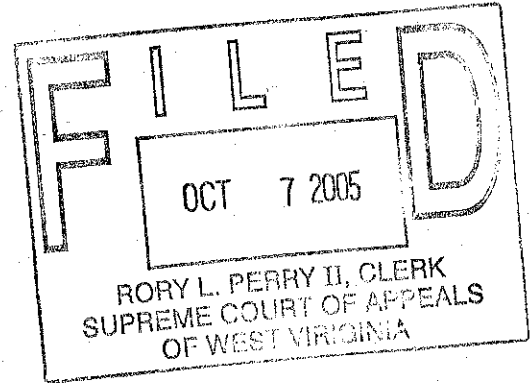
Chidetta Reed,

Appellee (Defendant)

and

National Union Fire Insurance Company of Pittsburgh, Pennsylvania

Appellant (Defendant)



APPELLANT
NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PENNSYLVANIA'S
BRIEF ON THE MERITS

From the Circuit Court of Mingo County
Honorable Michael Thornsburry
Civil Action No.: 03-C-264

Charles R. Bailey, Esquire (WV Bar No. 0202)
Mark Troy, Esquire (WV Bar No. 6678)
Tammy Bowles Raines, Esquire (WV Bar No. 9708)
BAILEY & WYANT, P.L.L.C
500 Virginia Street East, Suite 600
P.O. Box 3710
Charleston, WV 25337-3710
Ph: (304) 345-4222
Counsel for Appellant (Defendant)
National Union Fire Insurance Company of Pittsburgh, PA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. Nature of the Proceedings and the Rulings Below.....1

II. Statement of Facts.....3

Policy Language Provisions.....8

III. Assignments of Error.....9

IV. Points and Authorities Relied Upon9

V. Discussion of Law and Argument

1. The Insurance Policy Procured Through the Board of Risk and Insurance Management (“BRIM”) Program and Issued by NUFIC to the Human Resources Development Foundation Contained a Valid Amendatory Endorsement Which Modified the Policy Language and Coverage Afforded Under the Policy, Such That Said Coverage Became Excess Coverage.....11

2. The Circuit Court Erred in Finding that the NUFIC Policy Provided Primary Coverage for the Plaintiff’s Claims Herein.....14

A. The purpose of procuring excess insurance as well as the purpose of the Guaranty Act will be served by this court’s application of the plain language in the policy to find the plaintiff’s claim is not covered by the NUFIC policy and allowing the plaintiff to proceed with his claim against the Guaranty Association.17

VI. Conclusion and Request for Relief20

TABLE OF AUTHORITIES

Reported Cases of the Supreme Court of Appeal of West Virginia

Allstate Insurance Company v. State Automobile Mutual Insurance Company,
178 W.Va. 704, 364 S.E.2d 30 (1987).....16

Cook v. McDowell County Emergency Ambulance Service Authority, Inc.,
191 W.Va. 256, 445 S.E.2d 197 (1994)..... 14,15

Devane v. Kennedy,
205 W.Va. 519, 519 S.E.2d 622 (1999).....16,17,19,20

Eggleston v. West Virginia Department of Highways,
189 W.Va. 230, 429 S.E.2d 636 (1993)14

Keffer v. Prudential Ins. Co.,
153 W.Va. 813, 172 S.E. 2d 714 (1970).....13

Russell v. State Automobile Mutual Insurance Company,
188 W.Va. 81, 422 S.E.2d 803 (1992).....13

Tennant v. Smallwood,
211 W.Va. 703, 568 S.E.2d 10 (2002).....11

West Virginia Insurance Guaranty Association v. Potts,
209 W.Va. 682, 550 S.E.2d 660 (2001).....16

West Virginia Insurance Guaranty Association v. Potts,
214 W.Va. 332, 589 S.E.2d 216 (2003).....16

Statutes and Regulations

West Virginia Code § 29-12-54

West Virginia Code § 33-1-1612

West Virginia Code § 33- 26 -125,7,17

West Virginia Code § 33-26-8 (1) (b)14,16,20

West Virginia Code § 33-26-8(1)(c)20

Court Rules

West Virginia Rules of Civil Procedure, Rule 54 (b).....3

Foreign Authority- Cases

Alaska Rural Elec. Co., v. INSCO Ltd.,
785 P.2d 1193 (Alaska 1990).19

Ambassador Assc. v. Corcoran,
541 N.Y.S.2d 715 (1989).....19

Kinderman & Sons, Inc. v. United Nat. Ins. Co.,
593 A2d 857 (Pa Super 1987), *aff'd without opinion*,
619 A2d 1058(Sup. Ct. PA 1993).....19

Morbark Ind. Inc. v. Western Empl. Ins. Co.,
429 N.W.2d 213 (Mich.App. 1988).....19

North Carolina Insurance Guaranty Association v. Century Indemnity Company,
444 S.E.2d 464 (N.C.App. 1994).....18,19

Playtex FP, Inc., v. Columbia Co.,
622 A.2d 1074 (Del. Super. 1992).....19

Washington Ins. Guaranty Ass. v. Guaranty Nat. Ins. Co.,
685 F. Supp 1160 (W.D. Washington 1988).....19

Wurth v. Ideal Mut. Ins. Co.,
518 N.E.2d 607 (Ohio App 3d 1987).....19

Statutes and Regulations

N.C. Guaranty Association Act, G.S. § 58-48-1.....18

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 32787

Walter Gauze, By Next Friend Mary Meade,

Appellee (Plaintiffs)

v.

Chidetta Reed,

Appellee (Defendant)

and

National Union Fire Insurance Company of Pittsburgh, Pennsylvania

Appellant (Defendant)

**ARGUMENT ON BEHALF OF APPELLANT NATIONAL UNION
FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA**

COMES NOW Appellant National Union Fire Insurance Company of Pittsburgh, Pennsylvania (“NUFIC”), by its counsel, Mark Troy, Tammy Bowles Raines, and the law firm of Bailey & Wyant, P.L.L.C., and respectfully submits to this Honorable Court its argument on the assignments of error by the Circuit Court of Mingo County, West Virginia.

I. NATURE OF PROCEEDINGS AND THE RULINGS BELOW

NUFIC is seeking relief from an Order entered in the Circuit Court of Mingo County, West Virginia on February 9, 2005, (hereinafter “Order”), and amended by Order of February 15, 2005 (hereinafter “Amended Order”), which denied NUFIC’s Motion for Summary Judgment on an insurance coverage issue. This matter arises from a dispute between NUFIC and the West Virginia

Guaranty Association, (“Association”), the latter party defending Chidetta Reed relative to a claim for personal injury damages being pursued by the plaintiff in the underlying case. At the time of the accident at issue, Ms. Reed was insured by an automobile liability policy issued by Oak Casualty Insurance Company. The Association assumed the defense of Ms. Reed relative to the plaintiff’s underlying claims, due to the fact that Oak Casualty was declared insolvent by order of the Circuit Court of Cook County, Illinois on November 19, 2002.¹ Both insurance policies, the Oak Casualty policy and the NUFIC policy, were issued for the vehicle involved in the subject accident. The issue decided in the Court below is whether the NUFIC policy provides primary coverage for the plaintiff’s loss or whether the Association must provide coverage for the plaintiff’s claims as though it were the primary insurance carrier.

The Association has asserted that the plaintiff must first recover under the NUFIC policy, which was obtained by the West Virginia Board of Risk and Insurance Management, before the Association has any obligation to provide coverage for plaintiff’s damages.² NUFIC has asserted that its insurance policy at issue is an “excess” policy according to its plain language and therefore does not provide primary insurance coverage for the plaintiff’s claims.³ Both NUFIC and the Association (on behalf of Chidetta Reed), filed cross- motions for summary judgment on the insurance coverage issue in this case.⁴ On February 9, 2005, the Court entered an Order denying

¹See Order, Findings of Fact ¶ 5.

²See Defendant Chidetta Reed’s Memorandum in Support of Motion for Summary Judgment, Feb. 3, 2005, p. 6.

³See NUFIC’s Motion for Summary Judgment and Memorandum in Support thereof, Dec.9, 2005.

⁴See NUFIC’s Motion for Summary Judgment and Memorandum in Support thereof, Dec. 9, 2005; See Chidetta Reed’s Motion for Summary Judgment and Memorandum in Support thereof, Feb. 3, 2005.

NUFIC's Motion for Summary Judgment, and Granting Defendant Chidetta Reed's Motion for Summary Judgment.⁵ The Court held that the NUFIC policy provides primary insurance coverage relative to the Plaintiff's claim.⁶ On February 15, 2005, the Court entered an Amended Order to reflect the finality of the Court's decision, pursuant to Rule 54 (b) of the *West Virginia Rules of Civil Procedure*, so that an appeal could be taken from the decision on the insurance question.⁷

II. STATEMENT OF THE FACTS

Although there are factual disputes in the underlying personal injury action giving rise to the insurance coverage dispute, their resolution is not necessary for this Court's decision on the legal issue of coverage available under the NUFIC policy presented to and adjudicated by the Court below. The facts giving rise to NUFIC's appearance in this case are undisputed. The Plaintiff filed the Complaint in this matter on September 3, 2003.⁸ The Complaint was filed by Mary Meade, on behalf of Walter Gauze, against Chidetta Reed, alleging that Defendant, Chidetta Reed, was the driver of a vehicle on September 4, 2001, when she negligently operated the vehicle and caused a one vehicle collision that resulted in injuries to the Plaintiff Walter Gauze.⁹ The plaintiff claims to have been a passenger in the vehicle at the time of the accident.¹⁰ According to the accident report, Walter Gauze was found lying on the side of the road around 7:30 a.m. after being ejected from a 1993 Ford Escort Wagon that apparently had veered off the road and collided with an embankment.

⁵See Order, Conclusions of Law ¶ 11.

⁶See Order, Conclusions of Law ¶ 10.

⁷See Amended Order, p. 5.

⁸See Complaint.

⁹See Complaint at ¶ 2 - ¶ 4.

¹⁰ See Complaint at ¶ 2.

The vehicle rolled over at least one time in a remote part of Wayne County, West Virginia.¹¹ Mr. Gauze alleges to have incurred medical bills and other damages arising from this accident.¹²

The vehicle involved in the accident was owned by the Human Resource Development Foundation, (“HRDF”), a non-profit agency and an administrator of the state funded “Wheels to Work Program.”¹³ The Wheels to Work program provided lower income applicants with transportation for job purposes. HRDF qualified for certain excess insurance coverage purchased from NUFIC through the West Virginia Board of Risk and Insurance Management (“BRIM”), as authorized by *West Virginia Code* § 29-12-5 .¹⁴ The vehicle was leased to Chidetta Reed by the HRDF under a lease- to- own agreement.¹⁵ The HRDF also purchased an automobile liability policy for the vehicle involved in the subject accident from Oak Casualty Insurance Company, designating both HRDF and Ms. Reed as insureds.¹⁶ On November 19, 2002, after the subject accident but prior to the filing of the Complaint, Oak Casualty was declared insolvent and liquidation was ordered by the Circuit Court of Cook County, Illinois.¹⁷ By virtue of the insolvency order, the Association assumed the defense of this action on behalf of the Defendant, Chidetta Reed.¹⁸

¹¹See NUFIC’s Memorandum in Support of Motion for Summary Judgment, Exhibit 5, Dec. 9, 2005.

¹²See Complaint.

¹³See Order, Findings of Fact ¶ 3.

¹⁴See Order, Findings of Fact ¶ 6.

¹⁵See Order, Finding of Fact ¶ 3.

¹⁶See Order, Findings of Fact ¶ 7.

¹⁷See Order, Findings of Fact ¶ 4; See Chidetta Reed’s Motion for Summary Judgment, ¶5.

¹⁸See Order, Findings of Fact ¶ 4.

Before asserting a claim against NUFIC, the Plaintiff sought and received benefits from the uninsured motorist coverage available under a policy providing benefits to the Plaintiff's mother in the amount of \$35,000.¹⁹ This recovery was prompted by the Association's motion for plaintiff to exhaust all potential solvent sources of insurance coverage before recovering from the Association. After nearly a year of litigating this matter, Defendant Reed, by and through Counsel, filed a Motion to Compel Plaintiff to Serve Solvent Insurer of Wheels to Work Program, on August 18, 2004, claiming that the policy issued by NUFIC and procured through BRIM provided coverage for the plaintiff's claims, and therefore, such proceeds would have to be exhausted before any compensation could be pursued against the Association.²⁰ In support of its position, the Association cited *West Virginia Code* § 33-26-12, which provides that: "a person with a claim against any solvent insurer in an insurance policy other than the insolvent insurer, *which is also a covered claim*, must first exhaust his rights under that policy [before the Guaranty Association is triggered.]" (Emphasis added).²¹ This provision is commonly referred to as the "non-duplication" provision.

As a result of said Motion, the Plaintiff filed a Notice of Uninsured Motorist Claim before the Circuit Court on August 24, 2004, claiming benefits under the policy obtained by BRIM and issued through NUFIC on the vehicle being driven at the time of the accident in question.²² NUFIC filed a "Notice of Appearance" in the Mingo County Circuit Court on September 24, 2005.²³ On

¹⁹See Chidetta Reed's Memorandum in Support of Summary Judgment, at p. 3, Feb. 3, 2005.

²⁰See Defendant Chidetta Reed's Motion to Compel, Aug. 19, 2004.

²¹See Chidetta Reed's Memorandum in Support of Motion for Summary Judgment at p. 7, Feb. 3, 2005.

²²See Order, Finding of Fact ¶ 6.

²³See Notice of Appearance, Sept. 27, 2005.

December 8, 2005, NUFIC filed its Motion For Summary Judgment and Memorandum in Support of Motion, asserting that the insurance policy at issue did not provide coverage for the plaintiff's claim until all primary coverage had been exhausted, as the NUFIC policy was an "excess" policy.²⁴ The Association, on behalf of Defendant Chidetta Reed, filed its Motion for Summary Judgment and Response to NUFIC's Motion on February 1, 2005, asserting that the NUFIC policy provided "primary" coverage for the plaintiff's claims.²⁵

A hearing on the dispositive motions was held on February 7, 2005. At that time, counsel for NUFIC presented evidence to the Court that the Oak Casualty policy was in fact obtained by the HRDF, which had paid the premiums on that policy for the vehicle in question. An affidavit signed by Linda Lispcomb, Human Resources Manager at HRDF, as well as canceled checks and a list of insured vehicles, were provided to the Court by way of a Supplement to the Motion for Summary Judgment shortly after the hearing.²⁶ The lease agreement required HRDF to provide "normal class rate" insurance to the lessee, (Ms. Reed), on the vehicle during the two-year lease to own period. In addition to the Oak Casualty policy, HRDF qualified for certain excess insurance provided to the State of West Virginia, through BRIM and NUFIC, and after paying the appropriate premiums, HRDF became an additional named insured to the NUFIC policy covering numerous other vehicles owned by the HRDF.²⁷

Pursuant to the West Virginia Insurance Guaranty Association Act, *W. Va. Code* § 33-26-1,

²⁴See NUFIC's Motion for Summary Judgment, Dec. 9, 2005.

²⁵See Chidetta Reed's Motion for Summary Judgment, Feb.3, 2005.

²⁶See Supplement to Motion for Summary Judgment, at Exhibit 1.

²⁷See Order, Findings of Fact ¶ 7.

et seq., the Association will provide payment to a claimant for a covered claim under an insurance policy when their insurer has been declared insolvent. The insolvency of Oak Casualty mandates that the Association provide payment to a claimant with a covered claim under the Oak Casualty policy.²⁸ In order for a claim to succeed under the West Virginia Insurance Guaranty Association Act, *W.Va. Code* § 33-26-12 (1) requires a claimant to first exhaust available insurance under any solvent policies that may be in effect for the covered claim.²⁹

The NUFIC policy in this case is not available insurance because the clear and unambiguous language of the policy provides that it is an excess policy which can *only* provide coverage when primary insurance proceeds have been exhausted. Therefore, the plaintiff's claims are not *covered claims* under the NUFIC policy as anticipated by the Act. The Association has asserted that the NUFIC policy language found in the Business Auto Coverage Form provides primary coverage for any covered auto owned by the insured.³⁰ The Court agreed with the Association on this point and held that the terms of the NUFIC policy, as identified by the Association, rendered NUFIC the primary insurer for the plaintiff's claims.³¹ The Court further held that the plain language of the NUFIC policy establishes that it provides primary insurance coverage to the automobile owned and operated by the insureds, the HRDF and Ms. Reed.

²⁸See Order, Conclusions of Law ¶ 1-2.

²⁹See Order, Conclusions of Law ¶ 3.

³⁰See Chidetta's Reed's Memorandum in Support of Motion for Summary Judgment, p. 6.

³¹See Order, Conclusions of Law ¶ 8 - ¶ 9.

POLICY LANGUAGE PROVISIONS

The relevant portion of the policy states unambiguously on the Certificate of Liability Insurance found on the first page of the policy as follows:³²

Excess Coverage:

If the Additional Insured has other primary insurance for the hazards covered by the above policies, the coverage afforded by this certificate does not apply to losses occurring before the expiration or termination date of the other insurance except to the extent that the amount of loss exceeds the limit of liability of the other insurance, but then only for an amount not exceeding the difference between \$1,000,000 and the limit of liability of the other insurance.

The policy also contains an Amendatory Endorsement #10, which provides:

1. If an "insured" has other primary insurance for the hazards covered by this insurance, this insurance does not apply to losses occurring before the expiration or termination date of the other insurance except to the extent that the amount of loss exceeds the limit of liability of the insurance, but then only for an amount not exceeding the difference between any higher applicable limit of liability stated in the schedule of this policy and the limit of liability of the other insurance.³³

This provision is an Endorsement applicable to the policy, and specifically incorporates each Certificate of Liability insurance issued to West Virginia Non Profit organizations. HRDF was provided coverage as an additional insured on the NUFIC policy by virtue of the Certificate of Liability Insurance³⁴ and Amendatory Endorsement No. 1, which identifies HRDF as an additional named insured. The applicable limit of liability is also found on the Certificate, indicating a limit of \$1,000,000 each occurrence for all coverages combined. The language

³²A complete copy of the NUFIC policy was previously attached to NUFIC's Petition for Appeal as Exhibit 1, and has been bated stamped for the Court. The remaining citations to the policy will be referred to by page number.

³³See NUFIC's Policy, p. 25 - 26.

³⁴See Order, Finding of Fact ¶ 7.

relied upon by the Association and held by the Court to provide primary coverage for the vehicle in question is found in the Business Auto Coverage Form of the policy, Policy No. RMCA 534-85-61, which states in pertinent part that:

For any covered "auto" that you own, this Coverage Form provides primary insurance. For any covered "auto" you don't own, the insurance provided by this coverage form is excess over any other collectible insurance.³⁵

III. ASSIGNMENTS OF ERROR

1. The Circuit Court erred in failing to give effect to the plain and unambiguous language contained in the valid Amendatory Endorsement, which modified the policy language in the Business Auto Coverage Form and provided that coverage afforded the insureds under the policy was "excess" for losses occurring before the expiration or termination date of other applicable insurance.
2. The Circuit Court erred in finding that the NUFIC policy provided primary coverage to the Plaintiff's claims herein.

IV. POINTS AND AUTHORITIES RELIED UPON

- *West Virginia Code* § 29-12-5
- *West Virginia Code* § 33-1-16
- *West Virginia Code* § 33-26-1
- *West Virginia Code* § 33-26-8 (1) (b)
- *West Virginia Code* § 33-26-8(1)(c)
- *West Virginia Code* § 33-26-12
- *N.C. Guaranty Association Act*, G.S. § 58-48-1

³⁵See NUFIC's Policy, p. 40; See Order, Conclusion of Law ¶ 9.

- *Allstate Insurance Company v. State Automobile Mutual Insurance Company*,
178 W.Va. 704, 364 S.E.2d 30 (1987).
- *Alaska Rural Elec. Co., v. INSCO Ltd.*,
785 P.2d 1193 (Alaska 1990).
- *Ambassador Assc. v. Corcoran*,
541 N.Y.S.2d 715 (1989).
- *Cook v. McDowell County Emergency Ambulance Service Authority, Inc.*,
191 W.Va. 256, 445 S.E.2d 197 (1994).
- *Devane v. Kennedy*,
205, W.Va. 519, 519 S.E.2d 622 (1999).
- *Eggleston v. West Virginia Department of Highways*,
189 W.Va. 230, 429 S.E.2d 636 (1993).
- *Keffer v. Prudential Ins. Co.*,
153 W.Va. 813, 172 S.E. 2d 714 (1970).
- *Kinderman & Sons, Inc. v. United Nat. Ins. Co.*,
593 A2d 857 (Pa Super 1987), *aff'd without opinion*, 619 A2d 1058(Sup. Ct. PA 1993).
- *Morbark Ind. Inc. v. Western Empl. Ins. Co.*,
429 N.W.2d 213 (Mich.App. 1988).
- *North Carolina Insurance Guaranty Association v. Century Indemnity Company*,
444 S.E.2d 464 (N.C.App. 1994).
- *Playtex FP, Inc., v. Columbia Co.*,
622 A.2d 1074 (Del. Super. 1992)

- *Russell v. State Automobile Mutual Insurance Company*,
188 W.Va. 81, 422 S.E.2d 803 (1992).
- *Tennant v. Smallwood*,
211 W.Va. 703, 568 S.E.2d 10 (2002).
- *West Virginia Insurance Guaranty Association v. Potts*,
209 W.Va. 682, 550 S.E.2d 660 (2001), *aff'd and remanded*,
West Virginia Insurance Guaranty Association v. Potts,
214 W.Va. 332, 589 S.E.2d 216 (2003)
- *Washington Ins. Guaranty Ass. v. Guaranty Nat. Ins. Co.*,
685 F. Supp 1160 (W.D. Washington 1988).
- *Wurth v. Ideal Mut. Ins. Co.*,
518 N.E.2d 607 (Ohio App 3d 1987);

V. **ARGUMENT**

1. **THE INSURANCE POLICY PROCURED THROUGH THE BOARD OF RISK AND INSURANCE MANAGEMENT ("BRIM") PROGRAM AND ISSUED BY NUFIC TO THE HUMAN RESOURCES DEVELOPMENT FOUNDATION CONTAINED A VALID AMENDATORY ENDORSEMENT WHICH MODIFIED THE POLICY LANGUAGE AND COVERAGE AFFORDED UNDER THE POLICY, SUCH THAT SAID COVERAGE BECAME EXCESS COVERAGE.**

Where the issue on appeal from a circuit court is clearly a question of law, such as the determination of coverage under an insurance contract, the Court will apply a *de novo* standard of review. Syl. pt. 1, *Tennant v. Smallwood*, 211 W.Va. 703, 568 S.E.2d 10 (2002). The language relied upon by the Association, and held by the Court to afford primary coverage for the plaintiff's claims, is found in the general policy provisions of the Business Auto Coverage Form. Yet, the

Amendatory Endorsement, as discussed above, unambiguously states: *“This endorsement changes the policy. Please read it carefully. This endorsement, effective 12:01 a.m. 07/01/2001 forms a part of Policy No. RMCA 534-85-61.”* In West Virginia, an insurance policy is defined by *West Virginia Code* § 33-1-16, which provides: “Policy means the contract effecting insurance, or the certificate thereof, by whatever name called, and includes all clauses, riders, endorsements and papers attached thereto and made a part thereof.”

The language in the NUFIC policy endorsement cited above clearly provides that if an “insured” has other primary insurance for the hazards covered by this insurance, then this insurance does not apply to losses occurring before the expiration or termination date of the other insurance, except for any amount of loss that may exceed the limit of liability of the primary insurance, in an amount not exceeding the difference between any higher applicable limit of liability stated in the schedule of this policy and the limit of liability of the other insurance.³⁶ This language in the policy was intended to modify the general language relied upon by the Court and the Association contained in the Auto Coverage Form. As a valid endorsement, the above-quoted provision became part of the policy effective July 1, 2001, nearly two months before the accident described in the Complaint.

The lower court apparently considered the above-quoted language of the Amendatory Endorsement meaningless in considering the coverage afforded under the NUFIC policy. However, if amendatory endorsements were not made part of the NUFIC policy, then there would be no coverage for the HRDF at all, as the HRDF is an additional insured on the state policy *only* by virtue of the language contained in Endorsement # 1, “Named Insured Endorsement” which provides:

³⁶See NUFIC’s Policy, p. 25 - 26.

This endorsement modifies insurance provided under the following:

Business Auto Coverage Form

Item 1 of the Policy Declarations, "Named Insured" is completed as follows:

- A. Each West Virginia Political Subdivision or Non Profit Non Governmental Organizations, covered by Certificates of Liability Insurance on file with the Company.³⁷

The Court below found that the HRDF was an additional insured on the NUFIC policy, which afforded coverage for the Plaintiff's claims.³⁸ Therefore, the Court must have considered the endorsement which completed the "named insureds" on the policy to include the HRDF as a valid part of the insurance policy. Without this endorsement, no coverage would be provided to the HRDF at all under the NUFIC policy. It is inconceivable how the lower court could have intended this inconsistency when rendering its decision on the insurance coverage issue herein.

The law in West Virginia is well established: "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 1, *Russell v. State Automobile Mutual Insurance Company*, 188 W.Va. 81, 422 S.E.2d 803 (1992)(quoting *Keffer v. Prudential Ins. Co.*, 153 W.Va. 813, 813, 172 S.E. 2d 714, 714 (1970). Also clear in this State is the principle that: "It is not the right or province of a court to alter, pervert, or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." Syl. pt. 3, *Cortiga Development Co. v. United Fuel Gas Co.*, 147 W.Va.

³⁷See NUFIC's Policy, p. 12.

³⁸See Order, Findings of Fact ¶ 7.

484, 128 S.E.2d 626 (1962). Reading the entire provisions of the insurance policy, as that term is defined to include all endorsements made a part thereto, the unambiguous language does not afford primary insurance coverage for the plaintiff's loss in this case.

It is undisputed that this accident occurred before the "expiration or termination" of the Oak Casualty policy covering the claim. Therefore, full effect should be given to the plain meaning in the NUFIC policy to provide excess coverage only relative to the plaintiff's claims, and the Association, which "stands in the shoes" of Oak Casualty pursuant to W.Va. Code § 33-26-8 (1)(b), should be deemed the primary coverage provider relative to the plaintiff's claim.

2. THE CIRCUIT COURT ERRED IN FINDING THAT THE NUFIC POLICY PROVIDED PRIMARY COVERAGE FOR THE PLAINTIFF'S CLAIMS HEREIN.

The NUFIC policy at issue provided coverage to the HRDF as an additional insured on the policy issued to the State of West Virginia through BRIM. This Court has recognized that policies issued through BRIM are often custom-designed policies, and that BRIM is granted broad discretion and powers relating to the procurement of insurance. *Eggleston v. West Virginia Department of Highways*, 189 W.Va. 230, 429 S.E.2d 636 (1993). In discussing custom-designed policies and coverage afforded thereunder, this Court has stated: "...this Court believes that when a policy is a custom-designed policy . . . the broad discretion granted the West Virginia State Board of Risk and Insurance Management authorizes that body to incorporate language absolutely limiting liability under the policy, even if such language would ordinarily be in violation of the provisions of W. Va. Code § 33-6-31(b)...". *Cook v. McDowell County Emergency Ambulance Service Authority, Inc.*, 191 W.Va. 256, 261, 445 S.E.2d 197, 201 (1994). In *Cook*, the policy at issue provided insurance coverage to a political subdivision, the McDowell County Ambulance Authority, by virtue of the

certificate of liability insurance issued to the Ambulance Authority. The certificate of insurance provided for a maximum limit of liability for each occurrence of \$1,000,000.00 under the policy. Other language contained in an endorsement made part of the policy seemed to be ambiguous, in the plaintiff's view, as to the amount of maximum coverage actually available for each loss under the policy. However, the endorsement with the maximum liability language also contained a provision incorporating all coverages afforded the Insured under the certificate of insurance. The "incorporation" language contained in the endorsement in *Cook*³⁹ is nearly identical to the incorporation language found in the NUFIC policy in the case *sub judice*. That language provides:

It is agreed that the provisions of the Certificate of Liability Insurance issued to Each West Virginia Political Subdivision or Non Profit or For Profit Non Governmental Organizations are incorporated into this policy.⁴⁰

The Court held that the "incorporation" language of the endorsement, as quoted above, clearly intended for the maximum amount of liability to be \$1,000,000.00 under the policy, as stated on the certificate of insurance. *Id.* at 200, 259. Therefore, the coverage afforded the additional insured under the certificate of insurance would govern. In this case, not only did the NUFIC policy contain an endorsement which provided for the Business Automobile Coverage to be excess coverage to the HRDF, but it also is contained a statement on the certificate of insurance issued to HRDF which clearly stated that the coverages afforded under the policy were excess coverages only, if the additional insured had other primary coverage. HRDF did have other primary coverage – the

³⁹See *Cook*, 191 W.Va. 256, 258, 445 S.E.2d 197, 199 n.3, which quotes the policy language involved in that case as follows: "It is agreed that the provisions of the Certificate of Liability Insurance issued to Each Insured West Virginia Political Subdivision or Charitable or Public Service Organization are incorporated into this policy."

⁴⁰See NUFIC's Policy, p. 25-26.

policy from Oak Casualty, the obligations of which must now be assumed by the Association in light of Oak Casualty's insolvency. As HRDF paid for both the primary and the excess policy on the vehicle being driven at the time of the accident, the Association should honor its obligation to the insured, HRDF, and provide coverage for the plaintiff's claim.

The powers and duties of the Association are set forth in *West Virginia Code* § 33-26-8 (1) (b), which provides that the Association shall: "Be deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties, defenses, and obligations of the insolvent insurer as if the insurer had not become insolvent." Also, the Association has pointed out in its Motion for Summary Judgment that insurance generally follows the owner of the subject vehicle.⁴¹ In fact, the Oak policy is the subject vehicle's owner's policy that should "follow the vehicle" and be considered primary herein, pursuant to *Allstate Insurance Company v. State Automobile Mutual Insurance Company*, 178 W.Va. 704, 364 S.E.2d 30 (1987).

Additionally, the West Virginia Guaranty Act has been interpreted by this Court in *Devane v. Kennedy*, 205 W.Va. 519, 519 S.E.2d 622 (1999), and in *West Virginia Insurance Guaranty Association v. Potts*, 209 W.Va. 682, 550 S.E.2d 660 (2001), *aff'd and remanded*, *West Virginia Insurance Guaranty Association v. Potts*, 214 W.Va. 332, 589 S.E.2d 216 (2003). In both cases, the court discussed the intent of the Legislature in creating the Association for the remedial purpose of providing payment for "covered claims" under certain insurance policies that have become insolvent. In *Potts I*, the Court set out the definition of "covered claim" as contemplated by the statute, and interpreted by *Devane* as follows:

(1) a claim that is (2) unpaid (3) which . . . is within the coverage of an insurance policy,

⁴¹See Chidetta Reed's Memorandum in Support of Motion for Summary Judgment, p. 7.

which (a) is in full force at the time of the occurrence giving rise to the claim and (b) was issued by an insurer which became insolvent after May 12, 1970.

209 W.Va., 550 S.E.2d, at 665.

The definition of "covered claim" articulated by this Court clearly includes the claim asserted by the plaintiff against Oak Casualty, as the policy was in "full force" at the time of the "occurrence." Moreover, the non-duplication provision in *West Virginia Code* § 33-26-12 (1) requiring a claimant to first pursue any claims he may have against solvent insurers providing coverage for the covered claim before proceeding against the Association is inapplicable. In *Devane*, the Court explained that a claimant could proceed with his claim against the Association if there were no other insurers "*collaterally* insuring the covered claim." 205, W.Va. at 530, 519 S.E.2d at 633 [*emphasis added*]. Clearly, the risk insured against by the NUFIC policy is not collateral of that insured in the first instance by Oak Casualty, as can clearly be seen from the straightforward language of the insurance policy provision entitled "Excess Coverage" found on the Certificate of Liability and quoted above.

A. The Public Policies Promoting the Procurement of Excess Insurance as Well as the Purpose of the Guaranty Act Will Be Served by this Court's Application of the Plain Language of the NUFIC Policy to Find Such Policy an Excess Policy and Allowing the Plaintiff to Proceed with His Claim Against the Association.

The NUFIC policy language is unambiguous in providing only excess coverage for the claim asserted by the Plaintiff and should be enforced as written. The State of West Virginia did not bargain for insuring against the risk attempted to be imposed upon it due to Oak Casualty's insolvency. By enforcing the NUFIC policy language as written, the purpose of the Guaranty Act as well as the important policies promoting the procurement of excess insurance, would be served. Because the Court below held that the NUFIC policy provided primary coverage, it did not reach the

question of whether an excess liability carrier must “drop down” into the place of the primary insurer when the primary insurer is insolvent and such a claim has been presented to the Guaranty Association.⁴² This issue has never directly been addressed in West Virginia under the Guaranty Act. However, numerous jurisdictions have held that an excess liability carrier need not “drop down” into the place of the primary insurer when the primary insurer becomes insolvent.

In *North Carolina Insurance Guaranty Association (“NCIGA”) v. Century Indemnity Company*, 444 S.E.2d 464 (N.C.App. 1994), the Court addressed the issue of whether an excess carrier must drop down and provide coverage when an insurer becomes insolvent, before the Plaintiff could recover from the Guaranty Association. The North Carolina Association, like the West Virginia Guaranty Association, was created to provide coverage to insureds when their liability carrier becomes insolvent. *See N.C. Guaranty Association Act, G.S. 58-48-1 et seq.* In deciding this issue, the Court looked to the policy reasons relied upon by other jurisdictions which had decided the issue. The Court observed that the fundamental purpose of excess insurance is to protect the insured against excess liability claims, not to insure against the underlying insurer’s insolvency. *Id.* at 470 (quoting *Playtex FP, Inc., v. Columbia Co.*, 622 A.2d 1074 (Del. Super. 1992)). Additionally, the Court explained that excess policies are sold at a comparatively modest cost to pick up where the primary coverage ends, for extended protection. It is designed to expand the amount, but not the scope of coverage. *Id.* The North Carolina Court held that the excess carrier was not required to “drop down” and provide primary coverage for the loss, as it was the purpose of the legislature for the Association to fill this position. *Id.* Notably, the majority of courts addressing this question have

⁴²See Order, Conclusions of Law ¶ 7.

rejected the “drop down” theory based upon the purpose of excess insurance.⁴³

Public policy in this case dictates that NUFIC should not be required to simply become a primary carrier relative to plaintiff’s claims. First, as mentioned above and relied upon by numerous jurisdictions, the cost of procuring an excess policy is calculated upon the anticipated risk insured against – a cost which is traditionally modest compared to the cost of procuring a primary policy which insures against the vast majority of anticipated claims. Moreover, the creation of precedent which would establish the excess policy in question as a primary policy when a primary carrier becomes insolvent would either:

- a) expose NUFIC to extreme financial hardship by requiring it to cover claims not anticipated or bargained for at the time the policy was obtained; or
- b) subject state agencies and others to substantially higher premiums to obtain excess insurance coverage which, in turn, can be expected to discourage the purchase of this important source of coverage.

In either instance, the public policies clearly weigh in favor of not transforming the NUFIC excess policy into that which it was never intended to be, and that which runs completely contrary its plain language.

Additionally, the Guaranty Association was created for the purpose of alleviating the financial burden borne by the citizens of this State when their insurance carriers cannot satisfy their

⁴³ See e.g. *Playtex FP, Inc.*, 622 A.2d at 1082; *Morbark Ind. Inc. v. Western Empl. Ins. Co.*, 429 N.W.2d 213 (Mich.App. 1988); *Alaska Rural Elec. Co., v. INSCO Ltd.*, 785 P.2d 1193 (Alaska 1990); *Washington Ins. Guranty Ass. V. Guaranty Nat. Ins. Co.*, 685 F. Supp 1160 (W.D. Washington 1988); *Ambassador Assc. v. Corcoran*, 541 N.Y.S.2d 715 (1989)(holding excess carried need not “drop down” due to primary insurer’s insolvency because of the reasonable expectations of the parties to the insurance contract); *Wurth v. Ideal Mut. Ins. Co.*, 518 N.E.2d 607 (Ohio App 3d 1987); *Kinderman & Sons, Inc. v. United Nat. Ins. Co.*, 593 A2d 857 (Pa Super 1987), *aff’d without opinion*, 619 A2d 1058(Sup. Ct. PA 1993).

contractual obligations due to insolvency. *Devane*, 205 W.Va., 525, 519 S.E.2d at 628. The Association is also charged with protecting a claimant's rights when their insurer becomes insolvent by expediting and facilitating their monetary claims. *Devane*, 205 W.Va., 533, 519 S.E.2d, 636 n.25 ("The WVGIA does not have as its raison d'etre the conservation of its own financial reserves"). It has been asserted by the Association that it is not an insurer and does not collect premiums. Yet, by virtue of *West Virginia Code* § 33-26-8 (1) (b), the Association shall: "Be deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties, defenses, and obligations of the insolvent insurer as if the insurer had not become insolvent." The legislature has provided a funding procedure for the Association to meet its funding obligations, as stated in *Devane*, *supra* at 525, 628. The Association receives its funding for payment of claims against insolvent insurers by collecting monies from all insurance companies that write insurance in West Virginia. *Id.* at 525, 628. See *West Virginia Code* § 33-26-8(1)(c). These costs are ultimately borne by the payment of premiums made by insureds of the member insurers. *Id.* For these reasons, the HRDF is entitled to the protections of the Guaranty Act, as a paying insured contributing to the Association for the protections afforded thereunder, in light of the insolvency of its insurance company, Oak Casualty, and the Association should not be allowed to shirk its responsibility owed to the HRDF and, for that matter, the plaintiff.

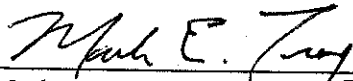
VI. CONCLUSION AND REQUEST FOR RELIEF

The Appellant respectfully requests that this Court apply the clear language contained in the NUFIC policy and hold that the coverage afforded therein is excess coverage relative to the plaintiff's claim, which would not apply until the primary coverage has been exhausted. Also, NUFIC requests this Court to hold that the Association, by virtue of its statutory obligation imposed after the insolvency of Oak Casualty, is now the primary coverage for the plaintiff's claims in the

underlying tort action, and that the Plaintiff should pursue his recovery directly against the Association.

**NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PENNSYLVANIA**

BY COUNSEL,



Mark Troy, Esquire (WV Bar No. 6678)
Tammy Bowles Raines, Esquire (WV Bar No. 9708)
BAILEY & WYANT, P.L.L.C.
500 Virginia Street, East
Suite 600 United Center
Post Office Box 3710
Charleston, West Virginia 25337-3710
(304) 345-4222

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 32787

Walter Gauze, By Next Friend Mary Meade,

Appellee (Plaintiffs)

v.

Chidetta Reed,

Appellee (Defendant)

and

National Union Fire Insurance Company of Pittsburgh, Pennsylvania

Appellant (Defendant)

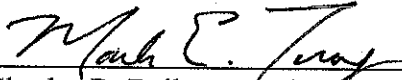
CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing "*Argument on Behalf Appellant National Union Fire Insurance Company of Pittsburgh, Pennsylvania*" has been served upon the following counsel of record by this day hand delivery and *via* facsimile, true copies thereof:

Susan J. Van Zant, Esquire
Susan J. Van Zant, L.C.
68 East 2nd Avenue
Post Office Box 987
Williamson, WV 25661
Counsel for Plaintiff

Kathlene Harmon-McQueen
Kelly C. Morgan
Cornerstone Building, Suite 100
1409 Greenbrier Street
P.O. Box 1831
Charleston, WV 25327-1831
Counsel for Defendant Chidetta Reed

Done this 7th day of October, 2005.


Charles R. Bailey, Esquire (WV Bar No. 0202)
Mark Troy, Esquire (WV Bar No. 6678)
Tammy Bowles Raines, Esquire (WV Bar No. 9708)
BAILEY & WYANT, P.L.L.C.
500 Virginia Street, East
Suite 600 United Center
Post Office Box 3710
Charleston, West Virginia 25337-3710
(304) 345-4222