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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

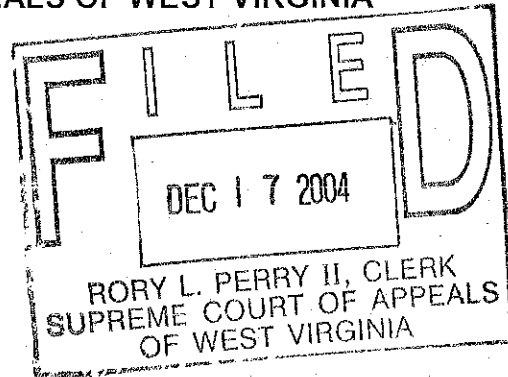
BRENTON L. FERRELL and
KATHLEEN D. FERRELL,

Appellees,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Appellant.



No. 041695

APPELLANT'S REPLY BRIEF

Anita R. Casey (WVSB # 664)
Barbara J. Keefer (WVSB #1979)
Maria Marino Potter (WVSB #2950)
MacCorkle, Lavender, Casey & Sweeney, PLLC
300 Summers Street, Suite 800
P. O. Box 3283
Charleston, West Virginia 25332-3283
Counsel for Appellant

Now comes the Appellant, Nationwide Mutual Insurance Company ("Nationwide"), by counsel Anita R. Casey, Barbara J. Keefer, Maria Marino Potter and the law firm of MacCorkle, Lavender, Casey & Sweeney, PLLC, and in reply to the Appellees', Brenton L. Ferrell's and Kathleen D. Ferrell's, Brief, as permitted by West Virginia Rules of Appellate Procedure 10 and 13, does hereby state the following:

I. ARGUMENT IN REPLY

In addressing the issue raised by the certified question posed by the Circuit Court of Mercer County, West Virginia, the Appellees posit that: 1) "[t]he policy provisions of the Century II Auto policy, as amended by Endorsement 2256C entitled 'Subrogation' is ambiguous because the language therein describes subrogation not reimbursement[;] and 2) "Nationwide's actions in this matter clearly identify its claim to get back the money it paid the Ferrells as a subrogation claim." (See Appellees' Brief at pp. 7 and 16). The Appellees' attacks on the relevant Nationwide policy provision which affords Nationwide a contractual right to reimbursement are not predicated upon any case law from this jurisdiction, or any other jurisdiction for that matter. Rather the attacks are predicated upon the Appellees continued disregard of the clear distinction between subrogation and reimbursement as recognized by the Court in Richards v. Allstate Insurance Co., 193 W. Va. 244, 455 S.E.2d 803 (1995). Appellees also try to bolster their position with a series of rhetorical questions involving largely hypothetical factual scenarios made up by the Appellees' counsel, which are simply not grounded in any of the undisputed facts which exist in this case. (See Appellees' brief at pp. 11-12).

A. The Nationwide Policy Provisions Contained Within the Nationwide Policy, as Amended by Endorsement 2256C, Clearly and Unambiguously 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 resolution of the certified question emanates from the Court's decision in Richards. See 193 W. Va. at 244, 455 S.E.2d at 803. Notwithstanding the Appellees' protest to the contrary, the Court, in Richards, unequivocally, in very precise language, **repeatedly** authorized the incorporation of reimbursement policy provisions into an insurance policy as a means by which the insurer could rightfully seek reimbursement of medical payment expenses paid to an insured. The Appellees have chosen to ignore the plain directive given by the Court to insurance companies, arguing that "Nationwide's demand for reimbursement stems from its misunderstanding and initial misrepresentation of the holding in Richards." (See Appellees Brief at p. 9). It is difficult to discern exactly how the Appellant "misunderstood" and/or "misrepresent[ed]" the following clear and unambiguous language of the Richards decision as the Appellees maintained in their brief:

[W]e 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.

Richards, 193 W. Va. at 249, 455 S.E.2d at 808 (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.; see also Thomas C. Cady and Christy Hardin Smith,

West Virginia's Automobile Insurance Policy Laws: A Practitioner's Guide, 97 W. Va. L. Rev. 583, 617 (Spring 1995)(discussing Richards and stating that "[a]n insurance company may not assert a right of subrogation against its own insured, but rather, should prevent a double recovery by inserting a clear and unambiguous clause regarding reimbursement in its policies).

Just as the Appellees ignore the dictates of Richards, the Appellees also refuse to acknowledge that the Supreme Court of Nebraska, in Control Specialists Company v. State Farm Mutual Automobile Insurance Co., 423 N.W.2d 775 (Neb. 1988), a case relied upon by the Appellees in support of their subrogation argument, also advocated the use of reimbursement clauses in insurance policies as a means of preventing a plaintiff from receiving a double recovery.

In addition to the Supreme Court of Nebraska, the Supreme Court of Alaska in Maynard v. State Farm Mutual Automobile Insurance Co., 902 P.2d 1328 (Alaska 1995) and the Court of Appeals of Washington in Reichl v. State Farm Mutual Automobile Insurance Co., 880 P.2d 558 (Wash. Ct. App. 1994), have both upheld the insurer's right of reimbursement of medical expense payments from an insured.

The Appellees' Brief is utterly devoid of any case law or other authority which supports their position that "[t]he 'reimbursement' Nationwide claims it is entitled to is, in fact and by law, subrogation and not permitted under these circumstances." (See Appellees' Brief at p. 9). In the instant case, Nationwide, in following the precept enunciated by the Court in Richards, incorporated a reimbursement clause into the Nationwide policy.

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 Nationwide policy language, at issue, 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 recovery duplicate our payment." This language is in complete compliance with the directive of the Court in Richards. This Court stated that in order to have a contractual right of reimbursement, an insurer needs 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 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). Nationwide did exactly what this Court directed be done in order to prevent a double recovery. This Court acknowledged, in Richards, that there was a valid reason for the incorporation of such language into an insurance policy in 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. . ." 193 W.Va. at 249, 455 S.E. 2d at 808.

The Court has recognized that because medical payments coverage is not statutorily mandated in West Virginia, "in the construction of coverage under a medical payments provision of an automobile liability insurance policy, it is the language of that provision which ordinarily controls the payment of the benefits." Carney v. Erie Insurance Co., 189 W. Va. 702, 434 S.E.2d 374 (1993). In the case sub judice, simply because the policy containing the Richards approved reimbursement clause provision, also contains language concerning Nationwide's subrogation rights does not render the reimbursement language ambiguous as determined by the lower court. Nor does the inclusion of the reimbursement clause language in the subsection of the policy entitled "Subrogation" render the reimbursement clause provision ambiguous. 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 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 section’s title and failed to read the policy as a whole in assessing whether an ambiguity, indeed, exists. See Soliva v. Shand, Morahan & Co., 176 W. Va. 430, 432-33, 345 S.E.2d 33, 34-35 (1986).

The language contained within the subsection entitled “Subrogation”, when read in its entirety, 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 right is to reimbursement from the claimant-insured, who obtained a recovery from another Nationwide insured, for the same expenses for which Nationwide paid to the claimant-insured. The Appellees have acknowledged that “[t]hese are two completely different theories of recovery.” (See Appellees’ Brief at p.9). The use of these two separate and distinct terms further supports Nationwide’s position that the reimbursement provision is unambiguous, because the policy language is such that “reasonably prudent and intelligent people could [not] honestly differ” as to the meaning of the policy language concerning reimbursement and subrogation. See Soliva, 176 W. Va. at 433, 345 S.E.2d at 35 (“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”). 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.

Moreover, it is undisputed that 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 those benefits once, not twice, which is exactly what the inclusion of the reimbursement clause was designed to prevent – a double recovery.

B. A Determination of Whether an Ambiguity in the Salient Nationwide Policy Provisions Exists Must be Made From a Review of the Nationwide Policy Provisions, When Read as a Whole, and not From the Alleged Actions of a Nationwide Adjuster in Issuing a Check.

The Appellees argue that “Nationwide’s actions in this matter clearly identify its claim to get back money it paid the Ferrells as a subrogation claim[,]” see Appellees’ Brief at 16. The Appellees make much ado about how the checks were issued by a claims adjuster for Nationwide’s tortfeasor’s liability insurance. The Appellees, however, conveniently ignore other clear and unequivocal conduct by Nationwide which undisputedly demonstrates that the Appellees’ claim was being dealt with under the reimbursement provisions of the insurance policy. Specifically, the Appellees argue that because Nationwide “issued checks for the amount of medical payments 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[.]" this changes the clear and unambiguous terms of the relevant insurance policy. (See Appellees' Brief at p. 16). Yet, the Appellees fail to provide the Court with any legal authority to support their position that this conduct can be used to render otherwise unambiguous policy provisions ambiguous. To the contrary, 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 (emphasis added). The determination of whether an ambiguity exists is not made by examining how a check is issued.

Additionally, the Appellees contend their claims "were negotiated to settlement without Nationwide putting Appellees' counsel on notice of their [sic] purported entitlement to get back the money it paid to the Ferrells under the medical expense payment coverage," see Appellees Brief at p. 17. The Appellees, yet again, fail to provide any authority for how this alleged conduct alters the terms of the insurance policy at issue. Certainly nothing prevented Appellees' Counsel from reviewing the policy. In making this statement the Appellees ignore the unequivocal fact that Nationwide is, and was, relying upon the reimbursement language in the Nationwide policy as the following excerpt from the May 15, 2003, letter from Nationwide to Janet Williamson, the Appellees' attorney, plainly demonstrates:

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

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). This letter undisputedly demonstrates that Nationwide was acting pursuant to the clear and unambiguous policy provisions on reimbursement of medical payments expenses and **not** the subrogation policy provisions as Appellees theorize.

II. CONCLUSION

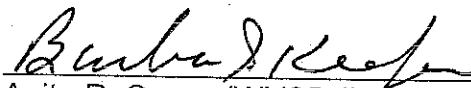
The Appellees’ refusal to acknowledge the Court’s holding in Richards, is plainly wrong. This Court clearly stated that:

the best way to deal with this problem [concerning an insured receiving a double recovery from an insurer] 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[.]. 192 W.Va. at 249, 455 S.E. 2d at 808.

This Court instructed insurance companies to add reimbursement language to the insurer’s policies and that is exactly what Appellant, Nationwide Mutual Insurance Company, did. See Richards, 193 W. Va. at 249, 455 S.E.2d at 808. The Appellees’ protestations to the contrary are simply without merit. The relevant, clear and unambiguous, policy provisions

See Richards, 193 W. Va. at 249, 455 S.E.2d at 808. The Appellees' protestations to the contrary are simply without merit. The relevant, clear and unambiguous, policy provisions at issue comport with the repeated dictates and instruction given by this Court in Richards. See id. The Appellees should not be allowed to escape their contractual obligation to reimburse Nationwide pursuant to the terms of the relevant policy provisions. Therefore, Nationwide respectfully requests that this Honorable Court answer the certified question posed by the Circuit Court of Mercer County, West Virginia, in the affirmative.

NATIONWIDE MUTUAL INSURANCE COMPANY
By Counsel



Anita R. Casey (WVSB #664)
Barbara J. Keefer (WVSB #1979)
Maria Marino Potter (WVSB #2950)
MacCorkle Lavender Casey & Sweeney, PLLC
300 Summers Street, Suite 800
P. O. Box 3283 (25332)
Charleston, WV 25301
Phone: 304/344-5600

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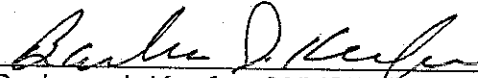
NATIONWIDE MUTUAL INSURANCE COMPANY,

Appellant.

CERTIFICATE OF SERVICE

I, Barbara J. Keefer, counsel for Nationwide Mutual Insurance Company, do hereby certify that on this 17th day of December, 2004, I served a true and correct copy of the foregoing **APPELLANT'S REPLY 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
P. O. Box 490
Bluefield, WV 24701
Counsel for Appellee


Barbara J. Keefer (WVSB #1979)