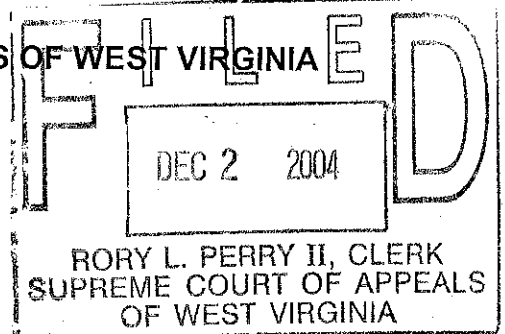


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRENTON L. FERRELL and
KATHLEEN D. FERRELL,
Appellees,



vs.

No. ~~041695~~

32050

NATIONWIDE MUTUAL INSURANCE COMPANY,
Appellant.

APPELLEES' BRIEF

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West Virginia Fire & Cas. Co. v. Stanley,
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Farmers Mutual Ins. Co. v. Tucker, 213 W.Va. 16,
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Couch on Insurance 2d § 61:136 at 195 (Rev. Ed. 1983) 9

II. STATEMENT OF FACTS

On January 19, 2002, the Appellees, Brenton L. Ferrell and Kathleen D. Ferrell, sustained bodily injuries as the result of an automobile accident which occurred when the 2001 Dodge Neon driven by Mrs. Ferrell was struck by another vehicle at an intersection in Bluefield, West Virginia. At the time of the collision, Mrs. Ferrell was three months pregnant with their first child. Both vehicles involved in the accident were insured by Nationwide Mutual Insurance Company.

Pursuant to the provisions of the Family Compensation Coverage of the Century II Auto Policy No. 92 47 H 890080 issued by Nationwide to Mary S. and Clarence D. Baldwin, the parents of Plaintiff Kathleen D. Ferrell (hereinafter referred to as the "Baldwin policy"), Nationwide paid medical expenses incurred as the result of the accident in the amount of \$2,982.61 to Mrs. Ferrell and \$1,884.76 to Mr. Ferrell. The Family Compensation Coverage provided for payment of medical expenses resulting from accidental bodily injury sustained while occupying an insured vehicle regardless of fault.

In addition to receiving payment for medical expenses under the Family Compensation Coverage of the Baldwin policy, the Ferrells presented a claim against Kermit D. Davis, the Nationwide insured who was responsible for the accident of January 19, 2002. In conjunction with their claim for damages against Kermit D. Davis, the Ferrells submitted the same medical expenses for which they had received payment from Nationwide under the Family Compensation Coverage of the Baldwin policy.

In order to obtain a release for its insured, Kermit D. Davis, from the Ferrells' claims, Nationwide offered to settle Mrs. Ferrell's claim for \$10,000.00 and Mr. Ferrell's

claim for \$6,000.00. Appellees accepted said offers "provided Nationwide waives subrogation of its medical payments".¹

Nationwide refused to waive subrogation rights under the Baldwin policy for the medical payments made on behalf of the Appellees because "it was not a policy limits settlement".²

Nationwide also responded to the request for waiver of "subrogation" by explaining that the Century II Auto Policy as amended by Endorsement 2256C provided that where an insured received a recovery from any liable party, including another Nationwide insured, it was entitled to be reimbursed for payment of medical expenses when the proceeds of recovery from the other insured duplicated its prior payment.³

Because the claims adjuster for Nationwide's tortfeasor's liability insurance insisted on "*honoring the Med Pay lien*", Nationwide refused to pay the full amount of the previously agreed settlement to Kathleen Ferrell and Brenton L. Ferrell of \$10,000.00 and \$6,000.00, respectively, unless two separate checks were issued for each claim. *Honoring what it referred to as "a Med Pay lien"*, Nationwide's liability claims adjuster

¹ See Exhibit A, May 15, 2003 letter to Lake Wykle; Exhibit C, May 15, 2003 letter to Shelley Newman; Exhibit D, May 22, 2003 letter to Shelly Newman; Exhibit E, June 26, 2003 letter to Lake Wykle; Exhibit F, July 3, 2003 letter from Lake Wykle attached to *Plaintiffs' Proposed Stipulated Facts and Certified Question*.

² Exhibit C, May 15, 2003 letter to Shelley Newman attached to *Plaintiffs' Proposed Stipulated Facts and Certified Question*. Apparently this is in reference to the "made whole" doctrine whereby an insurer is not entitled to subrogation before an insured is made whole for his or her losses.

³ See Exhibit C, May 15, 2003, letter from Shelley Newman attached to *Nationwide's Combined Memorandum of Law in Response to Plaintiffs' Motion for Summary Judgment and in Support of Nationwide's Cross-Motion for Summary Judgment*.

under cover of letter dated June 10, 2003 issued four separate checks dated June 11, 2003:

- a) A check in the amount of \$4,756.06 payable to Brent and Kathleen Ferrell and their attorney Janet Williamson;
- b) A check in the amount of \$1,243.94 payable to Brent and Kathleen Ferrell and their attorney Janet Williamson *and Nationwide Insurance as subrogee for Brent Ferrell*;
- c) A check in the amount of \$8,031.48 payable to Kathleen and Brent Ferrell and their attorney Janet Williamson; and
- d) A check in the amount of \$1,968.52 payable to Brent and Kathleen Ferrell and their attorney Janet Williamson *and Nationwide Insurance as subrogee for Kathleen Ferrell*.⁴

The two checks that included Nationwide as payee reflected a reduction of one third attorney's fees and a proportionate share of the costs incurred in each claim.

The Baldwin policy under which the Ferrells received payment for medical expenses in accordance with the provisions of the Family Compensation Coverage contains Endorsement 2256C as approved by the Insurance Commissioner. Pursuant to Endorsement 2256C, the "GENERAL POLICY CONDITIONS" read 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 a 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

⁴ See Exhibit F, July 3, 2003, letter from Lake Wykle; Exhibit G, June 10, 2003, letter from Lake Wykle; and Exhibit H copies of checks dated June 11, 2003 attached to *Plaintiffs' Proposed Stipulated Facts and Certified Question* (emphasis added).

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.

5

Based upon an agreement between the Ferrells and Nationwide, the Ferrells accepted payment of the settlement offered on behalf of Nationwide's tortfeasor and executed a release to the tortfeasor in which they reserved the right to pursue a declaratory judgment action challenging whether Nationwide is entitled to enforce the reimbursement provisions applicable to payments made under the Family Compensation Coverage of the Baldwin policy.⁶

Thereafter, Appellees filed the underlying declaratory judgment action in Mercer County Circuit Court. Motions for summary judgment were filed by both the Ferrells and Nationwide. The Honorable Judge John R. Frazier expressed his intention to certify the questions raised by the parties. Appellees proposed to certify the following four questions:

(1) Under West Virginia law, can an insurance company, pursuant to the terms of its policy, require its insured to reimburse it for medical payments when the insured receives a recovery from a tortfeasor insured by the same insurance company?

⁵ See Exhibit A attached to *Nationwide Mutual Insurance Company's Response to Plaintiffs' Motion to Compel Discovery*; Exhibit A attached to *Cross Motion for Summary Judgment of Natiowide Mutual Insurance Company*.

⁶ See Exhibit E, June 226, 2003 letter to Lake Wykle and Exhibit F, July 3, 2003, letter from Lake Wykle; Exhibit G, June 10, 2003, letter from Lake Wykle; and Exhibit H copies of checks dated June 11, 2003 attached to *Plaintiffs' Proposed Stipulated Facts and Certified Question*.

(2) Has Nationwide properly created by clear and unambiguous language a contractual right of reimbursement for medical payment between it and its policyholders under Nationwide Policy No. 92 47 H 890080, Endorsement 2256C, Page 6, "GENERAL POLICY CONDITIONS"?

(3) Does the language contained in Nationwide Policy No. 92 47 H 890080, Endorsement 2256C, Page 6, "GENERAL POLICY CONDITIONS", create a lien against the settlement proceeds payable to the insured under the liability coverage of the tortfeasor's separate Nationwide policy for sums paid to the insured under the medical payments coverage of the insured's own Nationwide policy?

(4) Does the policy language of Endorsement 2256C entitle Nationwide to utilize the methods which it employed in this case to require the Ferrells to reimburse Nationwide for the medical payments which it paid to the Ferrells from the settlement proceeds which the Ferrells received from the tortfeasor?⁷

Judge Frazier elected to certify the following single question:

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?⁸

Judge Frazier determined that the policy in question **was ambiguous** in that it discusses both subrogation of medical payment and reimbursement under the title "Subrogation".⁹

⁷ *Plaintiffs' Proposed Stipulated Facts and Certified Questions.*

⁸ Order of Certification entered July 2, 2004.

⁹ See Order of Certification entered July 2, 2004, pp. 2-3.

III. AUTHORITIES RELIED UPON

Black's Law Dictionary (Rev 4th Ed. 1968)

Couch on Insurance 2d § 61:136 at 195 (Rev. Ed. 1983)

Control Specialists Company, Inc. v State Farm Mutual Automobile Insurance Company, 228 Neb. 642, 423 N.W.2d 775 (1988)

Farmers Mutual Ins. Co. v. Tucker, 213 W.Va. 16, 576 S.E.2d 261 (2002)

Hambric v. Doe, 201 W.Va. 615 499 S.E.2d 619 (1997)

Home Insurance Co. v Pinski Brothers, Inc., 160 Mont. 219, 225-26, 500 P2d 945, 949 (1972)

Marcum Trucking Co., Inc. v. U.S. Fidelity & Guar. Co., 190 W.Va. 267, 438 S.E.2d 59 (1993)

Maynard v. State Farm Mutual Automobile Insurance Co., 902 P.2d 1328 (Alaska 1995)

Murray v. State Farm Fire and Cas. Co., 203 W.Va. 477, 509 S.E.2d 1 (1998)

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

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State Farm Mutual Automobile Insurance Company v. Facemyre, et al., Civil Action No. 01-C-1565

Stetina v. State Farm Mutual Insurance Co., 196 Neb. 441, 243 N.W. 341(1976)

W.Va. Const. Art 8, § 4

Walker v. Doe, 210 W.Va. 490, 558 S.E.2d 290 (2001)

IV. ARGUMENT

Nationwide's Century II Auto Policy Endorsement 2256C entitled "Subrogation", does not by clear and unambiguous language create 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 because (1) the language therein describes subrogation and (2) Nationwide's actions in this matter clearly identify its claim as a subrogation claim.

- 1) **The policy provisions of the Century II Auto Policy, as amended by Endorsement 2256C entitled "Subrogation" is ambiguous because the language describes subrogation not reimbursement.**

"*Subrogation*" is 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". *Black's Law Dictionary* (Rev. 4th Ed 1968). A "*subrogee*" is the person who succeeds to the rights of another; the person who is subrogated, usually the insurer. *Id.*

Placing this definition into the context of insurance law, and specifically this policy language, once an insured is injured as the result of the negligence of a third party, the insured has certain rights against the third party, including the right to be compensated for any medical bills incurred by the insured as a result of the third party's negligence. When the insurer pays its insured's medical bills under medical payment coverage, the insurer obtains the insured's rights to collect payment for the medical bills from the third party. The insurer's right to collect for medical coverage payments is contingent upon the

insured's right to collect payments for medical bills from a negligent third party. Clearly, in this situation, the insurer does not have any independent direct right to recover from a third party tortfeasor.

No matter what you call it, what Nationwide is attempting to do, by trying to get the Ferrells to return the money it paid them under the medical payment coverage is, by legal definition, subrogation.¹⁰

It is undisputed that the policy in question does not define "reimbursement". Nationwide has gone to great length and hired extremely intelligent defense attorneys who have researched the difference between subrogation and reimbursement and have

¹⁰ No wonder Nationwide previously refused to explain the difference between subrogation and reimbursement. In *Nationwide's Responses to Plaintiffs' First Set of Interrogatories, Requests for Admissions, and Requests for Production of Document*, interrogatory number twelve, Nationwide refused to

"12. Explain the difference between subrogation and reimbursement.

Response: Please refer to the West Virginia Supreme Court's holding in *Richards v. Allstate Ins. Co.*, 455 S.E.2d 803 (W.Va. 1995)."

In *Nationwide's Amended and Supplemental Responses to Plaintiffs' First Set of Interrogatories, Requests for Admissions, and Requests for Production of Document*, interrogatory number twelve, Nationwide again failed to explain the difference between subrogation and reimbursement.

"12. Explain the difference between subrogation and reimbursement.

Amended/Supplemental Response: Nationwide states that the *Richards* case provides that subrogation arises only with respect to rights of the insured against a third person to whom the insurer owes no duty. *Richards* notes that subrogation rights do not exist against a company's own insured. However, per *Richards*, an insurance company can include language in its policy of insurance that permits it to seek reimbursement from its insured when its insured received a settlement or judgment against a tortfeasor. Per *Richards*, an insurance carrier may place clear language in its policy providing for the reimbursement of medical payments it may advance to an insured to the extent such medical payments are compensated by a settlement or judgment with a tortfeasor whom it insures.

argued merely by general statements that this is unambiguously reimbursement; arguments they were apparently unable to make below.

The policy provision in question identifies both subrogation of medical payment and "reimbursement". These are two completely different theories of recovery. As stated above, subrogation is the substitution of the insurer for the insured in an attempt to recover the medical coverage payments, which is what the liability claims adjuster has done in "honoring the med pay lien". Reimbursement is a direct right to recover the medical payment coverage from its own insured. The "reimbursement" Nationwide claims it is entitled to is, in fact and by law, subrogation and not permitted under these circumstances.

It is undisputed that West Virginia law does not permit subrogation in favor of an insurer against its own insured who is a negligent third party to the insurance policy between the victim of the negligence and the victim's insurer. Richards v. Allstate Insurance Company, 193 W.Va. 244, 455 S.E.2d 803 (1995). "No right of subrogation can arise in favor of the 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.* Syl. Pt. 2 and 193 W.Va. at 246, 455 S.E.2d at 805 *quoting Couch on Insurance 2d* §61:136 at 195 (Rev. ed. 1983).

Nationwide's demand for reimbursement stems from its misunderstanding and initial misrepresentation of the holding in Richards v. Allstate Insurance Company. Nationwide claims that

"in Richards, the Court held that an insurer is entitled to include language in a policy of motor vehicle insurance providing for the reimbursement of medical payments it may advance to its insured to the extent such

medical payments are compensated by settlement with or judgment against a tortfeasor whom it also insures."¹⁰

The Richards Court made no such holding as Nationwide claimed. The Richards Court mentioned *in dicta* that plaintiff's policy therein did not contain any language providing for reimbursement. "Although Allstate could have placed language in its policy providing for reimbursement in this type of situation, it did not." 193 W.Va. 247-48, 455 S.E.2d 806-807. Since language providing for reimbursement was not before the Richards Court, it made no holding regarding validity of such.

In West Virginia, as required by our state constitution, every point of law (the holding) decided by our Supreme Court is announced through syllabus points. Walker v. Doe, 558 S.E.2d 290 (W.Va. 2001); W.Va. Const. Art.8, §4. The Richards case contains no such syllabus point or holding as Appellant wants to believe.

One of the concerns the Richards Court noted regarding the subrogation language equally applies to reimbursement. The concern is that permitting the insurer to subrogate against its own insured on medical payments *would allow the insurer to expend premiums collected from its insured to secure a recovery against the same insured on a risk insured against*. 193 W.Va. at 247, 455 S.E.2d at 806, relying on Home Insurance Co. v Pinski Brothers, Inc., 160 Mont. 219, 225-26, 500 P.2d 945, 949 (1972). Identically, an insurer's attempt to receive *reimbursement* for medical payments would allow it to expend premiums collected from its insured to secure a judgment against the same insured on a risk insured against. See also, Control Specialists Company, Inc. v.

¹⁰ See Nationwide's Responses to Plaintiffs' First Set of Interrogatories, Requests for Admissions, and Requests for Production of Documents, interrogatory numbers 2, 3, 6, 7, 8, and 9. See also Nationwide's Petition For Certified Question Review pp. 10-15.

State Farm Mutual Automobile Insurance Company, 228 Neb. 642, 423 N.W.2d 775 (1988) quoting Stetina v. State Farm Mutual Insurance Co., 196 Neb. 441 at 451, 243 N.W. 341 at 346 (1976)(“To allow subrogation [or reimbursement] under such circumstances would permit an insurer, in effect, to pass the incidence of the loss, either partially or totally, from itself to its own insured and thus avoid the coverage which its insured purchased...”).

One has to wonder if the medical payments must be returned, exactly what is purchased by the insured with his medical payment premium? Why would an insured pay for auto medical payment coverage when he has health insurance coverage which he can use instead? Why would an insured pay for auto medical payment coverage when his attorney will provide assurance to his medical providers that their balance will be protected out of settlement or litigation proceeds? When Appellees asked Nationwide to explain exactly what the family compensation (medical payment) premium purchased if Appellees have to return the medical payments, Nationwide’s initial response was to refer to the policy. Its amended/supplemental response did no more to explain the purchase.¹¹

¹¹ Interrogatory 13. Should Appellees pay Nationwide Mutual Insurance Company the amount of medical payments/family compensation Nationwide paid under the policy of Insurance No. 92 47H 890080, explain exactly what the family compensation premium purchased.

Response: Please refer to the portions of policy number. 92 47H 890080 for a description of family compensation.

Its amended and supplemental response was as follows:

Amended/Supplemental Response: Nationwide will not repeat herein, but incorporates by reference, the provisions of the policy supplied with its original Responses, pp. 11 to 14, that describe the Insurance Commissioner approved terms and provisions of the Family Compensation coverage.

The premium received from Nationwide’s policyholders for family compensation coverage was approved by the West Virginia Insurance Commissioner and

Nationwide cites an Alaskan case for identifying the purpose of medical payment coverage. Identified as the purpose of medical payment coverage is "peace of mind" consisting of speedy reimbursement for medical expenses without regard to fault and coverage for uninsured or underinsured accidents.¹²

These purported purposes do not address the situation where the injured party has private medical insurance and is without fault. Further, typically the injured party's attorney provides written assurance to medical providers to protect their balance out of settlement or judgment proceeds pending resolution of their claim and by so doing, provides the same "peace of mind" Nationwide charges a hefty premium for and then requests the benefits thereof be returned.

The policy provision in question states 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 recovery duplicate our payment". It is not just medical bills paid from the policy of another Nationwide insured, *but any liable party*. Nationwide does not provide a premium discount or rebate to its insureds when they must repay medical payments.

applicable to use of Endorsement 2256C, which was approved for use in West Virginia on July 8, 2000. Under the terms and conditions of the Commissioner-approved policy, no premium was paid by the policyholders which would entitle an insured to double recovery of the same medical expenses paid under the policy of another Nationwide insured. Simply stated, **the family compensation premium purchased the right to receive compensation for payment of medical bills not paid from the policy of another Nationwide insured.** (emphasis added)

¹² *Nationwide Mutual Insurance Company's Petition for Certified Question Review*, pp. 17-18 citing Maynard v. State Farm Mutual Automobile Insurance Co., 902 P.2d 1328 (Alaska 1995).

Interestingly, besides Richards, all of the cases Nationwide has cited in support of its claim that the Baldwin policy gives it a right of reimbursement are State Farm Mutual Automobile Insurance Co. ("State Farm"). The reimbursement language contained in the State Farm policies is different than that contained in the Nationwide Baldwin policy. The State Farm policy contains the following reimbursement language:

"Under medical payments and physical damages coverages, if a liable party is

- (1) insured by us or any affiliated company for liability coverage, and
 - (a) we pay for the same expenses or loss that has been paid under these coverages as damages under that party's liability coverage, then
 - (b) the party to or for whom we make payment must reimburse us to the extent of the payments we have made under the medical payments and physical damage coverages."¹³

There is no language regarding "subrogation" contained in the State Farm policy as is contained in the Nationwide policy.

Additional evidence of ambiguity contained in paragraph 5 is the phrase that Nationwide "**may** require the insured to reimburse us when the proceeds of recovery ***duplicate our payment***". The "proceeds of recovery", i.e., the proposed settlement to Kathleen and Brenton Ferrell of \$10,000.00 and \$6,000.00, respectively, did not specifically identify the underlying damages for which it was being offered by the tortfeasor. Who is to say whether the proceeds of recovery were not entirely for pain,

¹³ See Order Granting Plaintiff Summary Judgment As Against All Defendants in State Farm Mutual Automobile Insurance Company v. Facemyre, et al. Civil Action No. 01-C-1565 appearing as Exhibit C, p. 3 attached to Nationwide Mutual Insurance Company's Petition for Certified Question Review. See also Order in State Farm Mutual Automobile Insurance Company v. Justus, Civil Action No. 01-C-324-S, appearing as Exhibit B, p. 5 attached to Nationwide Mutual Insurance Company's Petition for Certified Question Review.

suffering and worry about the condition of their unborn baby? Who determines, and by what criteria, whether the proceeds of recovery “duplicate payment”?

When Appellees asked Nationwide to explain when it requires the insured to reimburse it “when the proceeds of recovery duplicate payment”, and identify the criteria used in making this determination, initially Nationwide merely told the Appellees to refer to the policy.¹⁴ In its *Amended and Supplemental Responses*, Nationwide again failed to explain when it requires the insured to reimburse it and failed to identify the criteria used.

Instead, it stated

The proceeds of a recovery received by an insured from a tortfeasor duplicate payments made by Nationwide under Family Compensation when the insured makes a decision to submit the bills to Nationwide for consideration for payment under the Family Compensation coverage and then seeks to recover those same bills when making a claim against the third party. The Family Compensation coverage provides benefits when an insured insures medicals for bodily injury suffered while occupying your auto, or when ceratin [sic] other coverage extensions stated in the policy apply. The insured makes the decision on duplicated payments when he/she submits the bills to Nationwide and represents that they were incurred as a result of a motor vehicle accident and then presents them again for consideration for damages the insured seeks to recover from a tortfeasor.¹⁵

The undersigned cannot envision a scenario where an insured would submit bills for payment under medical payment coverage and not seek to recover those same medical bills from the tortfeasor, especially when the tortfeasor’s insurer (Nationwide) requires it.

¹⁴ *Nationwide’s Responses to Plaintiffs’ First Set of Interrogatories, Requests for Admissions, and Requests for Production of Document*, interrogatory number 14.

¹⁵ *Nationwide’s Amended and Supplemental Responses to Plaintiffs’ First Set of Interrogatories, Requests for Admissions, and Requests for Production of Document*, interrogatory number 14.

Paragraph 5 is unquestionably ambiguous because the policy language does not specifically identify when Nationwide may require reimbursement for "duplication of payment". Nationwide's inability to explain when the proceeds of recovery duplicate their payment demonstrates this ambiguity. Any such ambiguity must be decided in favor of the insured. Syl. Pt 1, Prete v. Merchants Property Ins. Co. of Indiana, 159 W.Va.508, 223 S.E.2d 441 (1976); Syl. Pt. 2, Murray v. State Farm Fire and Cas. Co., 203 W.Va. 477, 509 S.E.2d 1 (1998); see West Virginia Fire & Cas. Co. v. Stanley, ___ W. Va. ___, 602 S.E.2d 483, 2004 WL 1144050 (May 21, 2004).

Nationwide purports to claim that because the policy was approved for use by West Virginia's Insurance Commissioner, it is not ambiguous. Obviously, the Insurance Commissioner does not warrant that approved policies do not contain ambiguities. If that were the case, there would never be an ambiguity in a policy approved by the Insurance Commissioner. Several policy provisions contained in policies previously approved by the Insurance Commissioner have been the subject of litigation over ambiguity. See e.g. Farmers Mutual Ins. Co. v. Tucker, 213 W.Va 16, 576 S.E.2d 261 (2002); Murray v. State Farm Fire and Cas. Co., 203 W.Va. 477, 509 S.E.2d 1 (1998); Syl. Pt. 6 Hambric v. Doe, 201 W.Va 615, 499 S.E.2d 619 (1997); Marcum Trucking Co., Inc. v. U.S. Fidelity & Guar. Co., 190 W.Va. 267, 438 S.E.2d 59 (1993) (*per curiam*). Nationwide's claim simply defies law, reason and logic.

Finally, the policy provision in question, states that Nationwide "**may** require the insured to reimburse us when the proceeds of recovery **duplicate our payment**". However, Nationwide cannot explain when it does **not** require the insured to reimburse

it when the proceeds of recovery duplicate its payment; nor can it identify the criteria used to determine when the proceeds of recovery duplicate payment. If Nationwide cannot explain when it may or may not require the insured to reimburse it when the proceeds of recovery duplicate payment, how can this provision **not** be ambiguous?

2. Nationwide's actions in this matter clearly identify its claim to get back the money it paid the Ferrells as a subrogation claim.

In what he termed "*honoring the Med Pay lien*", the claims adjuster for Nationwide's tortfeasor's liability insurance issued checks for the amount of medical payments made payable to the Ferrells, their attorney "**and Nationwide Insurance as subrogee for Kathleen Ferrell**" and "**and Nationwide Insurance as subrogee for Brent Ferrell**".¹⁶ In other words, Nationwide recognized that its claim for payment of the medical bills was one of subrogation and not reimbursement.¹⁷

Reimbursement does not give rise to a lien, but subrogation does. **The right of reimbursement would not entitle the liability claims adjuster to withhold the medical payments from the negotiated liability settlement claiming a lien existed therefor.**

Procedurally speaking, if this were truly a right of reimbursement then Nationwide would not withhold the medical payments from the negotiated liability settlement, but

¹⁶ See Exhibits A and B attached to *Plaintiffs' Motion For Summary Judgment And Memorandum In Support Thereof* (emphasis added).

¹⁷ Either that or the policy language is so ambiguous that even its claims adjusters do not know whether its claim is for subrogation or reimbursement. See discussion *supra* regarding ambiguity.

rather would give the Appellees the entire negotiated liability settlement and seek repayment directly from its insureds.

Moreover, the procedure by which Nationwide has attempted to obtain repayment of medical payments is not authorized by the policy. By issuing checks for the amount of medical payments made payable to the Ferrells, their attorney, and Nationwide as *subrogee* for Kathleen and Brenton Ferrell, Nationwide has clearly placed its interests over the interests of its insureds without policy authority.

In this case, Nationwide sought repayment of medical payments reduced by one third attorney's fees and a proportionate share of the costs due to Ferrells' attorneys' efforts. Ferrells' attorneys collected the money on behalf of Nationwide. That is subrogation.¹⁸ Arguably, a right of reimbursement directly from the Ferrells would not be reduced by a percentage of the attorney's fees and costs required to obtain it.

Further, these claims were negotiated to settlement without Nationwide putting Appellees' counsel on notice of their purported entitlement to get back the money it paid to the Ferrells under the medical payment coverage, despite the fact that on August 23, 2002, Nationwide was given written permission to exchange information regarding the different claims handling. All actions taken by Nationwide demonstrated that Nationwide was handling the claim as one of subrogation. Only after settlement had been reached,

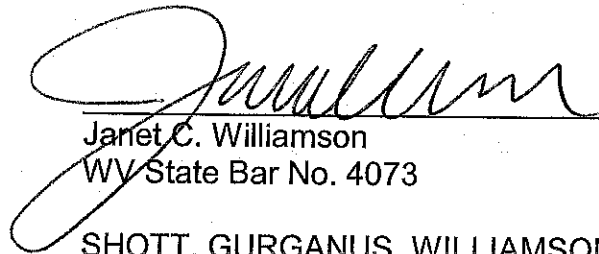
¹⁸ See Exhibits A & B attached to *Plaintiffs' Motion For Summary Judgment and Memorandum in Support Thereof*.

did Nationwide refuse to waive "subrogation" because "*it was not a policy limits settlement*".¹⁹

V. RELIEF PRAYED FOR

Should this Court grant Nationwide's Petition for Certified Question Review, the Ferrells request that this Court answer the certified question in the negative, as did the Mercer County Circuit Court and determine that Nationwide's Century II Auto Policy Endorsement 2256C entitled "Subrogation", does not by clear and unambiguous language create 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 because (1) the language therein describes subrogation not reimbursement and (2) Nationwide's actions in this matter clearly identify its claim as a subrogation claim.

Respectfully Submitted,



Janet C. Williamson
WV State Bar No. 4073

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¹⁹ See Exhibit C attached to *Plaintiffs' Motion For Summary Judgment And Memorandum In Support Thereof* (5-15-03 letter from Janet Williamson to Shelley Newman).

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRENTON L. FERRELL and
KATHLEEN D. FERRELL,
Appellees,

vs.

No. 041695

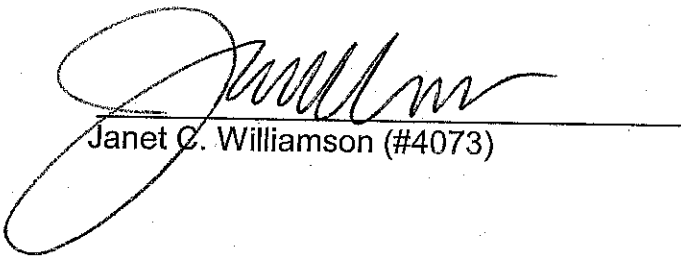
NATIONWIDE MUTUAL INSURANCE COMPANY,
Appellant.

CERTIFICATE OF SERVICE

The undersigned, of counsel for Brenton L. Ferrell and Kathleen D. Ferrell, does hereby certify that the foregoing "**APPELLEES' BRIEF**" has been served upon the following counsel of record by this day mailing to her a true copy thereof:

Barbara J. Keefer
Maria Marino Potter, Esq.
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Done this the 1st day of December, 2004.


Janet C. Williamson (#4073)