

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 32787

Walter Gauze, By Next Friend Mary Meade,

Appellee (Plaintiffs)

v.

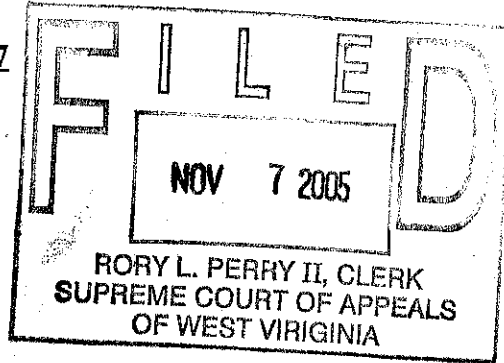
Chidetta Reed,

Appellee (Defendant)

and

National Union Fire Insurance Company of Pittsburgh, Pennsylvania

Appellant (Defendant)



APPELLANT
NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PENNSYLVANIA'S
REPLY TO CHIDETTA REED'S RESPONSE TO APPEAL

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

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and

National Union Fire Insurance Company of Pittsburgh, Pennsylvania

Appellant (Defendant)

**APPELLANT NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PENNSYLVANIA'S REPLY
TO CHIDETTA REED'S RESPONSE TO APPEAL**

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 reply to the Response filed on behalf of Chidetta Reed by the West Virginia Guaranty Association ("Association") to NUFIC's appeal.

I. NATURE OF PROCEEDINGS AND THE RULINGS BELOW

The Association has defended Chidetta Reed relative to a claim for personal injury damages being pursued by the plaintiff in the underlying tort case. In responding to NUFIC's appeal, the Association sets forth the nature of the case and proceedings below in its "Response on Behalf of

Defendant Chidetta Reed To Appeal Filed By National Union Fire Insurance Company of Pittsburgh, Pennsylvania” without citing any part of the record below for support. The Association asserts that NUFIC’s Appeal should be denied because it was filed late, after the deadline set by this Court’s Order of September 1, 2005, without providing any support for this argument by reference to the applicable rule or Order. Contrary to this groundless assertion, NUFIC’s appeal was timely filed pursuant to Rule 10 (a) of the *West Virginia Rules of Appellate Procedure*, which provides as follows:

- (a) Within thirty days of the date of the notice of the filing of the appellate record, or within thirty days of the receipt of the granting order establishing a briefing schedule, the appellant shall file an original and nine copies of a brief with the Clerk of the Supreme Court. One copy thereof should be served by the appellant upon each party to the appeal.

This Court issued an Order setting forth a briefing schedule on September 1, 2005, which also ordered the appellant to file its brief within thirty days of receipt of the Order.¹ The Order was received by Bailey & Wyant, P.L.L.C , on behalf of NUFIC, on September 7, 2005, which was marked with a date stamp at the time of receipt.² NUFIC filed its Appellant Brief and served the same on all parties via hand delivery and facsimile on October 7, 2005, which is thirty days from the date of receipt of the Briefing Order from the Supreme Court. ³ Therefore, NUFIC’s brief was timely filed in this Court, and Respondent Chidetta Reed’s argument on this issue is without merit.

¹ See Order, Sept.1, 2005, attached hereto as Exhibit 1.

² See Exhibit 1, reverse side of Order, p. 2.

³ See Cover of Appellant brief, stamped filed by the Clerk of the Supreme Court and Certificate of Service, attached hereto as Exhibit 2.

II. STATEMENT OF THE FACTS

Chidetta Reed's Response also sets forth the factual history of the case, again without citation to any evidence in the record on appeal. As a result, the Respondent is able to misquote certain "facts" which occurred in this case, such as who actually purchased the policy of insurance issued by Oak Casualty Insurance Company, which subsequently became insolvent before payment of the Plaintiff's claims. 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."⁴ The HRDF purchased the automobile liability policy for the vehicle involved in the subject accident from Oak Casualty, designating both HRDF and Ms. Reed as insureds.⁵

As NUFIC explained in its original brief, the Wheels to Work program provided lower income applicants with transportation for job purposes. The vehicle was leased to Chidetta Reed by the HRDF under a lease- to- own agreement.⁶ During the hearing before the Circuit Court on the parties' motions for summary judgment on February 7, 2005, counsel for NUFIC presented evidence to the Court that the Oak 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

⁴See Order, Findings of Fact ¶ 3.

⁵See Order, Findings of Fact ¶ 7.

⁶See Order, Finding of Fact ¶ 3.

the hearing.⁷ Therefore, the Respondent's assertion that Chidetta Reed purchased the Oak policy is without merit, and the HRDF, as the purchaser of that policy, should be protected by the Association once its insurer became insolvent.

III. REPLY TO ARGUMENTS ADVANCED BY THE ASSOCIATION

A. The NUFIC Policy is Not a Primary Policy.

The Association has argued throughout its Response that the NUFIC policy provides primary coverage for the Plaintiff's claims against Chidetta Reed. In support of this argument, the Association points out the language in the NUFIC policy, contained in the general provisions of the Business Auto Coverage Form, despite the fact that a valid amendatory endorsement to the policy modified this provision. The policy language relied upon by the Association and the Court below 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.⁸

The Association chooses to ignore the endorsement which modified this general policy provision but recognizes the endorsement which makes the HRDF an additional insured on the policy, which is the only endorsement providing HRDF any coverage at all under the NUFIC policy. Simply stated, if amendatory endorsements are not made part of the NUFIC policy, then there would

⁷See Supplement to NUFIC's Motion for Summary Judgment, at Exhibit 1, which was designated as part of the record for consideration of the appeal.

⁸A 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. See NUFIC's Policy, p. 40; See Order, Conclusion of Law ¶ 9.

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 that insureds on the Business Auto Coverage Form are completed as follows: "Each West Virginia Political Subdivision or Non Profit Non Governmental Organizations, covered by Certificates of Liability Insurance on file with the Company".⁹ The Association cannot have it both ways; i.e., it cannot recognize that HRDF is provided coverage under the policy for the vehicle in question under Endorsement No. 1, but ignore the amendatory language which makes such coverage excess on the subject vehicle, under Endorsement No. 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.¹⁰

This provision is 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 Insurance¹¹ and Amendatory Endorsement No. 1, which identifies HRDF as an additional named insured. The language in the NUFIC policy Endorsement No. 10, 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,

⁹See NUFIC's Policy, p. 12.

¹⁰See NUFIC's Policy, p. 25 - 26.

¹¹See Order, Finding of Fact ¶ 7.

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.¹² This language in the policy was intended to modify the general language relied upon by the lower Court and the Association contained in the Business 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. It is well established in West Virginia that 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.*" [emphasis added]. Therefore, the NUFIC policy does not provide coverage for the accident in question, unless and until the primary coverage, provided through the Oak Casualty policy or the Association, has been paid in full and, thus been exhausted.

B. The NUFIC Policy Does Not Provide Uninsured or Underinsured Motorist Coverage for Plaintiff Gauze's Claim.

The Association has asserted in its reply brief on this appeal that:

The definition of "insured" [in the NUFIC policy] 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 [NUFIC] policy who may be entitled to uninsured/underinsured motorist benefits.¹³

There are several fatal flaws with this extreme attempt to invoke coverage under the NUFIC

¹²See NUFIC's Policy, p. 25 - 26.

¹³See Chidetta Reed's Response to Appeal, p. 7.

policy in question. First, the record on this appeal and, in particular, the Complaint, provide that Mr. Gauze was the passenger in the vehicle driven by Chidetta Reed.¹⁴ Moreover, even if the evidence of record provided some indication or evidence that Mr. Gauze was operating the vehicle involved in the crash, there is no evidence of record to suggest that he was doing so with the permission of the HRDF (the named insured in the NUFIC policy in question) or even Ms. Reed.

Finally, and most significantly, the policy in question only provides uninsured and underinsured motorist coverage for “all sums the ‘insured’ is legally entitled to recover as compensatory damages from the owner or driver of an ‘uninsured’ or ‘underinsured’ motor vehicle.”¹⁵ Clearly, if Mr. Gauze were driving the vehicle in question at the time it left the road and overturned in the one-vehicle accident, he would not be “legally entitled to recover” compensatory damages from himself as a tortfeasor. It should also be noted that the NUFIC policy’s prohibition against an injured insured collecting against him- or herself for a loss occasioned by his or her own conduct is certainly in line with the general purpose of uninsured and underinsured motorist coverage, and the statutes mandating the same, as recognized by this Court. *See Postlethwait v. Boston Old Colony Ins. Co.*, 189 W.Va. 532, 432 S.E.2d 802 (1993) (Uninsured motorist statute deals only with the situation where plaintiff has sued uninsured/underinsured tort-feasor); *Plymale v. Adkins*, 189 W.Va. 204, 429 S.E.2d 246 (1993) (Primary purpose of mandatory uninsured motorist coverage is to protect innocent victims from hardships caused by negligent, financially irresponsible drivers); *Alexander v. State Auto Mut. Ins. Co.*, 187 W.Va. 72, 415 S.E.2d 618 (1992) (Uninsured and underinsured motorist coverage is intended to compensate parties for injuries caused by other

¹⁴See generally, Complaint; see also Order, Finding of Fact ¶ 2.

¹⁵See NUFIC’s policy, p.47.

motorists who are uninsured); *Cantrell v. Cantrell*, 213 W.Va. 372, 582 S.E.2d 819 (2003) (The purpose of optional underinsured motorist coverage is to enable the insured to protect himself, if he chooses to do so, against losses occasioned by the negligence of other drivers who are underinsured; “other drivers” necessarily infers the drivers of vehicles other than the vehicle owned and operated by the insured). In light of the foregoing, this extreme attempt by the Association to invoke coverage under the NUFIC policy in question should be quickly disregarded by the High Court.

C. The NUFIC Policy, As an Excess Policy, Should Not Be Required to Drop Down to Provide Primary Coverage, as Argued in the Alternative by the Association.

It is beyond dispute that the issue of whether an excess policy should be required to “drop down” to provide primary coverage for Plaintiff’s claims, under circumstances such as those at hand, has never been addressed by the High Court, and, thus, is a matter of first impression in this Court. In fact, the Association acknowledges that the jurisdictions which have decided this issue are divided, and it cannot be disputed that the majority of jurisdictions deciding this issue have logically concluded that an excess liability carrier need not “drop down” into the place of the primary insurer when the primary insurer becomes insolvent and a claim has been presented to the Guaranty Association. For example, in *North Carolina Insurance Guaranty Association (“NCIGA”) v. Century Indemnity Company*, 444 S.E.2d 464 (N.C.App. 1994), the Court held that the excess carrier was not required to “drop down” and provide primary coverage for the loss, as it was the stated purpose of the legislature that the Association fill this position. *Id.* at 470. The North Carolina Court also looked to the policy reasons relied upon by other jurisdictions which had decided the issue in *North Carolina, supra*. Specifically, 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.* In this way, 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. Requiring NUFIC to provide coverage in this case would create precedent which would establish the excess policy in question as a primary policy when a primary carrier becomes insolvent. Therefore, state agencies and others would be subjected 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.

Moreover, the Association's argument in support of the NUFIC policy "dropping down" is based upon decisions in jurisdictions where the insurance policy language in question indicated it was excess *over amounts recoverable or collectible*.¹⁶ [*emphasis added*]. Clearly, the NUFIC policy language does not provide that it is excess only in the event that other insurance is not collectible or recoverable, but provides the policy is excess when there is other insurance covering the hazard at that time, and the NUFIC policy will not apply until the expiration or termination date of the other insurance covering the risk. Therefore, the Association's alternative argument on this issue should be denied by this Court.

¹⁶See Chidetta Reed's Response to Appeal, p. 12, citing *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. 1998); *Luko v. Lloyd's of London*, 573 A.2d 1139 (Pa. 1990).

Lastly, the Association suggests that the High Court should not address the “drop down” issue at all because the lower Court did not reach this issue. If this argument were adopted by the Court, many of the Association’s arguments set forth in its Response brief would similarly be inappropriate, including whether the Plaintiff’s is entitled to uninsured/underinsured motorist benefits under the NUFIC policy in question. Again, the Association cannot have it both ways – asking the High Court to consider matters not addressed by the lower court while simultaneously asking the Court to ignore other such matters.

D. The Amended Order is Ripe for Appeal.

The Association has taken the position that this case is not ripe for appellate review, as the Order from which the appeal was taken was an “interlocutory order,” citing *Gooch v. W.Va. Dept. Of Public Safety*, 195 W.Va. 357, 465 S.E.2d 628 (1995).¹⁷ First, the Association’s argument on this issue is moot before this Court, because the Petition for Appeal was granted by this Court for appellate review. Notwithstanding that argument, NUFIC asserts that the Order entered by the Circuit Court is final to end the litigation between the Association and NUFIC over the insurance coverage issue. In effect, the Order granting Defendant Chidetta Reed’s Motion for Summary Judgment completely and finally disposed of the issue of which party held primary coverage for the Plaintiff’s claims and owed Defendant Chidetta Reed an immediate duty of a defense.

Moreover, the Association asserts that there were no arguments or rulings made under Rule 54 (b) of the *West Virginia Rules of Civil Procedure*. Rule 54(b) provides in pertinent part:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the

¹⁷See Chidetta Reed’s Response, p. 13.

claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

In the "Amended Order Granting Defendant Chidetta Reed's Motion or Summary Judgment," entered on February 15, 2005, the Circuit Court provides an express direction for the entry of judgment relative to the final resolution of the insurance coverage issue resolved by the Court.¹⁸ This was necessary due to the fact that without the express entry of judgment in favor of the Association, there would be no directive establishing NUFIC's obligations to Ms. Reed, as distinguished from any remaining obligations the Association may have in this matter. This argument was presented to the Court by counsel for NUFIC, and the Court entered the Amended Order to specifically reflect and clarify the finality of the Order, so that an appeal could be taken on the insurance coverage issue. Therefore, the Order approximates a final order in its nature and effect, as observed by this Court in *Gooch, supra*, at p. 364, 635, and the Circuit Court's decision to grant the Association's motion for summary judgment, on behalf of Defendant, Chidetta Reed, is ripe for appellate review.

The Association also argues that this Court's recognition of the exception to federal Rule 54 (b), as set forth in *Cohen v. Beneficial Ind. Loan Corp.*, 337 U.S. 541, 69 S.Ct.1221, 93 L.Ed.1528 (1949), and discussed by the West Virginia Supreme Court in *Gooch, supra*, at p.363, 634, n. 7, was inapplicable and did not allow the order in this case to fall into the exception for a final appealable order under the test. In *Cohen*, the test was stated as follows:

[a]n 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

¹⁸See Amended Order, February 15, 2005, p.5, designated by NUFIC as part of the record for consideration on appeal.

from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment."

Gooch, supra, at p. 363, 634 n.7 (also citing *Thompson v. Betts*, 754 F.2d 1243, 1246 (5th Cir.1985)). The Circuit Court's Order in this case also meets the test set forth above to render it ripe for appeal. First, the Order conclusively determined the disputed controversy between NUFIC and the Association, which was the issue of which entity must provide primary coverage and a paid defense to Ms. Reed relative to the Plaintiff's claims. Next, the order resolved a critical issue completely separate from the merits of the underlying negligence action (again, the coverage question). Finally, the Circuit Court's decision would be effectively unreviewable without an immediate right to appeal, because NUFIC, by virtue of the order, would be required to defend Chidetta Reed in the negligence action and pay any award of damages to Plaintiff, despite the fact that it disputed all such obligations in the action. That is to say, the Order was essentially unreviewable in this respect, by unfairly requiring NUFIC to proceed to trial on Chidetta Reed's behalf, exhausting resources and attorney's fees, only to have the coverage issue reversed by this Supreme Court, after NUFIC had incurred irreparable harm in the underlying action.

E. The Purpose of the Guaranty Association Should Be Upheld by this Court.

While the Association has provided a defense to Chidetta Reed in this matter, it now attempts to avoid its duty to provide her with a continued defense or any coverage for Plaintiff's claims. In fact, the Association has even responded to NUFIC's appeal in Ms. Reed's name and, in said Response, has vehemently denied its continuing duty to indemnify and defend Ms. Reed (and the HRDF) in the lower court. Aside from the rather clear-cut conflict of counsel that is created by this coverage-defeating effort being pursued by the Association in Ms. Reed's name, such maneuvering

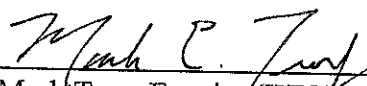
also runs contrary to the stated purpose of the West Virginia Insurance Guaranty Association Act. The stated purpose of that Act is to: "... provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to *claimants* or *policyholders* because of the insolvency of an insurer. . .". W.Va. Code § 33-26-2 (2005). Both Chidetta Reed and the HRDF are policyholders on the insolvent Oak policy, and, yet, both have met only resistance, delay and financial loss in their endeavor to pursue their valid rights and claims against the Association. For these reasons, the Association should not be allowed to shirk its responsibility owed to the HRDF and, for that matter, Chidetta Reed.

IV. 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**

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STATE OF WEST VIRGINIA
IN THE SUPREME COURT OF APPEALS
IN VACATION

Walter Gauze, Plaintiff Below, Appellee

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Chidetta Reed and National Union Fire
Insurance Company, Defendants Below

National Union Fire Insurance Company,
Appellant

On this day, came the Court, on its own motion, having received the completed record in the above-captioned matter, and proceeded to set forth a briefing schedule.

It is hereby ordered that the appellant file an original and nine copies of a brief within thirty days of receipt of this order; the appellee to file a like number of briefs within thirty days of receipt of the appellant's brief, with any reply brief deemed necessary to be filed within fifteen days of receipt of appellees' brief.

DONE IN VACATION of the Supreme Court of Appeals, this 1st day of
September, 2005.

Honorable Joseph P. Albright, Chief Justice

Honorable Robin Jean Davis

Honorable Larry V. Starcher

Honorable Elliott E. Maynard

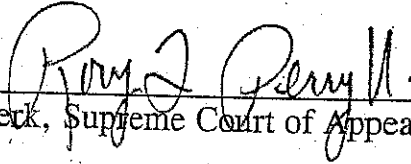
Honorable Brent D. Benjamin

NUFIC
EXHIBIT (1)

Received the foregoing order this 1st day of September, 2005, and entered the same in Order Book No. 154.

A True Copy

Attest:


Clerk, Supreme Court of Appeals

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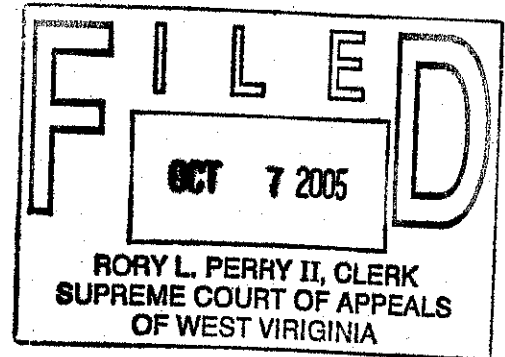
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**NUFIC
EXHIBIT (2)**

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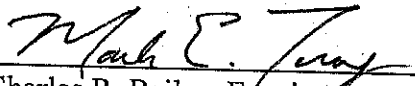
CERTIFICATE OF SERVICE

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:

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Done this 7th day of October, 2005.


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National Union Fire Insurance Company of Pittsburgh, Pennsylvania

Appellant (Defendant)

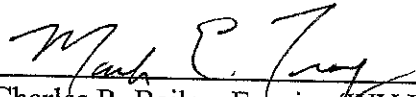
CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing "*Appellant National Union Fire Insurance Company of Pittsburgh, Pennsylvania's Reply To Chidetta Reed's Response to Appeal*" has been served upon the following counsel of record by this day hand delivery and via facsimile, true copies thereof:

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Done this 7th day of November, 2005.


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