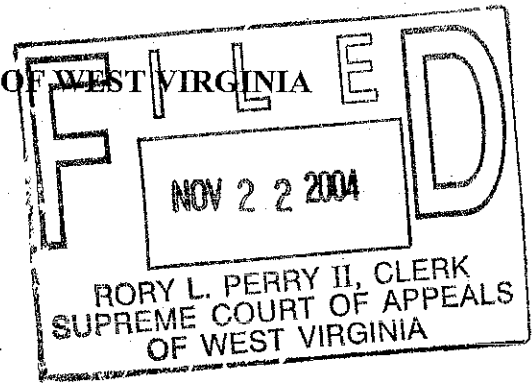


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



BRENTON L. FERRELL and
KATHLEEN D. FERRELL,

Appellees,

v.

No. 041695

NATIONWIDE MUTUAL INSURANCE COMPANY,

Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES -ii- and -iii-

II. NATURE OF PROCEEDINGS BELOW 1 - 3

III. STATEMENT OF FACTS 3 - 7

IV. CERTIFIED QUESTION PRESENTED 7

V. POINTS AND AUTHORITIES 7 - 8

VI. DISCUSSION OF LAW 8 - 26

A. Standard of Review

B. In Conformity With the Unequivocal Instruction Given by the Court in Richards v. Allstate, 193 W. Va. 244, 455 S.E.2d 803 (1995), the Clear and Unambiguous Policy Provisions Contained within the Nationwide Policy, as amended by Endorsement 2256C, Create a Contractual Right to Reimbursement of Medical Expense Payments Where a Nationwide Insured Received a Recovery From Another Nationwide Insured and the Proceeds of That Recovery Duplicate the Insurer's Previous Payment for Medical Expenses.

VII. RELIEF PRAYED FOR 26-27

I. TABLE OF AUTHORITIES

A. West Virginia Cases

Feliciano v. 7-Eleven, Inc., 210 W. Va. 740, 559 S.E.2d 713 (2001) 8, 9

Joslin v. Mitchell, 213 W. Va. 771, 584 S.E.2d 913 (2003) 8, 24, 25, 26

Osborne v. United States, 211 W. Va. 667, 567 S.E.2d 677 (2002) 8

Richards v. Allstate Ins. Co., 193 W. Va. 244, 455 S.E.2d 803 (1995) 1, 7, 9, 10, 11-14
..... 16, 18, 20, 22, 24, 26

Soliva v. Shand, Morahan & Co., 176 W. Va. 430, 345 S.E.2d 33 (1986) 8, 19, 20, 22, 23

Tennant v. Smallwood, 211 W. Va. 703, 568 S.E.2d 10 (2002) 9

Thompson v. State Auto. Mut. Ins. Co., 122 W. Va. 551, 11 S.E.2d 849 (1940) 8, 19, 22

West Virginia Fire & Cas. Co. v. Stanley, ___ W. Va. ___, 602 S.E.2d 483,
2004 WL 1144050 (W. Va., May 21, 2004) 8, 24

B. West Virginia Statutory Authority

West Virginia Code § 33-6-8. 6, 8, 15, 25

West Virginia Code § 33-6-9(b). 8, 25

West Virginia Code § 33-6-30(c). 8, 25

C. Other Jurisdictions

Barreca v. Cobb, 668 So.2d 1129 (La. 1996) 8, 21

Stetina v. State Farm Mutual Automobile Insurance Co., 196 Neb. 441,
243 N.W.2d 341 12

Control Specialists Co. v. State Farm Mut. Auto. Ins. Co.,
423 N.W.2d 775 (Neb. 1988) 7, 16

Maynard v. State Farm Mut. Auto. Ins. Co., 902 P.2d 1328 (Alaska 1995) 7, 17, 21
Reichl v. State Farm Mut. Auto. Ins. Co., 880 P.2d 558 (Wash. Ct. App. 1995) 7, 17
York v. Sevier County Ambulance Auth., 8 S.W.3d 616 (Tenn. 1999) 7, 21

D. Other Authority

Black's Law Dictionary (5th ed. 1983) 7, 20
Merriam-Webster Online at <http://www.m-w.com/dictionary.htm>. 7, 20

II. NATURE OF PROCEEDINGS BELOW

On or about August 21, 2003, the Appellees, Brenton L. Ferrell and Kathleen D. Ferrell filed a declaratory judgment action in the Circuit Court of Mercer County, West Virginia, against Nationwide Mutual Insurance Company ("Nationwide") and Shelley Newman, seeking a declaration of the rights and obligations of the Defendants Nationwide and Ms. Newman to the Appellees under a Nationwide insurance policy. The policy contained an amendatory endorsement which provided that Nationwide may seek reimbursement of benefits paid to an insured for medical expenses resulting from injuries while occupying an insured vehicle. (See Certified Copy of Nationwide Policy No. 92 47 H 890080, Exhibit A at Amendatory Endorsement 2256C attached to Nationwide's Cross-Motion for Summary Judgment of Nationwide Mutual Insurance Company; see also Copy of Appellees' Complaint for Declaratory Judgment). Subsequent to the filing of the declaratory judgment Complaint, an Answer was filed on behalf of the Defendant Nationwide, while a Motion to Dismiss was filed on behalf of the Defendant Shelley Newman. The Motion to Dismiss resulted in an Agreed Order dismissing, without prejudice, the Defendant Shelley Newman as a party in this action.

Thereafter, the Appellees filed a Motion for Summary Judgment, arguing that regardless of the language in the Nationwide policy, which clearly provided the insurer the right to reimbursement of the medical payments it paid under the terms of the relevant policy, Nationwide was seeking subrogation. The Appellees maintained that, according to Richards v. Allstate Insurance Company, 193 W. Va. 244, 455 S.E.2d 803 (1995), subrogation in favor of an insurer against its own insured is not permitted. Consequently, the Appellees argued that Nationwide was not entitled to reimbursement of the medical expenses it had paid under the salient policy. The Appellees further

argued that the Nationwide policy provisions were ambiguous and, therefore, the policy should be interpreted in favor of the insureds. (See Plaintiffs' Motion for Summary Judgment and Memorandum in Support Thereof).

The Appellant responded to the Appellees' summary judgment Motion and also filed its own Cross-Motion for Summary Judgment. The crux of Nationwide's argument concerning summary judgment was that the Nationwide policy was amended to comport with the dictates enunciated by the Court in Richard and, accordingly, Nationwide was entitled to reimbursement of payments made for medical expenses. Additionally, Nationwide argued that the policy provision at issue was clear and unambiguous and, therefore, that language should be applied as written and not interpreted by the courts. (See Nationwide's Cross-Motion for Summary Judgment and Combined Memorandum of Law in Response to Plaintiffs' Motion for Summary Judgment and In Support of Nationwide Mutual Insurance Company's Cross-Motion for Summary Judgment).

A hearing was conducted on April 28, 2004, at which time the Circuit Court indicated that it would deny both parties' Motions for summary judgment and certify a question to the West Virginia Supreme Court regarding whether Nationwide was entitled to reimbursement of medical payments under the relevant insurance policy provision. An Order of Certification was then entered by the Circuit Court of Mercer County, West Virginia on or about July 2, 2004. (See Copy of Order of Certification entered July 2, 2004, attached as Exhibit A to Appellant's Petition For Certified Question Review). It is significant to note at this point, that just months before this Order was entered, another judge sitting in the same circuit, found that a similar policy provision providing for reimbursement of medical payments comported with this Court's decision in Richards. See State Farm Mutual Automobile Insurance Company v. Justus, Civil Action No. 01-C-324 (Cir. Ct. Mercer

County filed December 3, 2003) (Judge Derek C. Swope, presiding) (attached as Exhibit B to Appellant's Petition for Certified Question Review).¹ The circuit court held in Justus that the reimbursement provision was clear and unambiguous and allowed the insurer to seek and obtain reimbursement for medical payments made to the defendants in that action. This Court accepted the certified question presented for review.

III. STATEMENT OF FACTS

On January 19, 2002, the Plaintiff Kathleen D. Ferrell² was an insured under a Nationwide automobile insurance policy, Policy No. 92 47 H 890080, issued to Mary S. and Clarence D. Baldwin (hereinafter sometimes referred to as "the Baldwin policy").³ On that day, Ms. Ferrell was

¹Similarly, the Circuit Court of Kanawha County, West Virginia has recently entered an Order Granting Plaintiff Summary Judgment as Against All Defendants in State Farm Mutual Automobile Insurance Company v. Facemyre, Civil Action No.: 01-C-1565 (Cir. Ct. Kanawha County filed April 20, 2004) (Judge Bailey-Walker presiding) (attached as Exhibit C to Appellant's Petition for Certified Question Review). In the Facemyre decision, the circuit court found that "the West Virginia Supreme Court explicitly authorized such reimbursement policy provisions in the Richards v. Allstate decision," and that the State Farm policy provision at issue in that case was a "reimbursement clause." (See Exhibit C, p. 9, attached to Appellant's Petition for Certified Question Review). Thus, the circuit court concluded that State Farm was entitled to summary judgment and that "[e]ach of the defendants must reimburse State Farm for all sums paid to or on behalf of defendants under each of the defendants' own medical reimbursement coverage, subject to a pro rata reduction for attorney's fees, costs and expenses in obtaining the underlying liability settlements." (See Exhibit C, p. 13, attached to Appellant's Petition for Certified Question Review). Appellees argue that these two State Farm cases are distinguishable because "[t]here is no language regarding 'subrogation' contained in the State Farm policy as is contained in the Nationwide policy." (See, Appellees' Response to Nationwide Mutual Insurance Company's Petition for Certified Review, p. 13). This is only technically correct because State Farm chose to use the phrase "pass your rights of recovery to us" instead of the word "subrogation" in its policy provision. (See, Exhibit B, p. 8 and Exhibit C, p. 7, attached to Appellant's Petition for Certified Question Review). The Appellees' argument is fatally flawed, however, because the State Farm policies, like the Nationwide policy, provides the insurer two different rights for the recovery of medical payments coverage when the insured receives duplicate recovery.

²Kathleen Ferrell's maiden name is Baldwin.

³The Order of Certification to the West Virginia Supreme Court of Appeals entered July 2, 2004, contains undisputed facts as identified by the Circuit Court. Nationwide also sets forth the factual recitation supra, which incorporates some of the Circuit Court's factual findings, as well as additional facts that Nationwide has identified as being relevant to the resolution of the certified question posed.

driving a 2001 Dodge Neon, which was insured under the Baldwin policy. The Plaintiff, Brenton L. Ferrell, was a passenger in the vehicle being operated by his wife. The Appellees sustained bodily injury when their vehicle collided with a vehicle driven by Kermit Davis, which was also insured under an automobile liability insurance policy issued by the Defendant Nationwide.⁴ (See Order of Certification at ¶ 1 and Nationwide's Cross-Motion for Summary Judgment at pp.1-2).

The provisions of the Baldwin policy included Family Compensation Coverage, which provided for the payment of medical expenses resulting from accidental bodily injury suffered while the insured was occupying an insured vehicle regardless of fault. (See Certified Copy of Nationwide Policy No. 92 47 H 890080, Exhibit A at p. 11, attached to Nationwide's Cross-Motion for Summary Judgment). Pursuant to this coverage, Nationwide paid medical expenses incurred by the Appellees as a result of the accident in the amounts of \$2,982.61 for Mrs. Ferrell and \$1,884.76 for Mr. Ferrell, respectively. (See Order of Certification at ¶ 2).

The Court found that, after receiving the Family Compensation benefits from the Baldwin policy, the Appellees presented a claim against the tortfeasor, who was also a Nationwide insured. (See Order of Certification at ¶ 3). The Court further found that "[i]n conjunction with their claim for damages against Kermit D. Davis, the Ferrells submitted the same medical expenses for which they had previously received payment from Nationwide under the Family Compensation Coverage of the Baldwin policy." (See Order of Certification at ¶ 3). The Appellees were offered a settlement under the liability portion of the policy issued to Mr. Davis. (See Nationwide's Cross-Motion for Summary Judgment, Exhibit B, letter dated May 15, 2003, from Janet Williamson to Lake Wykle and copied to Shelley Newman). As part of the settlement negotiations, the Appellees requested that

⁴The Nationwide policy maintained on the Davis vehicle is not the subject of the instant litigation.

Nationwide waive its rights to "subrogation" of the medical payments made under the Baldwin policy. (See Nationwide's Cross-Motion for Summary Judgment, Exhibit B, letter dated May 15, 2003, from Janet Williamson to Lake Wykle and copied to Shelley Newman). Nationwide responded to the Appellees' request by advising them that, under the relevant Nationwide policy provisions, specifically Endorsement 2256C, the insurer was entitled to reimbursement of, not subrogation for, the payment of medical expenses which the insurer had paid under the Baldwin policy and that it would not waive its right to reimbursement. (See Nationwide's Cross-Motion for Summary Judgment, Exhibit C, letter dated May 15, 2003, from Shelley Newman to Janet Williamson).

Specifically, at issue was the following policy language found in Endorsement 2256C, under GENERAL POLICY CONDITIONS:

5. SUBROGATION

We have the right of subrogation under the:

- c) Medical Payments;
- d) Family Compensation;

coverages in this policy. This means that after paying loss to **you** or others under this policy, **we** will have the **insured's** right to sue for or otherwise recover such loss from anyone else who may be liable. Also, if the **insured** receives a recovery from any liable party, including another Nationwide insured, **we** may require the **insured** to reimburse us when the proceeds of recovery duplicate **our** payment. These provisions will be applied in accordance with state law. Any **insured** will sign such papers, and do whatever else is necessary, to transfer these rights to **us** and will do nothing to prejudice them.

(See Certified Copy of Nationwide Policy No. 92 47 H 890080, Exhibit A, attached to Nationwide's Cross-Motion for Summary Judgment) (emphasis added). This particular endorsement was

submitted by Nationwide to the West Virginia Insurance Commissioner for approval to be used in conjunction with its Century II Auto Policy (Auto 6163-B) on March 17, 2000,⁵ as required by the provisions of West Virginia Code § 33-6-8.⁶ Endorsement 2256C was approved by the West Virginia Insurance Commissioner for use in West Virginia on or after July 8, 2000. (See Order of Certification at ¶ 12).

Ms. Ferrell and Mr. Ferrell subsequently settled their respective liability claims under the Davis policy. Ms. Ferrell received the amount of \$8,031.48 and Mr. Ferrell received the amount of \$4,756.06, which amounts reflected the uncontested sums of the settlement. (See Nationwide's Cross-Motion for Summary Judgment at pp. 2-3). Separate checks issued to Ms. Ferrell and Mr. Ferrell in the amounts of \$1,968.52 and 1,243.94, reflected the contested medical payments amounts at issue. (See Order of Certification at ¶ 10). Additionally, as part of the settlement negotiated

⁵The Filing Memorandum submitted to the West Virginia Insurance Commissioner, evinced in the March 17, 2000, letter from Nationwide to the Commissioner, the Honorable Hanley Clark, provides the following concerning reimbursement provision: "5. SUBROGATION . . . Further clarification has been added to the third sentence to provide for recovery from any liable party, including another Nationwide insured." (See Exhibit D, attached to Nationwide's Cross-Motion for Summary Judgment).

⁶West Virginia Code § 33-6-8 (a) provides:

(a) Except as provided in section eight, article seventeen of this chapter (fire and marine forms), no insurance policy form, no group certificate form, no insurance application form where written application is required and is to be made a part of the policy, and no rider, endorsement or other form to be attached to any policy, shall be delivered or issued for delivery in this state by an insurer unless it has been filed with and approved by the commissioner, except that as to group insurance policies delivered outside this state, only the group certificates to be delivered or issued for delivery in this state shall be filed for approval with the commissioner. This section shall not apply to policies, riders, endorsements or forms of unique character designed for and used with relation to insurance upon a particular subject, or which relate to the manner of distribution of benefits or to the reservation of rights and benefits under life or accident and sickness insurance policies, and are used at the request of the individual policyholder, contract holder or certificate holder, nor to the surety bond forms.

Id.

between the parties, the Appellees agreed to release the tortfeasor but reserved the right to pursue the declaratory judgment action challenging Nationwide's right to enforcement of the reimbursement provisions applicable to the medical expense payments made under the Family Compensation Coverage of the Baldwin policy.

IV. CERTIFIED QUESTION PRESENTED

Whether the policy provisions of the Century II Auto Policy, as amended by Endorsement 2256C, provide clear and unambiguous language which creates a contractual right to reimbursement of medical expense payments where an insured received a recovery from another Nationwide insured and the proceeds of that recovery duplicate the insurer's previous payment.

V. POINTS AND AUTHORITIES

In Conformity With the Unequivocal Instruction Given by the Court in Richards v. Allstate, 193 W. Va. 244, 455 S.E.2d 803 (1995), the Clear and Unambiguous Policy Provisions Contained within the Nationwide Policy, as amended by Endorsement 2256C, Create a Contractual Right to Reimbursement of Medical Expense Payments Where a Nationwide Insured Received a Recovery From Another Nationwide Insured and the Proceeds of That Recovery Duplicate the Insurer's Previous Payment of Medical Expenses.

Richards v. Allstate, 193 W. Va. 244, 455 S.E.2d 803(1995).

Control Specialists Co. v. State Farm Mut. Auto. Ins. Co., 423 N.W.2d 775 (Neb. 1988).

Reichl v. State Farm Mut. Auto. Ins. Co., 880 P.2d 558 (Wash. Ct. App. 1994).

Maynard v. State Farm Mut. Auto. Ins. Co., 902 P.2d 1328 (Alaska 1995).

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York v. Sevier County Ambulance Auth., 8 S.W.3d 616 (Tenn. 1999).

Barreca v. Cobb, 668 So.2d 1129 (La. 1996).

Soliva v. Shand, Morahan & Co., 176 W. Va. 430, 345 S.E.2d 33 (1986).

Thompson v. State Auto. Mut. Ins. Co., 122 W. Va. 551,
11 S.E.2d 849 (1940).

West Virginia Fire & Cas. Co. v. Stanley, ___ W. Va. ___, 602 S.E.2d 483,
2004 WL 1144050 (W. Va., May 21, 2004).

Joslin v. Mitchell, 213 W. Va. 771, 584 S.E.2d 913 (2003).

West Virginia Code § 33-6-9(b).

West Virginia Code § 33-6-8.

West Virginia Code § 33-6-30(c).

VI. DISCUSSION OF LAW

A. Standard of Review

As the Court most recently opined in Osborne v. United States, 211 W. Va. 667, 567 S.E.2d 677 (2002),

[w]hen this Court is called upon to resolve a certified question, we employ a plenary review. " 'A de novo standard is applied by this [C]ourt in addressing the legal issues presented by a certified question from a federal district or appellate court.' Syl. Pt. 1, Light v. Allstate Ins. Co., 203 W.Va. 27, 506 S.E.2d 64 (1998)." Syl. pt. 2, Aikens v. Debow, 208 W.Va. 486, 541 S.E.2d 576 (2000). Accord Syl. pt. 1, Bower v. Westinghouse Elec. Corp., 206 W.Va. 133, 522 S.E.2d 424 (1999) ("This Court undertakes plenary review of legal issues presented by certified question from a federal district or appellate court.").

Osborne, 211 W. Va. at 670, 567 S.E.2d at 680. Moreover, it is undisputed that the question posed by the Circuit Court of Mercer County, West Virginia, for this Court's determination is a question of law. As the Court stated in Feliciano v. 7-Eleven, Inc., 210 W. Va. 740, 559 S.E.2d 713 (2001),

[d]uring our consideration of questions of law, be they presented by certification or otherwise, we employ a de novo standard of review. "To the extent that we are asked to interpret a statute or address a question of law, our review is de novo. State v.

Paynter, 206 W. Va. 521, 526, 526 S.E.2d 43, 48 (1999). Accord Syl. pt. 2, Coordinating Council for Indep. Living, Inc. v. Palmer, 209 W. Va. 274, 546 S.E.2d 454 (2001) (“Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.’ Syllabus point 1, Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995).”).

Feliciano, 210 W. Va. at 744, 559 S.E.2d at 717. There is no doubt that the current question posed by the Circuit Court is a question of law as the relevant material facts are not in dispute and this question centers upon the determination of coverage. As this Court enunciated in syllabus point one of Tennant v. Smallwood, 211 W. Va. 703, 568 S.E.2d 10 (2002), “[d]eterminations of the proper coverage of an insurance contract when the facts are not in dispute is a question of law.” It is with this standard of review in mind that the Court should undertake its review and its determination of the certified question posed by the Circuit Court.

B. In Conformity With the Unequivocal Instruction Given by the Court in Richards v. Allstate, 193 W. Va. 244, 455 S.E.2d 803 (1995), the Clear and Unambiguous Policy Provisions Contained Within the Nationwide Policy, as Amended by Endorsement 2256C, Create a Contractual Right to Reimbursement of Medical Expense Payments Where a Nationwide Insured Received a Recovery From Another Nationwide Insured and the Proceeds of That Recovery Duplicate the Insurer’s Previous Payment of Medical Expenses.

The issue in this case is rather straightforward -- whether this Court gave express direction to insurance companies, in Richards v. Allstate, 193 W. Va. 244, 455 S.E.2d 803 (1995), to include reimbursement language in insurance policies which would allow an insurer to recover, from an insured, medical expense payments where the insured received a recovery from a separate policy of insurance by the same company and which recovery duplicates the insurer’s previous payment of medical expenses. The Defendant Nationwide maintains that the Court did give such express direction in Richards, and pursuant to that direction, Nationwide amended its policy of insurance to

include a reimbursement clause which clearly and unambiguously provides the insurer with a contractual right to reimbursement of medical expense payments it made to the Appellees under the relevant policy provisions.

In contrast, the crux of the Appellees' arguments concerning the certified question posed by the Circuit Court is that the Defendant Nationwide is entitled neither to subrogation, nor reimbursement, of the medical payments coverage Nationwide paid under Policy No. 92 47 H 890080 because Nationwide's reimbursement claim is nothing more than subrogation and, therefore, is disallowed under the Richards decision. See 193 W. Va. 244, 455 S.E.2d 803. In support of this argument, the Appellees go to great lengths to blur the clear distinction between subrogation and reimbursement so as to transmute what is plainly a right to reimbursement into subrogation to support the Appellees' claim that the policy language at issue is "ambiguous." The Appellees' argument, however, totally ignores the clear and express instruction given by the Court in Richards to insurance companies. The Court instruction in Richards unequivocally provides an insurance company the right to include reimbursement language in an insurance policy to prevent an insured from receiving a double recovery. Id. 193 W. Va. at 249, 455 S.E.2d 808.

In order to answer the Circuit Court's certified question, it is essential to begin by reviewing the Court's decision in Richards, which presents a factual scenario that is analogous to the instant matter. The plaintiffs in Richards were involved in an automobile accident and sustained injuries. The plaintiffs' vehicle, which was insured by Allstate Insurance Company ("Allstate"), had collided with a vehicle driven by Elisha Workman, the tortfeasor, who was also insured by Allstate. Id. 193 W. Va. at 246, 455 S.E.2d at 805. Pursuant to the plaintiffs' policy, Allstate paid the plaintiffs \$2,000 each for medical bills they had incurred as a result of the accident. The plaintiffs then settled

their case with the tortfeasor, Ms. Workman, for \$59,000, which was less than Ms. Workman's liability limit of \$300,000. Id. Allstate sought repayment of the \$4,000 it had paid to the plaintiffs under their policy from the settlement the plaintiffs made with the tortfeasor. Id.

The plaintiffs filed a declaratory judgment action with the circuit court seeking a determination that Allstate had no right to reimbursement of the medical payments it made to the plaintiffs under their policy because Allstate could not enforce a right of subrogation against its own insured tortfeasor. Id. On cross-motions for summary judgment, the circuit court denied Allstate's motion and granted the plaintiffs' motion, determining that Allstate had no subrogation right against the tortfeasor. Id. 193 W. Va. at 245, 455 S.E.2d at 804.

On appeal, Allstate argued that it was entitled to receive reimbursement for the medical payments made to the plaintiffs under their insurance policy to prevent the plaintiffs from receiving a double recovery. Id. In regard to this public policy argument, the Court acknowledged that "there are competing public policy interests to consider." Id. 193 W. Va. at 246, 455 S.E.2d 805. Consequently, the Court was forced to resolve the issue by determining whether the subrogation clause contained within the Allstate policy afforded the insurer the right to repayment of the medical expenses.

In Richards, the Court found that the policy did not afford the insurer this right because "the plaintiffs' policy d[id] not contain any language providing for reimbursement." Id. 193 W. Va. at 247, 455 S.E.2d at 806. The Richards decision clearly centered upon "Allstate's alleged right of subrogation and any rights the plaintiffs have by virtue of the terms of the contract." Id. 193 W. Va. at 248, 455 S.E.2d 807. Unlike the Nationwide policy, the Allstate policy only provided Allstate a right of subrogation under which the insurer could seek repayment of the medical expenses paid to

its insured. Succinctly stated, the issue before the Court in Richards was solely whether an insurance company could “receive reimbursement via a right of subrogation against its own insured tortfeasor[.]” and the Court concluded that the insurer could not. Id.

For this reason, the Court affirmed the circuit court’s decision, holding in syllabus two of Richards that “[n]o right of subrogation can arise in favor of an insurer against its own insured, since by definition subrogation arises only with respect to rights of the insured against third persons to whom the insurer owes no duty.” Id. 193 W. Va. at 245, 455 S.E.2d at 804, Syl. Pt. 2.. The Court explained that “the most obvious public policy reason for this rule is to prevent an insurance carrier from having a conflict of interest.” Id. at 246, 455 S.E.2d at 805. Citing a Nebraska decision, Stetina v. State Farm Mutual Automobile Insurance Co., 196 Neb. 441, 243 N.W.2d 341, the Court further explained that a conflict of interest arises when an insurer has a subrogation right against its own insured because, among other things, an insurer would be permitted to obtain information from the tortfeasor insured under the “guise of policy provisions” for use against that same insured in the insurer’s subrogation action to establish the liability of the tortfeasor insured. Richards, 193 W.Va. at 247; 455 S.E.2d at 806, citing Stetina, 196 Neb. at 451, 243 N.W.2d at 346 (further citation omitted). Additionally, the Court explained in Richards, the inherent conflict of interest created by subrogation against the insurer’s own insured would permit the “insurer to take advantage of its conduct and conflict of interest with its insured.” Id.⁷ Conversely, the right to reimbursement from

⁷Appellees argue that Richards sets forth another reason that a conflict of interest is created by a subrogation right that would be equally applicable to a right of reimbursement. Specifically, they rely upon a portion of Richards which states that a conflict arises because the insurer would use premiums collected from its tortfeasor insured to obtain recovery against that insured for the risk against which the policy insured. See Appellee’s Response to Nationwide Mutual Insurance Company’s Petition for Certified Question Review, p. 10. The fallacy of this argument is established by the sentence preceding the Appellee’s citation, and which was omitted from their response. The Richards decision stated that this is a conflict where “the insurer [is permitted] to sue its own insured for **liability** covered by the insurance policy.”

the claimant insured does not require the insurer to establish liability for the cause of injuries against its own insured. The insurer need only prove that the insured was paid the benefit and the insured received a recovery which duplicated the payment. This would not require proof from the underlying liability case. Thus, there is no inherent conflict of interest in the right to reimbursement.

Let there be no mistake, however, that the Court in Richards, in very precise language, authorized the incorporation of reimbursement policy provisions in an insurance policy as a means by which the insurer could rightfully seek reimbursement of medical expenses paid to an insured. This is evidenced by the fact that, on no less than six different occasions in the Richards decision, which is little more than five pages in length, the Court instructed and re-instructed insurance companies that reimbursement of medical expense payments in situations such as the case subjudice were permissible so long as the clear and unambiguous language to that effect was included in the insurance policy. Id. 193 W. Va. at 249, 455 S.E.2d at 808. The Court's emphasis on the inclusion of reimbursement language in the insurance policy to allow the type of reimbursement sought by the insurer Allstate in Richards was first noted when the Court stated that "the plaintiffs' policy does not contain any language with regard to subrogation." Id. 193 W. Va. at 247, 455 S.E.2d at 806. The Court next states that "[a]lthough Allstate could have placed language in its policy providing for reimbursement in this type of situation it did not." Id. 193 W. Va. at 247-48, 455 S.E.2d at 806-07. Further, in very explicit language the Court instructed insurers that

[t]he best way an insurance carrier can prevent a situation like the present one from arising is to place clear and unambiguous language in its policy providing for the reimbursement of medical payments it may advance to its insured to the extent

Richards 193 W. Va. at 247, 455 S.E.2d at 806, citing Stetina, *supra* (citation omitted) (emphasis added). A claim for medical payments coverage is a first-party claim and is a totally different creature from a third-party claim for liability coverage.

such medical payments are compensated by a settlement with or judgment against a tortfeasor whom it also insures.

Id. 193 W. Va. at 249, 455 S.E.2d at 808 (emphasis added). The Court then, in very unambiguous and plain language, tells the insurer, Allstate, in Richards how to prevent double recoveries by plaintiffs regarding the medical expense payment issue: “Allstate is bound by the provisions of its own policy; and, **if it desires to prevent double recoveries, it should place reimbursement language in its policies as previously discussed.**” Id. (emphasis added). In emphasizing the importance of the reimbursement language in the insurance policy the Court, in rejecting Allstate’s argument that reimbursement “creates a situation where plaintiffs are treated differently depending upon whether the tortfeasor has the same insurance carrier as the plaintiffs[,]” stated that “[i]f they are treated differently by receiving double recoveries, it is by virtue of the lack of reimbursement language in the insurance policies.” Id. Finally, despite the fact that the ensuing portion of the Richards opinion was not elevated to syllabus point status, the Court, nevertheless, used the express term “holding” which undisputedly signifies the importance of said language as follows:

we **hold** the best way to deal with this problem is not to permit an insurance carrier to assert a right of subrogation against one of its own insured, but rather **to have an insurance carrier insert clear and unambiguous language with regard to reimbursement in its policies.**

Id. (emphasis added). Unquestionably, based upon the Richards decision, an insurer may seek reimbursement from its own insured if the insurer places “clear and unambiguous language” providing for such reimbursement in its policies. See id.

Consequently, in the instant case, Nationwide, in following the precept enunciated by the Court in Richards, submitted Amendatory Endorsement 2256C to the West Virginia Insurance Commissioner for approval to be used in conjunction with its Century II Auto Policy (Auto 6163-B)

on March 17, 2000, as required by the provisions of West Virginia Code § 33-6-8,⁸ in order to conform its policy to the dictates of the Richards decision.⁹ This inclusion of a reimbursement clause into the Nationwide policy in the case subjudice is the distinguishing factor between the Richards case and the instant matter, given that the Allstate policy at issue in Richards contained no such reimbursement language. As previously mentioned, Endorsement 2256C amended the GENERAL POLICY CONDITIONS of the relevant Nationwide policy to clearly and unambiguously provide contractual language which allows Nationwide to seek reimbursement of medical payments as follows:

5. SUBROGATION

We have the right of subrogation under the:

- ...
c) Medical Payments;
- d) Family Compensation;
- ...

coverages in this policy. This means that after paying loss to **you** or others under this policy, **we** will have the **insured's** right to sue for or otherwise recover such loss from anyone else who may be liable. Also, if the insured receives a recovery from any liable party, including another Nationwide insured, we may require the insured to reimburse us when the proceeds of recovery duplicate our payment. These provisions will be applied in accordance with state law. Any **insured** will sign such papers, and do whatever else is necessary, to transfer these rights to **us** and will do nothing to prejudice them.

(See Certified Copy of Nationwide Policy No. 92 47 H 890080, Exhibit A, attached to Nationwide's Cross-Motion for Summary Judgment)(emphasis added). The policy language which clearly and unambiguously provides that "if the **insured** receives a recovery from any liable party, including another Nationwide insured, we may require the insured to reimburse us when the proceeds of

⁸See note 6 *supra*.

⁹Endorsement 2256C was approved by the West Virginia Insurance Commissioner for use in West Virginia on or after July 8, 2000. (See Order of Certification at ¶ 12).

recovery duplicate our payment” comports with the directive of the Court in Richards. As directed by the Richards decision, Nationwide “**place[d] clear and unambiguous language in its policy providing for the reimbursement of medical payments it may advance to its insured to the extent such medical payments are compensated by a settlement with or judgment against a tortfeasor whom it also insures.**” Richards, 193 W. Va. at 249, 455 S.E.2d at 808 (emphasis added). This was done to prevent a double recovery, which the Court acknowledged, in Richards, was a valid reason for the incorporation of such language into an insurance policy. See Id. (stating that “we understand Allstate’s concern with regard to preventing insureds from receiving double recoveries . . .” and “if it [referring to the insurer, Allstate] desires to prevent double recoveries, it should place reimbursement language in its policies. . .”). Id. 193 W. Va. at 249, 455 S.E.2d 808.

Like the Court in Richards, other jurisdictions have similarly advocated the use of reimbursement clauses in insurance policies as a means of preventing a plaintiff from receiving a double recovery. For instance, in Control Specialists Co. v. State Farm Mutual Automobile Insurance Co., 423 N.W.2d 775 (Neb. 1988), a case relied upon by the Court in Richards, the Supreme Court of Nebraska held that

[w]here two motor vehicles covered by the same insurance carrier collide, the nonnegligent driver may recover for damage to his vehicle under the negligent driver’s liability insurance and again under the property damage clause of his own insurance policy **unless the nonnegligent driver’s policy limits such recovery.**¹⁰

Id. at 775, Syl. Pt.2. (emphasis added)(footnote added).

¹⁰This limitation of such recovery, i.e. the inclusion of the reimbursement clause policy provision, is exactly what Nationwide has included in its policy in the instant case.

Additionally, in Reichl v. State Farm Mutual Automobile Insurance Co., 880 P.2d 558 (Wash. Ct. App. 1994), the Court of Appeals of Washington upheld the insurer's right of reimbursement of medical expense payments from its insured as follows:

Reichl next argues that State Farm has no right to be reimbursed because it could not subrogate against Stetz, its own insured. We assume that State Farm could not subrogate against Stetz because, if it did so, it would breach its promise to indemnify him. State Farm, however, is not attempting to subrogate against Stetz. Rather, it is claiming a reimbursement from the proceeds of the Reichl-Stetz judgment. . . .

Id. at 456-57. Consequently, the Reichl court upheld the insurer's right to reimbursement, in part, because "the parties' insurance contract . . . statc[d] that State Farm will be entitled to reimbursement" Id. at 457.

Lastly, the Supreme Court of Alaska, in Maynard v. State Farm Mutual Automobile Insurance Co., 902 P.2d 1328 (Alaska 1995), was presented with a virtually identical factual scenario to that in the instant case. An insured brought suit against his automobile insurer, alleging that any attempt by the insurer to seek reimbursement for medical expenses the insurer had paid under the insured's medical payments coverage would violate the rule that an insurer could not subrogate against its own insured where the third-party tortfeasor was also insured by the same automobile insurer. Id. at 1329. The Maynard court determined that "[n]either the insurance contract language nor public policy prohibits State Farm from seeking reimbursement for the medical expenses it paid under . . . [the plaintiff's] Medical Payments Coverage" from the settlement with the third-party tortfeasor, who was also insured by State Farm. Id. at 1334. In reaching this decision, the Alaska court explained the purpose of medical payments coverage and the benefits an insured receives by purchasing that coverage. The court explained that

[t]he medical payments provision performs numerous important functions. It permits speedy reimbursement for medical expenses without regard to fault; it assures

coverage when the insured is involved in an accident with an uninsured or underinsured driver; and in situations where both parties to an accident are insured by the same insurer it sometimes eliminates the need for costly litigation to determine fault.

Id. at 1334.¹¹

Succinctly stated, in the instant case, the Appellees, despite insinuations raised in arguments to the contrary, got exactly what the Baldwins paid a premium for in Family Compensation expenses coverage – Nationwide, without question as to fault, paid the medical expenses incurred by the Appellees within the limits of liability of the Baldwin policy Family Compensation coverage. The Appellees also received the peace of mind that their medical expenses were being paid, pending the resolution of their claim against the tortfeasor. What was contracted for in purchasing this coverage from Nationwide was to receive one payment of medical expenses, not a double recovery. This Court expressly acknowledged, in Richards, that double recovery of medical payments was a legitimate concern for insurers and that it can be prevented by the inclusion of a reimbursement clause. See 193 W. Va. at 249, 455 S.E.2d at 808.

Accordingly, because the reimbursement clause contained within the relevant Nationwide policy contains language dictated by the Court in Richards which allows Nationwide to recover medical expense payments advanced to a claimant insured and for which the insured received a double recovery, the reimbursement clause policy provision is valid and enforceable.

¹¹This explanation offered by the Maynard court refutes one of the arguments raised by the Appellees, which was essentially “if the medical payments must be returned, exactly what is purchased by the insured with his medical payment premium?” (See Plaintiffs’ Motion for Summary Judgment and Memorandum In Support Thereof at p.7; see also Plaintiffs’ Response to Nationwide’s Cross-Motion for Summary Judgment and Reply to Nationwide’s Response to Plaintiff’s [sic] Motion for Summary Judgment at p.1). Essentially, medical payments coverage assures first, and foremost, prompt payment of medical expenses resulting from injuries while occupying an insured vehicle. Secondly, the coverage assures “peace of mind” because the insured knows payment will be made up to the limits purchased.

In their concerted effort to defeat a valid and enforceable reimbursement clause policy provision contained within the Nationwide policy at issue, the Appellees assert that said policy provision is ambiguous because the relevant policy provision addresses both subrogation and reimbursement. Again, the Appellees' argument on this issue demonstrates a complete lack of understanding of the legal principles by which the Court must address the interpretation of an insurance contract. In Soliva v. Shand, Morahan & Co., 176 W. Va. 430, 345 S.E.2d 33 (1986), the Court set forth the following basic legal principles to be used in determining whether an insurance policy needs interpretation and, if so, how to engage in said interpretation:

(1) The contract should be read as a whole with all policy provisions given effect. See generally 2 Couch on Insurance 2d § 15:29 (rev. ed. 1984). If the policy as a whole is unambiguous **then the insured will not be allowed to create an ambiguity out of sections taken out of context.**

(2) The policy should be given its plain, ordinary meaning. See, e.g., Adkins v. American Casualty Co., 145 W. Va. 281, 285, 114 S.E.2d 556, 559 (1960). In no event should the plain language of the policy be twisted or distorted. See Green v. Farm Bureau Mut. Auto. Ins., 139 W. V. 475, 477, 80 S.E.2d 424, 425 (1954). A doubt which would not be tolerated in other kinds of contracts will not be created merely because the contract is one of insurance. See generally 2 Couch on Insurance 2d § 15:86 (rev. ed. 1984).

(3) A policy should never be interpreted so as to create an absurd result, but instead should receive a reasonable interpretation, consistent with the intent of the parties. See e.g. Thompson v. State Auto Mut. Ins., 122 W. Va. 551, 554, 11 S.E.2d 849, 850 (1940).

(4) If, after applying the above rules, reasonably prudent and intelligent people could honestly differ as to the interpretation of the contract language, then an ambiguity will be said to exist. See syl. pt. 1, Prete v. Merchants Property Ins., 159 W. Va. 508, 223 S.[E.]2d 441 (1976); 2 Couch on Insurance 2d § 15:84 (rev'd ed. 1984). Any ambiguity in an insurance contract will be interpreted against the insurer unless it would contravene the plain intent of the parties. See, e.g., syl. pt. 2, Marson Coal Co. v. Insurance Co. of Pa., 158 W. Va. 146, 210 S.E.2d 747 (1974).

176 W. Va. at 432-33, 345 S.E.2d at 34-35 (emphasis added). Finally,

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. Christopher v. United States Life

Ins. Co., 145 W. Va. 707, 116 S.E.2d 864 (1960). Syl. Pt. 3, Soliva, 176 W. Va. at 431, 345 S.E.2d at 33.

The Appellees attempt to distort and confuse the concepts of subrogation and reimbursement in an effort to have the Court determine that the reimbursement clause is ambiguous. As Nationwide argued before the lower court, the legal definitions of the words "subrogation" as opposed to the word "reimbursement" have vastly different meanings under the law. The word "subrogation" is defined as

The substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities. The right of one who has paid an obligation which another should have paid to be indemnified by the other. The lawful substitution of a third party in place of a party having a claim against another party. Insurance companies . . . generally have the right to step into the shoes of the party whom they compensate and sue any party whom the compensated party could have sued.

Black's Law Dictionary at p. 743 (5th ed. 1983). The term "reimbursement", however, is defined simply as "[t]o pay back, to make restoration, to repay that expended; to indemnify . . ." Black's Law Dictionary at p.669 (5th ed. 1983).¹² Thus, while subrogation "arises only with respect to rights of the insured against third persons to whom the insurer owes no duty," see Richards, 193 W. Va. at 246, 455 S.E.2d at 805 (citation omitted), as noted by the Maynard court;

'[t]he right to reimbursement provision is a contractual setoff distinct from a subrogation. Enforcement of the provisions is not the functional equivalent to suit against one to whom the insurer owes an indemnity obligation.' In other words, where both the claimant and tortfeasor are insured by the same company, this provision does not give rise to a cause of action initiated by the insurance company against its insured. **Instead, it is an automatic setoff which occurs only as a result**

¹²Even the most basic of definitions for these terms readily reveals the differences between the two terms. For instance, according to Merriam-Webster Online, the term "subrogation" is defined as "the assumption by a third party (as a second creditor or an insurance company) of another's legal right to collect a debt or damages." Conversely, the term "reimbursement" is defined as "to pay back to someone." Merriam-Webster Online at <http://www.m-w.com/dictionary.htm>.

of the insured seeking damages which he has already been compensated for under his own policy.

Maynard, 902 P.2d at 1333. (emphasis added).¹³

Thus, despite the Appellees' attempts to confuse the definitions of the words "reimbursement" with "subrogation," in an effort to make them one and the same, the simple reality is that the two concepts are clearly different. In this case, Nationwide does not intend to substitute itself for the Appellees or otherwise attempt to recover any portion of the Appellees' losses directly from the tortfeasor insured. Rather, Nationwide merely seeks to be reimbursed by the Appellees from the proceeds that the Appellees have received from their settlement with the tortfeasor.

Therefore, in this case, the Nationwide policy when read as a whole, clearly provides that Nationwide has a contractual right to seek reimbursement of medical expense payments previously paid on behalf of an insured from proceeds that an insured receives from a tortfeasor who is also an insured. This right to seek reimbursement is clearly and unambiguously expressed in the following policy provision: "Also, if the insured receives a recovery from any liable party, including another Nationwide insured, we may require the insured to reimburse us when the proceeds of recovery duplicate our payment." (See Certified Copy of Nationwide Policy No. 92 47 H 890080, Exhibit A, attached to Nationwide's Cross-Motion for Summary Judgment).

¹³See also York v. Sevier County Ambulance Auth., 8 S.W.3d 616, 618-19 (Tenn. 1999) ("In the context of insurance, subrogation allows the insurer to 'stand in the shoes' of the insured and assert the rights the insured had against a third party. In contrast, a right of reimbursement simply allows the insurer to recoup payments from the insured which had been made on the insured's behalf.") (citations omitted); Barreca v. Cobb, 668 So.2d 1129, 1131 (La. 1996) ("With subrogation, the insurer stands in the shoes of the insured and acquires the right to assert the actions and rights of the plaintiff, whereas with reimbursement, the insurer has only a right of repayment against the insured.").

Although the provision of the Nationwide policy which contains a reimbursement clause which unquestionably conforms with the Court's Richard decision, contains language concerning Nationwide's subrogation rights, this alone does not render the reimbursement language ambiguous. Neither does the inclusion of the reimbursement language in the subsection of the policy entitled "Subrogation" render the reimbursement clause provision ambiguous.¹⁴ See Syl. Pt. 5, Thompson v. State Auto. Mut. Ins. Co., 122 W. Va. 551, 11 S.E.2d 849 (1940) ("The caption of an insurance policy should not of itself be taken to override the intention of the parties to the policy as shown by

¹⁴The Appellees also argued below that "[c]hecks issued by Nationwide for the amount of medical payments made were made payable to the Ferrells, their attorney and Nationwide Insurance as subrogee for Kathleen Ferrell," as well as "Nationwide Insurance as subrogee for Brent Ferrell." (See Plaintiffs' Response to Nationwide's Cross-Motion for Summary Judgment and Reply to Nationwide's Response to Plaintiff's Motion for Summary Judgment at p. 1). Again, whether an ambiguity exists in the insurance policy at issue must be resolved **by reviewing the provisions of the insurance policy**, when read as a whole. See Soliva, 176 W. Va. at 432-33, 345 S.E.2d at 35. The determination of whether an ambiguity exists is not determined by examining how a check is issued. Moreover, ironically, what the Appellees failed to address to the lower court regarding the unequivocal fact that Nationwide is and was relying upon the reimbursement language in the Nationwide policy is the following excerpt from the May 15, 2003, letter from Nationwide to Janet Williamson:

I am in receipt of your letter dated 05/15/03 wherein you requested that Nationwide waive the Medical Payments subrogation on the above referenced claim for Brenton Ferrell & Kathleen (Baldwin) Ferrell.

In response to your reference to WV Supreme Court case, Richards v. Allstate Ins. Co., 193 W. Va. 244, 455 S.E.2d 803 (1995), which prohibits subrogation under these circumstances." Please refer to the enclosed Nationwide Century II Auto Policy Endorsement 2256C, Pg 6 "General Policy Conditions": "The third sentence of General Policy Condition 5. SUBROGATION is replaced to read: Also, if the insured receives a recovery from any liable party, including another Nationwide insured, we may require the insured to reimburse us when the proceeds of recovery duplicate our payment."

As you can see, Nationwide's policy includes the provisional "reimbursement language" recommended in the WV Supreme Court decision (Page 4-5) to prevent double recoveries. Based on this criteria, Nationwide respectfully declines to waive our right of reimbursement under Endorsement 2256C of the Nationwide Century II Auto Policy.

(See Exhibit C, attached to Nationwide's Cross- Motion for Summary Judgment).

the provisions and clauses inserted thereunder, but the caption may be read in connection with the clauses to aid in arriving at the intention of the parties.”). Both the Appellees and the lower court focused the examination of the salient policy provision upon the use of the word “subrogation” in the policy section’s title and failed to read the policy as a whole in assessing whether an ambiguity, indeed, exists. See Soliva, 176 W. Va. at 432-33, 345 S.E.2d at 34-35.

When the subsection entitled “Subrogation” is read in its entirety, there can be no doubt as to the plain and unambiguous meaning of the reimbursement clause. The language in the subsection provides that when payments for medical expenses are both paid under the policy and recovered by the claimant-insured from a tortfeasor, Nationwide has two rights. The first is the right to subrogation of the claim against a third-party tortfeasor as permitted by law. The second is the right to reimbursement from the claimant-insured, who obtained a recovery from another Nationwide insured, for the same expenses for which Nationwide advanced payment to the claimant-insured. Again, even as the Appellees acknowledged in their memorandum supporting their summary judgment motion, “[t]hese are two completely different theories of recovery.” (See Plaintiffs’ Motion for Summary Judgment and Memorandum in Support Thereof at p.9). Furthermore, the plain, ordinary meaning of the two terms, subrogation and reimbursement, are totally different, which clearly establishes that there is no ambiguity when the two terms are used in the same section of a policy. The use of these two separate and distinct terms makes this policy one in which reasonably intelligent people could not honestly differ as to the meaning of the policy language concerning reimbursement and subrogation. See Soliva, 176 W. Va. at 432, 345 S.E.2d at 35. It is the inclusion of the reimbursement language in this case as dictated by the Court in Richards which

makes this policy clear and unambiguous. See Richards, 193 W. Va. at 249, 455 S.E.2d at 808.¹⁵ To give credence to the Appellees' argument that "[t]he 'reimbursement' Nationwide claims it is entitled to is, in fact and by law, subrogation and not permitted under these circumstances" undercuts the express direction of this Court in Richards that insurers may prevent double recovery by incorporating reimbursement language into their policies. Also, adopting the Appellee's interpretation would be accepting a distorted interpretation of otherwise clear and unambiguous language. This would lead to an utterly absurd result, especially in light of the Richards decision. Appellee's contentions do not comport with the clear meaning of the reimbursement provision and are not sufficient to create an ambiguity in the policy. In other words, "[t]he mere fact that parties do not agree to the construction of a contract does not render it ambiguous." Syl. Pt. 4, in part, West Virginia Fire & Casualty Co. v. Stanley, ___ W. Va. ___, 602 S.E.2d 483, 2004 WL 1144050 (W. Va., May 21, 2004)(quoting, in part, Syl. Pt. 1, Berkeley County Pub. Serv. Dist. v. Vitro Corp. of Am., 152 W. Va. 252, 162 S.E.2d 189 (1968)).

Finally, "[i]n construing any insurance policy, it is appropriate to . . . consider whether the policy language is in accord with West Virginia law . . ." Joslin v. Mitchell, 213 W. Va. 771, 779, 584 S.E.2d 913, 921 (2003)(quoting Adkins v. Meador, 201 W. Va. 148, 153, 494 S.E.2d 915, 920 (1997)). It has already been established that the Nationwide policy at issue was amended to bring it in conformity with the dictates of the Court's decision in Richards regarding the inclusion of medical payment expenses reimbursement language. As the Court recognized in Joslin,

¹⁵This is in sharp contrast to the Allstate policy in Richards, wherein the insurer was attempting to get reimbursement of medical expenses under a policy which contained only subrogation language and no reimbursement language. See 193 W. Va. at 249, 455 S.E.2d at 808.

[t]he Legislature has entrusted to the Insurance Commissioner the power to regulate insurance rates to the end that they “shall not be excessive, inadequate or unfairly discriminatory[,]” W. Va. Code, 33-20-3[1976], and **the Insurance Commissioner is required to “disapprove any such form of policy, application, rider, or endorsement” if it does not comply with our insurance laws.** W. Va. Code, 33-6-9 [1957].¹⁶ An insurance policy can even be disapproved where the “benefits provided therein are unreasonable to the premium charged.” W. Va. Code, 33-6-9(c).

213 W. Va. at 777-78, 584 S.E.2d at 919-20 (emphasis added). As previously mentioned, the reimbursement provision contained in the Nationwide policy at issue was submitted to the West Virginia Insurance Commissioner as required by West Virginia Code § 33-6-8, and the West Virginia Insurance Commissioner approved the amendment on July 8, 2000. (See Order of Certification at ¶ 12). West Virginia Code § 33-6-30(c) expressly provides that “[w]here any insurance policy form, including any endorsement thereto, has been approved by the [insurance] commissioner, and the corresponding rate has been approved by the commissioner, there is a presumption that the policy forms and rate structure are in compliance with the requirements of this chapter.” *Id.* The approval by the Insurance Commissioner for the State of West Virginia of the amendment to the Nationwide policy regarding the reimbursement clause creates a presumption that the policy was in compliance with the insurance laws of this State. See *Joslin*, 213 W. Va. at 777-78, 584 S.E.2d at 919-20; W. Va. Code § 33-6-30(c). The West Virginia Insurance Commissioner was statutorily mandated to disprove the policy amendment had it not been in compliance with the insurance laws of our State and/or the amendment was ambiguous, misleading or contained a title

¹⁶Specifically West Virginia Code § 33-6-9(b) provides, in relevant part, that the Insurance Commissioner “shall disapprove any such form of policy, application, rider, or endorsement . . . : [i]f it contains or incorporates by reference any inconsistent, ambiguous, or misleading clauses . . . which deceptively affect the risk purported to be assumed in the general coverage of the contract[,] . . . [and] . . . [i]f it has any title, heading, or other indication of its provision which is misleading.” *Id.*

or heading that was misleading. See Joslin, 213 W. Va. at 777-78, 584 S.E.2d at 919-20; W. Va. Code 33-6-9(b) and (c).

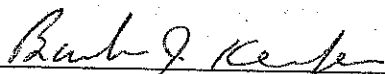
Consequently, the undisputed evidence in this case is that Nationwide, pursuant to the directions set forth by the Court in Richards, implemented those directions by including clear and unambiguous language, approved by the West Virginia Insurance Commissioner, regarding reimbursement of medical expense payments in its policies so as to prevent an insured from receiving a double recovery. 193 W. Va. at 249, 455 S.E.2d at 808.

V. RELIEF PRAYED FOR

Based on the foregoing, the Defendant Nationwide respectfully requests that the Court uphold the directive it established in Richards as being the “**best way to deal with**” the problem of preventing insureds from receiving double recoveries. See 193 W. Va. at 249, 455 S.E.2d at 808 (emphasis added). The directive the Court established was “to have an insurance carrier insert clear and unambiguous language with regard to reimbursement in its policies.” Id. It is incontrovertible that Nationwide conformed its policy provisions to comport with the dictates and instruction given by the Court in Richards. Id. As such, these policy provisions are not only in compliance with the laws of our State, but they are also clear and unambiguous, despite the Appellees’ protestations to the contrary. The Appellees should not be allowed to escape their contractual obligation to reimburse Nationwide pursuant to the terms of the relevant insurance policy provisions. Accordingly,

Nationwide respectfully requests that the Court answer the certified question posed by the Circuit Court of Mercer County, West Virginia in the affirmative.

NATIONWIDE MUTUAL INSURANCE COMPANY
By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRENTON L. FERRELL and
KATHLEEN D. FERRELL,

Appellees,

v.

No. 041695

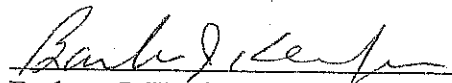
NATIONWIDE MUTUAL INSURANCE COMPANY,

Appellant.

CERTIFICATE OF SERVICE

I, Barbara J. Keefer, counsel for Nationwide Mutual Insurance Company, do hereby certify that on this 22nd day of November, 2004, I served a true and correct copy of the foregoing **APPELLANT'S BRIEF** upon counsel of record, by depositing the same in the United States mail, postage prepaid, sealed in an envelope, and addressed as follows:

Janet C. Williamson, Esquire
Shott, Gurganus, Williamson & Magann
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