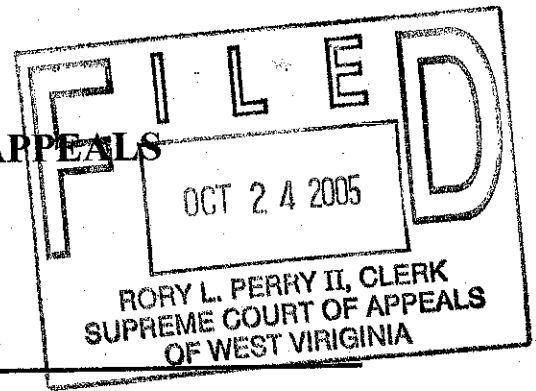


**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

APPEAL NUMBER 32787



**WALTER GAUZE, BY HIS NEXT FRIEND, MARY MEADE,
APPELLEE / PLAINTIFF BELOW,**

V.

**CHIDETTA REED,
APPELLEE / DEFENDANT BELOW,**

AND

**NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PENNSYLVANIA,
APPELLANT / DEFENDANT BELOW.**

**RESPONSE ON BEHALF OF DEFENDANT, CHIDETTA REED,
TO APPEAL FILED BY NATIONAL UNION FIRE
INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA**

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1. THE KIND OF PROCEEDING AND THE NATURE OF THE RULING IN THE LOWER TRIBUNAL

A civil action was filed in the Circuit Court of Mingo County, West Virginia, styled *Walter Gauze by his next friend, Mary Meade Plaintiff, v. Chidetta Reed, Defendant*, and assigned civil action number 03-C-264. Mr. Gauze claimed Ms. Reed had negligently operated the vehicle in which he was a passenger, and he claims permanent and severe injuries caused by the accident, including closed head injuries. The accident was a single-car collision, involving only the Reed vehicle. Mr. Gauze also sued Oak Casualty Insurance Company (hereinafter Oak) for bad faith, which was later dismissed by the trial court upon motion by counsel for Oak, Robert Greer. The Oak liability policy limits would have been \$100,000.00.

After the insolvency of Oak, the West Virginia Insurance Guaranty Association (hereinafter the WVIGA) assumed the defense of the Oak insured, Chidetta Reed, and plaintiff attempted to locate all sources of solvent coverage to comply with the requirements of the Guaranty Act. In so doing, plaintiff recovered \$35,000.00 from AIG under his mother's, Mary Meade's, uninsured motorist and medical payments coverage. Plaintiff then looked to National Union Fire Insurance Company (hereinafter NUFIC), another AIG company, as an additional solvent source of coverage with One Million Dollar (\$1,000,000.00) limits, on the car leased to Ms. Reed but owned by the state of West Virginia through the Human Resource Development Foundation (hereinafter HRDF).

When the WVIGA and NUFIC filed cross motions for summary judgment on the issue of the order in which the policies must be aligned and the limits exhausted, the Mingo County Circuit Court ruled that NUFIC's policy was the next policy

answerable to the plaintiff for his damages. The NUFIC policy has limits of \$1,000,000.00; the Oak policy had \$100,000.00 limits.

The policy of insurance issued to the State of West Virginia by NUFIC, which covers vehicles owned by the HRDF, provides full coverage or in the alternative, at least the statutory minimum limit of bodily injury liability of \$20,000.00 per person and \$40,000.00 per accident required under the West Virginia law. The defendant, Chidetta Reed, moved the trial court to grant summary judgment in her favor by so declaring. She further moved the trial court to rule that NUFIC's solvent insurance coverage on the vehicle at issue in the civil action provided coverage for the plaintiff's claims before any liability accrued against the West Virginia Insurance Guaranty Association. NUFIC's motion for summary judgment moved the court to dismiss it from the action, claiming its policy provided no coverage to defendant Reed, in spite of the clear policy language. The trial court ruled in favor of the defendant, Chidetta Reed, on the issue of primacy of coverage.

However, NUFIC's Appeal should be denied because it was filed late, after the deadline established by the court's 1 September, 2005, Order, but more importantly, it should fail because the trial court made the correct ruling, as more fully set out within this Response to NUFIC's Appeal.

2. A STATEMENT OF THE FACTS OF THE CASE

Factual History

On or about 31 July, 2001, Chidetta Reed leased a 1993 Ford Escort owned by the Human Resource Development Foundation, Inc. (the HRDF), through a state-funded program known as "Wheels to Work." In the lease agreement, the HRDF

acknowledged sole ownership of the vehicle and agreed to provide insurance coverage on the vehicle. In addition, a policy of insurance was purchased by Chidetta Reed from the now insolvent Oak Casualty Insurance Company to provide coverage beginning 26 July, 2001, to provide bodily injury and property damage liability and uninsured motorist coverage, as required by West Virginia law. Evidence of Oak's insolvency, and the Orders documenting it, were presented to the Circuit Court. Please see *Defendant's Motion to Compel Plaintiff to Serve Solvent Insurer of Wheels-to-Work Vehicle to Exhaust Potential Liability Coverage and Memorandum of Law in Support Thereof*, filed on or about August 18, 2004.

Concurrently, the State of West Virginia had a comprehensive automobile policy in full force and effect, numbered RM CA 534-85-61, and issued by National Union Fire Insurance Company of Pittsburgh, PA (NUFIC). That policy covers all vehicles owned by the State and/or its "additional insureds." HRDF is named as an additional insured on the policy which was effective 1 July, 2001 to expire 1 July, 2002. See *Certificate of Liability Insurance* attached as Exhibit 1 to *National Union Fire Insurance Company of Pittsburgh, Pennsylvania's Motion for Summary Judgment* dated December 8, 2004.

Under its own language, the NUFIC policy is considered excess coverage only "if the additional insured has other primary insurance for the hazards covered by the above policies...." The legal issue is whether the insolvent Oak policy is "other primary insurance" for the additional insured, the HRDF, since Oak is insolvent. It is clear that due to the insolvency of Oak, the additional insured (the HRDF) does not have other primary insurance in force to cover the claims of the plaintiff in this instance. Therefore,

it is clear from the policy language that the NUFIC policy cannot be deemed excess coverage under these facts. The same result is true under an analysis and application of the Guaranty Act, West Virginia Code §§33-26-1 through 33-26-19.

On or about 4 September, 2001, during the periods covering both the Oak and NUFIC policies, Walter Gauze alleges he was a guest passenger in the 1993 Ford Escort being operated by Chidetta Reed when a single vehicle accident occurred, allegedly causing serious injury to Mr. Gauze. There is a factual dispute as to whether or not Mr. Gauze was operating the vehicle at the time the accident occurred, but that factual determination was not necessary to the trial Court's decision on the coverage afforded by the NUFIC policy, and is likewise not necessary to the Supreme Court of Appeals to enable it to reach a decision on the issues here presented. Mr. Gauze filed a civil action against Chidetta Reed for negligent operation of the vehicle resulting in his injury on or about 3 September, 2003, and against Oak for bad faith. Counsel was retained to defend Chidetta Reed and set about to conduct an investigation into the circumstances and events surrounding the motor vehicle accident and injuries allegedly sustained therein. Oak was later dismissed as a bad faith defendant, due to its insolvency.

On or about 19 November, 2002, Oak was declared insolvent. Oak's insolvency triggered the West Virginia Insurance Guaranty Act and accordingly, the WVIGA assumed responsibility for defense of claims under Oak's policies, in accordance with the mandates of the Act. With Oak's insolvency the vehicle Mr. Gauze claims was driven by Chidetta Reed, the vehicle leased from the Wheels to Work program, met one legal definition of an "uninsured motor vehicle":

W. Va. Code §33-6-31(j): A motor vehicle shall be deemed to be uninsured within the meaning of this section, if there has been a valid bodily injury or property damage liability policy issued upon such vehicle, but which policy is uncollectible, in whole or in part, by reason of the insurance company issuing such policy upon such vehicle being insolvent or having been placed in receivership. The right of subrogation granted insurers under the provisions of subsection (f) of this section shall not apply as against any person or persons who is or becomes an uninsured motorist for the reasons set forth in this subsection.

This definition is also in keeping with both policies' definitions, so there is no conflict between the statutory language and the policies in this regard.

Due to the insolvency, plaintiff pursued and received uninsured motorist coverage from a solvent insurer providing liability insurance to his mother and other residents of her household. Upon information and belief, Mr. Gauze received \$35,000.00, which represented the policy limits of an AIG insurance company automobile policy issued to Mary Meade, under its uninsured motorist and its medical payments benefits coverages.

The National Union Fire Insurance Company Policy

As previously mentioned, the State of West Virginia purchased comprehensive automobile liability insurance on state-owned vehicles, including the HRDF as an additional insured. The liability limit is \$1 million for any one accident or loss. The uninsured motorist coverage limit is \$1 million for any one accident or loss. The policy covers any automobile "owned by, leased to, or loaned to" the State of West Virginia, or any State Agency. This definition likewise applies to the uninsured/underinsured motorist coverage provided by the policy coverage forms. If

Defendant Reed were driving the vehicle at the time of the accident, the liability limit would provide coverage under the terms and conditions of the policy.

In the policy coverage form (Form CA 00 01 07 97, at page 2 of 10; please see *Exhibit 8 of National Union Fire Insurance Company of Pittsburgh, Pennsylvania's Motion for Summary Judgment*), NUFIC agreed to pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies. If Chidetta Reed were driving the vehicle in question at the time of the accident, she was doing so with the permission of the HRDF pursuant to the lease agreement. The definition of "insured" is extended to include any person while using with permission a covered auto owned by the insured in the State of West Virginia. If Walter Gauze was the driver of the vehicle, he was using the vehicle with the permission of the lessee, Chidetta Reed, and therefore qualifies as an insured under the policy who may be entitled to uninsured/underinsured motorist benefits.

While NUFIC asserts that the policy provides only excess coverage, the policy form (Form CA 00 01 07 97, at page 8 of 10; please see *Exhibit 8 of National Union Fire Insurance Company of Pittsburgh, Pennsylvania's Motion for Summary Judgment*) defines the coverage provided under the policy as "primary" for any covered auto owned by an insured. (See General Conditions, Paragraph 5. Other Insurance; please see *Exhibit 8 of National Union Fire Insurance Company of Pittsburgh, Pennsylvania's Motion for Summary Judgment*). Here, the state of West Virginia is the insured, the HRDF is the additional insured, and their status as insureds causes the coverage to be primary by the policy's own terms and conditions.

Additionally, the policy provides West Virginia uninsured and underinsured motorist coverage, pursuant to form CA 21 22 12 98. The policy also indicates that NUFIC will pay all sums an "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured" or "underinsured motor vehicle." (Policy form, at page 1 of 3; please see *Exhibit 8 of National Union Fire Insurance Company of Pittsburgh, Pennsylvania's Motion for Summary Judgment*). An "insured" is anyone occupying or using a covered auto. If Plaintiff Walter Gauze was operating the vehicle at the time of the accident, the vehicle in question may qualify as an uninsured motor vehicle which would entitle Mr. Gauze to the benefit of the uninsured motorist coverage.

3. THE ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL

The trial court did not err in ruling that the coverage afforded the state of West Virginia under the NUFIC policy is primary to indemnify the defendant and from which the plaintiff may recover, under these facts, the policies at issue, and the statutes governing these issues. For these reasons, more fully articulated below, the Petition should be denied. It should also be denied because NUFIC's brief was filed after the deadline established for its Appeal to be filed.

Issues

(1) Whether solvent coverage provided by NUFIC is primary coverage for a vehicle owned by the State of West Virginia and Human Resources Development Fund and leased to Chidetta Reed, where the policy issued by Oak to Ms. Reed became

insolvent after the accident, and if so, is there \$1 million available under the liability and uninsured motorists provisions of the policy?

(2) In the alternative, whether the solvent coverage provided by NUFIC exists in at least the minimum mandatory limits required by the omnibus statute, West Virginia Code Section 33-6-31(b)?

(3) Whether the February 15, 2005, Order was interlocutory or final where it did not resolve all issues between all parties to the litigation, and did not fall into any articulated exception?

4. POINTS AND AUTHORITIES RELIED UPON, A DISCUSSION OF THE LAW, AND THE RELIEF PRAYED FOR

Points and Authorities Relied Upon

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

Cannelton Indus., Inc. v. Aetna Cas. & Sur. Co. of Am., 194 W.Va. 203, 460 S.E.2d 18 (1994).

Durm v. Heck's, Inc., 184 W. Va. 562, 566, 401 S.E.2d 908 (1991).

Gooch v. West Virginia Department of Public Safety, 195 W. Va. 357; 465 S.E.2d 628 (1995).

James M.B. v. Carolyn M., 193 W. Va. 289, 456 S.E.2d 16 (1995).

Lechner v. Scharrer, 145 Wis.2d 667, 429 N.W.2d 491 (Wis. Ct. App. 1988).

Luko v. Lloyd's of London, 573 A.2d 1139 (Pa. 1990).

MacNeal, Inc. v Interstate Fire & Casualty Insurance Co., 132 Ill. App.3d 564, 477 N.E.2d 1322.

Thomson v. Betts, 754 F.2d [1243,] 1246 [(5th Cir. 1985).

West Virginia Code §33-6-31(j).

West Virginia Code §33-26-1 through 19.

Rule 54, West Virginia Rules of Civil Procedure.

Rule 56(d), West Virginia Rules of Civil Procedure.

The West Virginia Insurance Guaranty Act. The West Virginia Insurance Guaranty Act, West Virginia Code §33-26-1, *et seq.*, created a means by which insureds are afforded a remedy for their **covered** claims in the event their insurer becomes insolvent. The WVIGA is not an insurance company; it does not collect premiums or issue policies, but is a nonprofit organization to aid individuals when their insurance carrier cannot satisfy its contractual obligations due to insolvency. *Cannelton Indus., Inc. v. Aetna Cas. & Sur. Co. of Am*, 194 W.Va. 203, 460 S.E.2d 18 (1994). The legislature intended for the Act to be “liberally construed to effect the purpose under section two of the article.” West Virginia Code §33-26-4.

The plaintiff below has followed the Code’s mandate in this case, seeking coverage from NUFIC, which issued a policy covering this loss, whether under the liability, medical payments or uninsured coverages afforded under the policy, and NUFIC is a solvent source of insurance coverage as contemplated by the Guaranty Act.

The Guaranty Act requires that any person having a claim against a solvent insurer under any provision in an insurance policy other than a policy of an insolvent insurer, shall be required to exhaust first his right under such solvent insurer’s policy. West Virginia Code §33-26-12. The language of the statute is mandatory, not suggestive.

Legal Analysis and Argument. In West Virginia, the bright line rule of law is that when a pro-rata clause and an excess clause appear in the automobile policies of both the driver and the owner of an automobile, the insurer of the owner is primarily liable and must bear the whole loss, within the limits of the policy. The primary obligation to

defend and indemnify follows the automobile, rather than the driver. *Allstate Insurance Company v. State Automobile Mutual Insurance Company*, 178 W.Va. 704, 364 S.E.2d 30 (1987). The analysis is the same whether or not Chidetta Reed was the insured driver on an Oak policy. The HRDF was named to show its financial interest as the owner of that vehicle. Concurrently, the HRDF was insured under the comprehensive automobile policy issued to the State of West Virginia. In this instance, the HRDF was named on both automobile policies, with NUFIC asserting that its policy is excess over the primary Oak policy's coverage. However, as shown by the NUFIC policy language, in this event the NUFIC policy is not an excess policy. When the primary automobile liability carrier becomes insolvent, in keeping with the law and spirit of the Guaranty Act, the next layer of solvent insurance must respond to claims arising out of the use of the automobile before the Association is to participate in payment of claims. This conclusion is mandated by the NUFIC policy language and by the language of the Guaranty Act.

The policy language NUFIC claims creates **excess** coverage is the very language which clearly shows it to be provisional. That is, the amendatory endorsement indicates the policy provides excess coverage **if** there is no primary coverage. Here, where Oak is insolvent, it cannot provide primary coverage; the vehicle became an uninsured vehicle, by operation of law. This conclusion is mandated by the Guaranty Act, which clearly requires exhaustion of all coverages from solvent insurance sources before participation by WVIGA, and by the omnibus statute which indicates that a vehicle is uninsured which has been insured but the carrier has thereafter become insolvent. It is also in keeping with the language of the NUFIC policy, which is distorted by NUFIC's argument.

Arguing in the alternative, if the NUFIC coverage is excess, the excess coverage should “drop down” to provide primary coverage. This argument is made without waiving Ms. Reed’s position that the coverage provided by the NUFIC policy is primary liability coverage, even if the NUFIC policy had been deemed excess coverage by the trial court, under Guaranty Act law, which it did not. While there is no law on point in West Virginia, other states which have considered the question have determined that excess coverage from solvent insurers must drop down to provide primary coverage where the policy language indicates it was excess over amounts recoverable or collectible. *MacNeal, Inc. v Interstate Fire & Cas. Ins. Co.*, 132 Ill. App.3d 564, 477 N.E.2d 1322; *Lechner v. Scharrer*, 145 Wis.2d 667, 429 N.W.2d 491 (Wis. Ct. App. 1988); *Luko v. Lloyd’s of London*, 573 A.2d 1139 (Pa. 1990).

These courts’ decisions are consistent with the rule that ambiguities in insurance policies are to be construed in favor of insureds, as in West Virginia. *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987); *Horace Mann Ins. Co. v. Leeber*, 180 W. Va. 375, 376 S.E.2d 581 (1988). The rationale upon which the out of state cases are based are (a) the policy language was found to be ambiguous, (b) the Guaranty Act’s requirement that all solvent coverages must be exhausted prior to participation by the Guaranty Association, and (c) “excess” coverage is required to drop down into primary coverage level when the primary insurance carrier is insolvent, where the policy language is like NUFIC’s, indicating that the coverage is excess over collectible or recoverable amounts.

Even if NUFIC’s policy is found to provide excess coverage, this Court should not rule in its favor because that issue has not been dealt with at the trial court

level. NUFIC's policy will still provide any amounts awarded by the jury in excess of \$100,000.00 (the limits of liability of the Oak policy), pursuant to NUFIC's policy language:

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 other insurance except to the extent that the amount of loss exceeds the limit of liability of 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.

Therefore, it is clear that the NUFIC policy provides primary coverage to respond to the Plaintiff's Complaint for damages; and in the alternative should drop down to provide coverage if it is excess.

Interlocutory Appeals. The tort case pending in Mingo County Circuit Court is not final between the parties there involved. Interlocutory orders are not appealable, as a general matter. *Gooch v. W. Va. Dept. of Public Safety*, 195 W. Va. 357; 465 S.E.2d 628 (1995). The denial of summary judgment is interlocutory and not appealable, unless it falls into an articulated exception. *Id.*, at 363, 634. The tort issue which forms the basis of this lawsuit is still pending in circuit court; the order from which NUFIC filed its petition and appeal did not finalize the issues between the parties in the underlying action; the civil action will go on to a verdict or settlement between the parties. The issue is who will pay that verdict or settlement on behalf of the defendant (whether uninsured motorist coverage or liability coverage). The trial court correctly decided that NUFIC's coverage is primary, but the entry of that order should have caused the case to go forward to its conclusion, then to an appeal on the issue, if necessary.

As there has been no termination of the litigation between the parties on the merits of the case, NUFIC's appeal to the Supreme Court is an attempt to piecemeal appellate review of a trial court decision which did not terminate the litigation; further, the issues presented do not fall into the recognized exceptions to the finality principles enunciated by this Court. *Id.*, at 362, 363. There are no statutes which permit the interlocutory order to be immediately appealable, no rule of civil procedure, and no other known jurisdictional exception. There was no writ of prohibition filed, no certified questions, and no arguments or rulings made under Rule 54 of the West Virginia Rules of Civil Procedure.

In the controlling case in this matter, a wrongful death action against a hospital and state troopers, the circuit court granted summary judgment to the defendant hospital and dismissed the action against it. *Gooch v. the West Virginia Department of Public Safety, supra*. That same order on which the appeal was based, denied motions for summary judgment for the other defendants. This Court indicated in the *Gooch* case that it has long been its policy that denials of summary judgments are interlocutory and not appealable, where as here there are issues of negligence still pending, and where it is clear that the order taken as a whole is not a final order as to all issues and all parties.

The order did not terminate the litigation between the parties on the merits of the case and leave nothing to be done but to enforce by execution what has been determined.

Id., at 363, 364. This Court recognized its acceptance of the exception to federal Rule 54(b) in *Cohen v. Beneficial Industrial Loan Corp., Id.*, citing 337 U.S.541, 69 S.Ct. 1221, 93 L.Ed 1528 (1949), and *Durm v. Heck's, Inc.*, 184 W.Va. 562, where it indicated:

an interlocutory order would be subject to appeal under this doctrine if it “(1) conclusively determines the disputed controversy, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment.”

Id., citing *Thomson v. Betts*, 754 F.2d [1243,] 1246 [(5th Cir. 1985)]; *James M.B. v. Carolyn M.*, 193 W. Va. 289, at n. 4, 456 S.E.2d 16, at 20 n. 4 (1995). In the case at bar, the basis of the lower court ruling was Rule 56, W. Va. R.C.P. No Rule 54 determinations, rulings or arguments were made. Here, as in *Gooch*, the February 9 or 15, 2005, orders did not terminate the litigation between the parties on the merits of the case and leave nothing to be done but to enforce by execution what has been determined. After February 15, 2005, NUFIC moved the court, over objection, to stay the case pending the outcome of the filing of the petition for appeal. After hearing argument from counsel, the Court refused to grant NUFIC's motion to stay discovery.

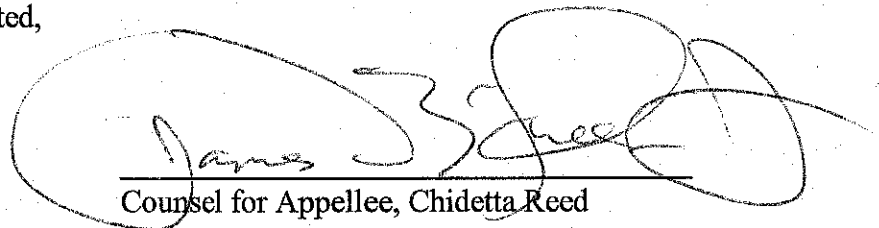
It is clear that the order from which NUFIC appeals is not one which conclusively determined the disputed controversy and the subject matter of the appeal will be reviewable on appeal from a final judgment. It did resolve an important issue which was separate from the merits of the action, that of coverage, but it is very important to the defendant, Ms. Reed, that NUFIC be required to provide coverage, due to the severity of the injuries claimed and the fact that her insolvent insurer's policy limits were only \$100,000.00, whereas the NUFIC policy afforded \$1 million in coverage. Further, while the Guaranty Association still provides a defense for the defendant, Ms. Reed, part of the requirements placed on the plaintiff is to exhaust all other coverages and not granting this petition will enforce the statutory requirements placed on the plaintiff in this matter. NUFIC should provide an indemnity for the

defendant, as set for more fully above, based on its policy language under these facts, coupled with an application of West Virginia law on point.

5. THE RELIEF PRAYED FOR

The Appellee, Chidetta Reed, respectfully requests that the Court deny the Appellant's Appeal and issue an opinion stating that the NUFIC policy is primarily liable to answer for the damages as claimed by the plaintiff below, should a verdict be rendered in his favor at trial; for being filed after the due date for the appeal to be filed; and due to there being no appealable order.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned, of counsel for defendant, Chidetta Reed, does hereby certify that the foregoing **RESPONSE OF APPELLEE, CHIDETTA REED, TO APPEAL FILED BY NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA** has been served upon the following counsel of record by this day mailing to them true copies thereof:

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Done this 24th day of October, 2005.



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