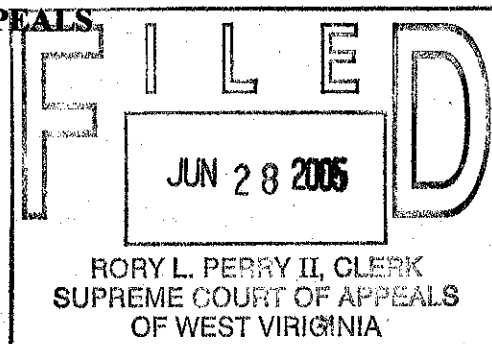


**IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA**



**Lillian Gibson, Administratrix of the Estate
of Angela Dawn Huffman Anderson
Petitioner below
Appellant herein**

v.

Supreme Court No. 32690

**Northfield Insurance Company, et. al.
Respondents below
Appellees herein.**

Appellant's Brief in Support of Petition for Appeal

Now comes the Appellant, Lillian Gibson, Administratrix of the Estate of Angela Dawn Huffman Anderson, the Petitioner below, by counsel, Margaret L. Workman, and files this Brief in Support of the Petition for Appeal heretofore filed and accepted by this Court for docketing on the Argument Docket.

In this Petition for Appeal, the Appellant asks this Honorable Court to reverse the order of the Circuit Court of Kanawha County (Exhibit A attached hereto), honorable Charles E. King, Jr. presiding, which denied the relief sought in a Petition for Declaratory Relief, and to order that the relief sought by the Appellant with regard to the insurance limits applicable in the wrongful death case below be granted.

Factual & Procedural Background

This case arises out of an accident that occurred in the City of Charleston, Kanawha

County, West Virginia on May 8, 1999, at the intersection of MacCorkle Avenue and Route 119 (Corridor G), which resulted in the death of Angela Dawn Huffman Anderson and caused serious and permanent injuries to her husband, Robert T. Anderson, Jr. It was a beautiful, sunny day with clear visibility in the early afternoon. Robbie Anderson, who was employed by the State Police, and his wife Angie, who was employed by the Supreme Court of Appeals administrative office, were out for a pleasure trip on their motorcycle. They were accompanied by three motorcyclists: John Mullins carrying a passenger; and Michael Greathouse and Ralph Schoolcraft, off-duty South Charleston police officers without passengers. A City of Charleston ambulance in the process of responding to a request for emergency services came down Corridor G from the direction of Oakwood Road towards the Southside Expressway.¹ As the ambulance approached the intersection, it had the red light, but paused only briefly at the red light before proceeding through the light and into the path of the Anderson motorcycle. The cycle had no choice but to plow into the ambulance that had stopped in the middle of the lane, and the impact of the accident was so great that Angie's helmet and boots flew off as she was thrown from the cycle. Robbie Anderson suffered severe and permanent injuries to his leg. Angie, a beautiful twenty-six-year-old was never conscious again and she died the next day, Mother's Day, May 9, 2005.

In the aftermath of the ambulance striking the Anderson motorcycle, a second motorcycle, driven by John Mullins but weighted down with a passenger, was able to avoid a collision. The third and fourth motorcycles operated by Ralph Schoolcraft and Michael Greathouse without passengers, were unable to avoid the accident and hit the ambulance, which had stopped in their

¹Liability is not an issue in this Petition. If the legal issues presented herein are resolved in Appellant's favor, the Respondents have agreed to pay the amount of proceeds which the Appellant contends remains in the policy.

path in the middle of the road.

On August 20, 1999, a personal injury action was filed by Robert T. Anderson, Jr. in the Circuit Court of Kanawha County, and was assigned to Judge Tod J. Kaufman (hereinafter called the Anderson personal injury case). On November 16, 1999, a wrongful death action was filed by the Estate of Angela Dawn Huffman Anderson in the Circuit Court of Kanawha County (hereinafter called the Anderson personal injury case), and was assigned to Judge Herman Canady. On July 19, 2000, the two causes of action were consolidated for trial before the honorable Judge Tod J. Kaufman.

Complaints alleging personal injury causes of action were filed by Mr. Schoolcraft and Mr. Greathouse on or about November 29, 1999 (hereinafter called the Schoolcraft/Greathouse case). A trial was commenced with respect to the Schoolcraft and Greathouse matter in October, 2000, before the honorable Tod J. Kaufman. At the Schoolcraft/ Greathouse trial, the City contended in open court that the accident involving Schoolcraft and Greathouse was a separate occurrence from the Anderson accident, and were granted a motion in limine precluding evidence of any details of the Anderson accident.

Trial of the consolidated Anderson cases was stayed pending resolution of this Petition for Declaratory Relief. Although Judge Kaufman retained the underlying case, he disqualified himself from the Petition for Declaratory Relief concerning the issue of applicable insurance limits and that portion of this matter was transferred to Judge Charles E. King, Jr.

The City of Charleston was insured pursuant to a policy of insurance issued and underwritten by Northland Insurance Company, a Minnesota corporation (hereinafter Northland), and its holding company Jupiter Holdings, Inc., a Minnesota corporation (hereinafter Jupiter).

The subject insurance policy reflects on the declarations page that there is one million dollars (\$1,000,000.00) in coverage. Furthermore, West Virginia Code § 16-4C-16 requires every ambulance service provider to have a policy of insurance in an amount of one million dollars (\$1,000,000.00) per incident.

During the pre-trial proceedings below, however, the City² relied upon a definition of the phrase "ultimate net loss" in the subject insurance policy for the contention that the policy permitted deductions from the coverage limits of all defense costs and attorneys fees. Pursuant to this assertion, the City contended that the policy limits of one million dollars (\$1,000,000.00) had already been reduced to less than seven hundred thousand dollars by the time of the filing of the Petition for Declaratory Relief below, and further contended that the limits continued to be reduced by fees and costs associated with the defense of all of these consolidated cases.

Furthermore, the City also asserted that defense attorneys fees and costs associated with the defense of the companion Schoolcraft/Greathouse litigation which had already been incurred and which continued to be incurred until those proceedings were final also reduced the policy limits of insurance available to the Anderson cases.

In June 1999, Plaintiffs in each of the separate Anderson cases by separate counsel made a demand for policy limits of \$1 million each for a full release of the City of Charleston. That

²As will be more fully set forth herein, the Appellant contends that the attorney for the City, who was selected by the insurer, in fact represented the insurer's interests, not the City's. As this court held in *Shamblin v. Nationwide*, 183 W.Va. 585, 396 S.E.2d 766 (1990), "An insurance company must take into account the interest of its insured and give its insured's interest at least as much consideration as it gives its own interest." That did not occur in this case. These Respondents have been intent from the outset at low-balling these very serious and legitimate claims.

demand was refused. Thereafter, the matters were voluntarily mediated and the Plaintiff estate and personal injury claim made a joint demand of policy limits of \$1 million, thus providing the insurer the opportunity to achieve a full settlement and release of any and all claims in the above-styled actions against its insured, the City of Charleston.³ Such demand for policy limits was also refused.

On the 12th day of July, 2002, both of the Anderson Plaintiffs out of desperation that there would be no insurance proceeds left if they continued without getting these legal issues resolved, settled and resolved their cases against the City by the payment of the amount of the insurance proceeds which the City and the Respondent insurance entities contended remained in the policy at that time, which was a total of \$688,361.86.⁴ By such settlement and release, however, the Appellant wrongful death estate of Angela Dawn Huffman Anderson, reiterated and preserved its claim that the City's policy contained \$1 million in coverage and retained the right to seek declaratory relief against the city's insurers for remaining proceeds of the \$1 million policy.⁵ The Respondents agreed that, should the Appellant prevail in its Petition for Declaratory Relief, such remaining proceeds would be paid to the wrongful death estate. The Appellant claims that \$311,638.14 currently remains in the total available proceeds of the policy. The City claimed

³At this time, the City should have been clamoring for its insurer to pay the policy limits demand in order to insulate itself from responsibility for an excess verdict. However, as will be demonstrated, counsel for the city actually asserted positions throughout which were in the insurer's best interests rather than the city's.

⁴The City and its insurer derived this number by deducting the defense fees and costs associated with both the Greathouse/Schoolcraft case and the Anderson personal injury and Anderson wrongful death cases which had been incurred to that point.

⁵The personal injury cause of action accepted the settlement amount as full settlement of its claims and waived its right to pursue additional relief.

then, and the Respondent insurance companies claim now that, after the deduction of the defense legal costs and fees, this settlement exhausted all available insurance proceeds.⁶ It was further agreed by the parties that the wrongful death estate would continue to pursue the remaining amount of the \$1 million policy limits that such estate contended were required by law to be in force and effect, and would seek by means of a Petition for Declaratory Relief to have the insurance policy limits clarified by a judicial ruling to be \$1 million, or in the alternative, if a court determined that the amount of the policy limits was less than \$1 million by virtue of the eroding defense costs concept, then to have the policy reformed to provide \$1 million in policy limits. This is the appeal by the denial by the Circuit Court of such relief.

The Statute

West Virginia Code, 16-4C-16(1) Limitation of liability; mandatory errors and omissions insurance requires every emergency medical service provider to obtain a policy of insurance insuring the person or entity and every employee, agent or servant thereof, against loss from the liability imposed by law for damages arising from any error or omission in the provision of emergency medical services in an amount no less than one million dollars per incident. The precise language is as follows:

West Virginia Code 16-4C-16(1) provides:

⁶The record reflects that on May 17, 2001, the City's attorney contacted the undersigned counsel for the estate and left a voice mail to the effect that counsel for Schoolcraft and Greathouse had filed an amended motion for a new trial on the basis that the City had withheld evidence. Counsel for the City indicated that, should such Motion for a New Trial be granted, that the danger that there would be even less policy limits "changes dramatically." In consequence, he urged settlement within the ever-decreasing amount he contends are left in the policy on the basis that limits would further dwindle if the new trial is awarded. The Appellant, Angie's beneficiaries, fearing that nothing would be left, settled with the City and reserved the right to pursue the Respondents.

(1) Every person, corporation, ambulance service, emergency medical service provider, emergency ambulance authority, emergency ambulance service or other person which employs emergency medical service personnel with or without wages for ambulance service or provides ambulance service in any manner, shall obtain a policy of insurance insuring the person or entity and every employee, agent or servant thereof, **against loss from the liability imposed by law for damages arising from any error or omission in the provision of emergency medical services as enumerated by this article, in an amount no less than one million dollars per incident.** Provided, That each emergency medical services agency having less than this amount on the first day of January, one thousand nine hundred ninety-six, shall obtain the policy of insurance required in this section in the amount of one million dollars on or before the first day of March, one thousand nine hundred ninety-seven. New applicants shall obtain the insurance required in this section in the amount of one million dollars. Emphasis added.

The Appellant contends that, by virtue of this statute, West Virginia law mandated that the City of Charleston have an insurance policy in the amount of \$1 million, and that such statutorily-required policy limits are applicable to the Anderson accident. The Respondent denies that Code 16-4C-16(1) is applicable to the insurance coverage at issue in this case on the basis of their contention that the Appellant's decedent did not die as a result of any error or omission in the provision of emergency medical services.

The Insurance Policy

The following policy language is important to the resolution of the coverage issues:

Section III - AUTOMOBILE LIABILITY

INSURING AGREEMENTS

A - AUTOMOBILE LIABILITY: Underwriters hereby agree, subject to the limitations, terms and conditions hereunder mentioned, to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability imposed upon the Assured by law or assumed by the Assured under contract or agreement, for damages direct or consequential, and expenses, all as more fully defined by the term 'ultimate net loss', arising out of any occurrence on account of bodily injury including death at the time resulting therefrom, suffered or alleged to have been

suffered by any person or persons (excepting employees of the Assured injured in the course of of their employment), and/or damage to or destruction of property or the loss of use thereof, arising out of the ownership, maintenance or use of any automobile. (See *Northland Insurance Companies policy of insurance issued to the City of Charleston, Policy No. AA101234 at page 19*).

Further, Paragraph 17 of the section of the policy entitled "GENERAL CONDITIONS," provides:

17. ULTIMATE NET LOSS:

For Section I, "ultimate net loss" means the loss sustained by the Assured after making deductions for all recoveries and salvages.

For Section II, the term "ultimate net loss" shall mean the total sum which the Assured becomes obligated to pay by reason of personal injury or property damage claims, either through adjudication or compromise, after making proper deductions for all recoveries and salvages.

"Ultimate net loss" shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, expenses for doctors and nurses, also legal costs, premiums on attachment of appeal bonds, expenses for lawyers and investigators and other persons for litigation, settlement, adjustment and investigation of claims or suits which are paid as a consequence of any occurrence covered hereunder.

The salaries, expenses or administrative costs of the Assured or the Assured's employees or the Third Party Claims Administrator are not to be included within the meaning of the "ultimate net loss" and are to be paid by the Assured.

For Section III, the term "ultimate net loss" shall mean the total sum which the Assured becomes obligated to pay by reason of bodily injury or property damage claims, either through adjudication or compromise, after making proper deductions for all recoveries and salvages.

"Ultimate net loss" shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, expenses for doctors and nurses, also law costs, premiums on attachment of appeal bonds, expenses for lawyers and investigators and other persons for litigation, settlement, adjustment and investigation of claims or suits

which are paid as a consequence of any occurrence covered hereunder. Emphasis added.

The salaries, expenses or administrative costs of the Assured or the Assured's employees or of the Third Party Claims Administrator are not be included within the meaning of the "ultimate net loss" and are to be paid by the Assured. Emphasis added.

For Sections IV, V, and VI, "ultimate net loss" means the total sum which the Assured becomes obligated to pay by reason of claims, either through adjudication or compromise, after making proper deductions for all recoveries and salvages. *(See Northland Insurance Companies policy of insurance issued to the City of Charleston, Policy No. AA101234 at pages 41 & 42).*

The portions of the policy language which are emphasized become particularly relevant to the issues presented by both sides in this case.

Additional Facts

The Appellant maintains that the record demonstrates that the subject insurance policy is a boilerplate policy sold to municipalities all over the country, and thus is not custom-designed. Further, an affidavit in the record from Greg Burton, who served as City Manager of the City of Charleston at the time the subject insurance policy was acquired, and who as in fact the person in charge of acquiring the coverage, reflects that he negotiated and approved the contract of insurance at issue. Mr. Burton's affidavit further reflects that he simply requested the amount of coverage sought (\$1 million) and that at no time did he discuss or negotiate on behalf of the City any specific provisions or specific language to be included in the policy. His affidavit further reflects that there were no negotiations or discussions as to any specific needs of the City of Charleston, nor as to any custom provisions specifically tailored to the City's needs. Mr. Burton believed that he was acquiring for the City the \$1 million in coverage required by law. See

Exhibit 2, affidavit of Greg Burton, attached hereto and made a part hereof.

Appellant's Arguments

In the Petition for Declaratory Relief, the Appellant made the following arguments to the Circuit Court and reiterates them herein:

(1.) West Virginia Code 16-4c-16(1) which requires \$1 million in coverage is applicable to the instant case and an eroding limits policy does not comply with the statutory requirement . (2) Even if the statute is found not to be applicable to the instant case, the language of the policy does not support the Respondents' contentions as to eroding limits. (3) Nor is the policy custom-designed, as that term is defined by case law, so as to defeat the requirements of Code 16-4c-16(1). (4) Further, any ambiguity in the policy language must be construed against the Respondents. (5) A contract of insurance marketed or underwritten to a public entity which does not comport with legal requirements must be reformed to do so. (6) Even if the Respondents prevail on their insurance limits arguments, the Anderson accident must be deemed a separate occurrence for purposes of insurance coverage. (7) There is a strong duty on an insurer to defend its insured which negates generally the concept of defense attorneys fees diminishing policy limits policies; and even more strongly, in the specific context of policies marketed to or underwritten for public entities. (8) Insurance policies which provide for policy limits to be eroded by defense fees and costs in violation of statutory minimum limits are against the public policy of West Virginia. (9) Insurance policies with eroding limits are against the public policy of West Virginia favoring settlement of cases. (10) Even if eroding limits policies are lawful in this context, there is no unilateral right of an insurer to determine amount by which policy limits to be reduced. (11) In

West Virginia, a Plaintiff's right to make a policy limits demand has particular legal significance, and an eroding limits policy precludes the exercise of this right.

The Lower Court Order

The Circuit Court determined that the Appellant was not entitled to declaratory relief and set forth the following reasons:

- a. West Virginia Code 16-4C-16(1) regulates persons and entities who provide emergency medical services, and does not regulate insurance companies, and is therefore not applicable to the Northfield respondents.
- b. West Virginia Code 16-4C-16(1) is not applicable because the Appellant's claim did not arise from an error or omission in the provision of emergency medical services;
- c. Even if West Virginia Code 16-4C-16(1) did apply to Northfield - and it does not - the Northfield Policy does not violate that statute;
- d. The events of May 8, 1999 were a single occurrence, and therefore, the Northfield Policy Limits must be applied accordingly;
- e. The Appellant's public policy arguments are without merit;
- f. Because the Northfield Policy was a custom-designed policy issued to a governmental entity, liability under the Policy could be permissibly limited notwithstanding West Virginia Code 16-4C-16(1); and
- g. The Appellant has established no basis to grant declaratory relief against Northland Insurance Company or Jupiter Holdings, Inc.

Assignments of Error

1. The Court erred in finding that West Virginia Code 16-4C-16(1), which requires that each emergency services provider have \$1 million in insurance coverage, imposes no legal obligation upon the insurance company Respondents to sell, market and/or underwrite to the City of Charleston an insurance policy covering its emergency service providers which comports with that statute.
2. The Court erred in holding that the claim of the Appellant was not a "loss from the liability imposed by law for damages arising from any error or omission in the provision of emergency medical services" by the City of Charleston.

3. The Court erred in not even considering, addressing, or upholding the Appellant's argument (a) that even if the statute is not applicable, the policy language itself does not support the Respondents' contentions as to the existence of eroding limits; and in (b) determining that the language of the policy is not ambiguous.
4. The Court erred in holding that, even if West Virginia Code 16-4C-16(1) was applicable to the Respondents, that the eroding limits policy did not violate 16-4C-16(1).
5. The court erred in holding that the accidents which occurred on May 8, 1999, were the same occurrences for purposes of applying applicable policy limits.
6. The court erred in determining that the policy at issue was a custom-designed policy and therefore entitled to evade the requirements of West Virginia Code 16-4C-16(1) as to the policy limits.
7. The court erred in finding the Appellant's public policy argument without merit.
8. The Court erred in determining that the Appellant established no basis for the declaratory relief sought.

Argument

1. Applicability of West Virginia Code 16-4C-16(1)

It is quite clear that the law required the City of Charleston to have an insurance policy providing \$1 million coverage in place, not \$1 million minus defense costs and fees. It is equally clear that an insurer may not prepare and present to a municipality, such as the City, a policy which provides on its declarations page policy limits of \$1 million, as requested by the City and as required by law, but which includes provisions in the body of the policy which purport to permit the erosion of those limits by the insured's defense costs and fees.

While the Respondents have argued that an insurer can sell any coverage it wants to sell to an insured, this concept does not comport with West Virginia case law in other contexts which has required that minimum required coverages be provided. This Court held in *Bell v. State Farm Mutual Automobile Insurance Co.*, 157 W. Va. 623, 207 S. E. 2d 147 (1974), that "The Uninsured Motorist Law, Chapter 33, Article 6, Section 31, *Code of West Virginia*, 1931, as amended, governs the relationship between an insured and insurer and provisions within a motor vehicle insurance policy which conflict with the requirements of the statute, either by adding to or taking away from its requirements are void and ineffective." This point of law was reiterated by the Court in the more recent *Mitchell v. Broadnax*. This same concept is equally applicable to the instant context. Nor does this argument comport with the statute itself which also provides:

(3) Every person or entity required to obtain a policy of insurance as contemplated by this section, shall furnish to the commissioner on or before the first day of January of each calendar year proof of the existence of the policy of insurance required by this section.

Clearly, it was the intent of the State Legislature that this statute be enforceable by the State Insurance Commissioner, and the fact that the Commissioner did not act to enforce the law certain does not preclude this Court from doing so. This provision supports Appellant's contention that the legislature intended for this minimum level of insurance coverage be mandatory.

Furthermore, in exchange for requiring \$1 million in insurance coverage for emergency service entities, the legislature added protections for those entities:

(2) No emergency medical service personnel or emergency medical service provider may be liable for civil damages or injuries in excess of the amounts for which the person or entity is actually insured, unless the damages or injuries are intentionally or maliciously inflicted.

2. Provisions of Emergency Services Issue

It is clear on the face of the statute that

“Every...emergency medical service provider, emergency ambulance authority, emergency ambulance service or other person which employs emergency medical service personnel with or without wages for ambulance service or provides ambulance service in any manner, shall obtain a policy of insurance insuring the person or entity and every employee, agent or servant thereof, against loss from the liability imposed by law for damages arising from any error or omission in the provision of emergency medical services as enumerated by this article, in an amount no less than one million dollars per incident.”

The damages sought in the instance matter clearly fall within that definition. The City's ambulance driver has consistently testified that on the day of the accident, he was providing emergency services by answering an emergency call in the ambulance. In fact, it is only because it was an emergency call that the ambulance was permitted to traverse through a red light at all.⁷ Even during the pre-trial proceedings in the Greathouse/Schoolcraft trial, the City's attorneys, who were retained by the Respondent insurance company's administrative services agency, argued that the ambulance was answering an emergency call:

As Your Honor is somewhat familiar with, the Anderson's were on the first motorcycle, the one that actually collided with the ambulance, and obviously the facts of their injuries and Ms. Anderson's unfortunate death would be highly inflammatory to this jury, and under Rule 403, the prerogative (sic) value, potential prerogative (sic) value of unrelated people who have a separate case pending before this Court and who are not involved in this litigation, any potential limited prerogative (sic) value that you would have here would be very much outweighed by the prejudicial nature of the their injuries and damages.

⁷W. Va. Code 17C-2-5, in pertinent part, provides:

- (a) The driver of an authorized emergency vehicle, **when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein stated.**
- (b) The driver of an authorized emergency vehicle may:
 - (1) Park or stand, irrespective of the provisions of this chapter;
 - (2) **Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation...** Emphasis added.

In addition, there's an accident report which was prepared when investigating the Anderson accident, and we would also ask that that accident report would be excluded because it pertains to the Anderson accident and not to the Greathouse and Schoolcraft accident."

(See transcript of proceedings held in Schoolcraft, et al. v. The City of Charleston, Civil Action No. 99-C-1865 and 99-C-1866, before the Honorable Tod Kaufman on October 10th and 11th, 2003, pages 15 & 16).

Further, during opening statements, the City's lawyer clearly contended that the ambulance was engaged in the provision of emergency services:

It's also quite obvious that this wasn't a call for going out and having donuts, and we'll have the testimony of Mr. Shrewsbury, whose wife was the person who was being attended to and who had this emergency. In fact, Mr. Shrewsbury's wife died Friday, and he's still coming here to testify that the necessity of this call as an emergency and it was a life-threatening situation."

(See transcript of proceedings held in Schoolcraft, et al. v. The City of Charleston, Civil Action No. 99-C-1865 and 99-C-1866, before the Honorable Tod Kaufman on October 10th and 11th, 2003, pages 55 & 56.)

At his deposition in the underlying wrongful death case, the ambulance driver himself testified accordingly:

Q. Now, you get the call. And what call did you receive?

A. It was for a respiratory difficulty call down off of Patrick Street area. A woman was having trouble with her tracheal tube.

Q. At her home?

A. At her home, yes, sir.

Q. And who eventually responded to that call?

A. We did. After the accident?

Q. Yes, sir.

A. I have no idea.

Q. And have you heard since the accident who responded to that, if anybody?

A. Somebody did, but I don't know who. I don't know if it was a city ambulance or if maybe it was a county ambulance. It could have been either one. Somebody did.

Q. And is that what you would call an emergency run that you were on?

A. Yes sir.

(*Deposition of William Edward Loftis, taken in Anderson v. City of Charleston, 99-C-1898, pages 17 & 18*)

The Respondents will readily acknowledge that there is no factual dispute whatsoever that the ambulance driver was in the process of answering an emergency call and therefore engaging in the "provision of medical services." The only issue is a legal one, that being whether the phrase "engaged in the provision of emergency medical services" requires that the insurance coverage is only in place for those who were the direct recipient of such emergency medical services. The Appellant contends that it is clear that the City was engaged in the provision of emergency medical services, and that the statutory requirement for insurance coverage is therefore applicable to the instant case. The statute only requires that the policy insure "against loss from the liability imposed by law for **damages arising from any error or omission in the provision of emergency medical services.**" Clearly, the damages incurred by the estate of Angela Anderson, e.g. her death, arose from the ambulance's error in the provision of medical services in that the ambulance improperly progressed against a red light while responding to an emergency call, and the actions of the driver were done in the course of providing emergency services.

This Court has held on numerous occasions that where provisions in an insurance policy are plain and unambiguous and where such provisions are not contrary to a statute, regulation, or public policy, the provisions will be applied and not construed. *Horace Mann Insurance Co. v. Adkins*, 215 W.Va. 297, 599 S.E.2d 720 (2004).

3. Policy Language Arguments

Even if the statute is not applicable, the Appellant contends that the policy language itself

does not lend itself to the interpretation given it by the Respondents. The language in the insurance policy upon which the Respondent relies in contending that the City's legal fees and costs are deducted from the policy limits is found in the definition of "ultimate net loss." That term's definition "law costs...expenses for lawyers and investigators and other persons for litigation, settlement, adjustment and investigation of claims or suits which are paid as a consequence of any occurrence covered hereunder." The Respondents cite this language as justifying the so-called eroding limits policy. In fact, however, the term "ultimate net loss" in the policy "shall mean the total sum which the Assured becomes obligated to pay..." Thus, the Appellant contends that the items described in the definition of "ultimate net loss" actually apply to sums which the assured (insured) is obligated to pay, which certainly would not include the defense costs.⁸ Furthermore, other language in the policy bodes against the eroding limits interpretation of the policy. The policy provides: "The salaries, expenses or administrative costs of the Assured or the Assured's employees or of the Third Party Claims Administrator are not be included within the meaning of the "ultimate net loss" and are to be paid by the Assured." Emphasis added. The record is clear that the Third Party Claims Administrator selected the lawyer to represent the City, and therefore the expenses of such lawyer are not within

⁸The prefatory language to the definition of "ultimate net loss" further supports the Appellant's contention: "Underwriters hereby agree, subject to the limitations, terms and conditions hereunder mentioned, to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability imposed upon the Assured by law or assumed by the Assured under contract or agreement, for damages direct or consequential, and expenses, all as more fully defined by the term 'ultimate net loss', arising out of any occurrence on account of bodily injury including death at the time resulting therefrom, suffered or alleged to have been suffered by any person or persons (excepting employees of the Assured injured in the course of of their employment), and/or damage to or destruction of property or the loss of use thereof, arising out of the ownership, maintenance or use of any automobile." Emphasis added.

the meaning of the term "ultimate net loss."

Furthermore, the Appellant contends that, in the event that this Court determines that the insurance contract is ambiguous, it must be interpreted against the insurer. The lower court correctly cited the discussion of the term "ambiguity" found in Justice Cleckley's opinion *West Virginia Ins. Co., v. Lambert*, 193, W. Va. 681, 458 S.E.2d 774 (1995). While the lower court cited good law, it made a legal conclusion that the contract of insurance was not ambiguous without any reasoning whatsoever. An examination of the cited language of the policy reflects that it is confusing, clearly not even written in this country, and definitely susceptible to two interpretations. Even if one of those interpretations is the one that the City advances, the language is at minimum ambiguous, and thus must be interpreted against the insurer. West Virginia's courts have long held that since insurance policies are prepared solely by insurers, any ambiguities in the language of the insurance policy must be construed liberally in favor of the insured or against the insurer. *See Hensley v. Erie Insurance Co*, Syl. Pt. 1, 168 W. Va. 172, 283 S.E.2d 227 (1981) (quoting Syl. Pt. 3, *Polan v. Travelers Insurance Co.*, 156 W. Va. 250, 192 S.E.2d 481 (1972)).

This Court has also made clear that whenever the language of an insurance policy provision is reasonably susceptible of two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning, it is ambiguous. *Horace Mann Insurance Co. v. Adkins*, 215 W. Va. 297, 599 S.E.2d 720 (2004).

This court must examine this issue closely in light of the fact that **the lower court did not provide any reasoning whatsoever as to how it made its conclusion that the language was not ambiguous, but merely made a conclusory statement as its legal ruling.**

4. Effect of Eroding Policy Limits on Compliance with West Virginia Code 16-4C-16(1)

The Circuit Court held that, even if the statute applies to the Respondents, that they did not violate it, because the insurance policy did provide \$1 million limits even with its eroding limits language. The lower court went on to call the concept of eroding limits “inconsequential,” because neither Code 16-4C-16(1) nor any other statute prohibited eroding policy limits.

First, the Appellant contends it is absurd to call the difference between a full limits policy and an eroding limits policy “inconsequential.” The difference in the instant case amounts to more than \$300,000. The Legislature obviously established a mandatory minimum requirement for a reason, and the Appellant contends that the reason was to protect persons who might be injured as a result of the provision of emergency services and that the decedent clearly falls into that category. Had the Legislature intended for cities such as Charleston to be free to contract for whatever amount of insurance it desired, or for insurance companies to market and underwrite amounts of insurance at whatever level such entities desired, then there would be no statute in place mandating a minimum amount of coverage. That simply is not the case. Syllabus pt. 2 of *Trent v. Cook*, provides in pertinent part:

...Consequently, when an insurer issues a custom-designed insurance policy to a governmental entity pursuant to the Governmental Tort Claims and Insurance Reform Act, that entity may incorporate language absolutely limiting liability under the policy, even if such language would otherwise violate the provisions of W. Va. Code 33-6-31(b).

Thus, it is clear that the only way in which a public entity can evade statutory requirements for insurance coverage is if it can be demonstrated that the policy in question was custom-designed as that term is described in W. Va. case law. As more fully set forth herein, the record is abundantly clear that the instant policy was not custom-designed.

5. Separate Occurrence Argument

The Respondents contend that the Greathouse/Schoolcraft accident and the Anderson accident were all the same "occurrence" under the subject insurance policy, and that the insurance limits, whatever they are ultimately interpreted to be, apply to all of these accidents as if they were only one occurrence. The practical effect of this issue on the amount of insurance proceeds available herein is that, even if the court agrees with Respondents that the eroding policy limits are valid and that defense costs can be deducted from the insurance limits, the Appellant still contends that the legal defense costs associated with the Greathouse/Schoolcraft accident should not be deducted from the amount available for the death of the Appellant's decedent. The Appellant further contends that the City argued throughout the Greathouse/Schoolcraft proceedings that they were separate accidents. The City and its insurers have had the benefit of this argument throughout the prior Greathouse/Schoolcraft trial, and should not be permitted to now argue in an alternative manner in the instant proceeding. Furthermore, although Respondents may contend that they are not bound by the City's position in the related litigation, it is a fact that the City and the insurance companies have had a complete community of interest in connection with this issue throughout. The further fact that the second motorcycle driven by Mr. Mullins was able to avoid the accident and to come to a stop prior to the Greathouse/Schoolcraft cycles even reaching the scene further bolsters the Appellant's argument that the accident which resulted in Angie's death was a separate accident from the Greathouse/Schoolcraft accident.

6. The Custom-designed Policy Issue

The Respondents contend that, even if *West Virginia Code 16-4C-16(1)* is applicable to them, that the policy at issue was custom-designed in a manner that permits the City and its

insurers to evade the requirements of that statute. The Appellant contends that the record reflects that the insurance policy is a boilerplate policy sold to municipalities all over the country, and thus is not custom-designed. The Appellant further cites the affidavit of Greg Burton, attached hereto as Exhibit B, who was Charleston City Manager and in charge of conducting negotiations for the acquisition and approval of the subject policy, at the time the insurance was acquired. The affidavit sets forth that no specific, individualized provisions designed to meet the City's special needs were requested, negotiated, or included in the policy. Mr. Burton simply requested that a policy providing the \$1 million in coverage required by law be provided.

As to the issue of the policy being a "boiler plate" one used all over the country, the Appellant filed the following interrogatory and received the following response:

INTERROGATORY NO. 3: Please produce names of other insureds who have entered into the same or substantially the same insurance policy with defendant as City of Charleston for Emergency Service Provider coverage.

RESPONSE: See Exhibit 2 for a chart of all municipal entities with an All Lines Aggregate form that would have been in effect from 1999 to 2000. (*Interrogatory and Response #3 of Northfield Insurance Company's Answers to First Set of Interrogatories and Requests for Production filed on February 4, 2002, with Exhibit 2*).

The exhibit contained hundreds of municipal entities who had purchased the same policy.

It is clear from the record, both by the number of such municipalities who have purchased the same identical policy, and even more clearly by the affidavit of Greg Burton that this was not a custom-designed policy. Therefore, it must comport with West Virginia law. In order for a policy to qualify as a "custom-designed" policy in a manner that extricates it from the statutory

minimum insurance requirements, it must be custom-designed within the meaning of West Virginia case law. The policy is not a custom-designed policy such that the mandatory limits can be avoided. The voluminous insurance policy at issue in this case is nothing more than a form policy delivered to the insured. As the Court explained in *Eggleston v. West Virginia Dept. of Highways* and again in *Trent v. Cook*, “the hallmark of a so-called custom-designed policy is that “[i]t is different from the usual insurance policy that is prepared and printed by an insurance company and delivered to the insured, whose only input ordinarily is not as to its language, but as to the amount and type of coverage.” *Trent v. Cook*, 198 W. Va. at 607, 482 S.E.2d at 224, (citing *Eggleston v. West Virginia Dept. of Highways*, 189 W. Va. 230, 233, 429 S.E.2d 636, 639 (1993)). Appellant contends that the policy is nothing more than a boilerplate policy written entirely by the insurance company. Even many of the words used in the policy are words commonly used in the United Kingdom, and upon information and belief, the Appellant believes that the insurer actually is Lloyds of London through Northland. If the City asserts in its response to this petition that it is custom-designed, it was the City’s burden to prove that contention⁹. In reaching the conclusion that the policy was custom-designed, the lower court gave no reasoning whatsoever and did not even address the affidavit of Mr. Burton, who actually negotiated and acquired the policy for the City and whose sworn statement made clear that there was nothing whatsoever custom-designed about this policy. When a policy issued to a public entity departs from statutory requirements for coverage, such policy can be upheld if and only if it can be shown

⁹Further, the City itself instituted litigation against the Respondent insurance companies and related entities wherein the City claimed that these Respondents committed fraud upon the city in the execution of the subject policy. (See *City of Charleston v. Citigroup, Inc., et al.*, Circuit Court of Kanawha County, Civil Action No. 02-C-2921)

that it was custom-designed to that municipality's needs. In the absence of such showing, the policy must be reformed to comport with our state law.

Even apart from the custom-designed concept, it is clear that the policy as characterized by the Respondents cannot be upheld, as the City official in charge of acquiring the policy gave a sworn affidavit that he thought he was acquiring \$1 million in coverage for the City, as required by law. In the recent case of *Luikart v. Valley Brook Concrete & Supply, Inc.*, --- S.E.2d ----, 2005 WL 1125059 (2005), this Court held:

With respect to insurance contracts, the doctrine of reasonable expectations is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

A review of the declarations page of the subject policy makes clear that it created an objectively reasonable expectation that provided \$1 million in coverage to the insured. In fact, the convoluted and ambiguous policy language upon which the Respondents rely in contending that its limits are diminished and eroded by the insured's attorneys fees and costs can be likened to an exclusion. With regard to exclusions, this Court in *Mitchell v. Broadnax*, 208 W. Va. 36, 537 S.E. 2d 882 (2000), citing *National Mutual Insurance Co. V. McMahon & Sons Inc*, 177 W. Va. 734, 356 S.E. 2d 488 (1987), reiterated that

An insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, placing them in such a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured."

7. Public Policy Arguments

A. Plaintiff's Right to Make Policy Limits Demand

A plaintiff has a right under West Virginia law to make policy limits demand, and thus a concordant right to know what the policy limits of an insurance policy are. Furthermore, there is substantial legal significance to the making of that policy limits demand for a plaintiff. Regardless of the amount of the insurance policy limits, an excess verdict can be collected from the insurer if the insurer fails to settle **within policy limits** and thus passes up an opportunity to achieve a full release for its insured. See *Shamblin v. Nationwide Mutual Insurance Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990).

Wherever there is a failure on the part of an insurer to settle within policy limits where there exists the opportunity to settle and where such settlement within policy limits would release the insurer from any and all personal liability, the insurer has prima facie failed to act in its insured's best interest and such failure to so settle prima facie constitutes bad faith toward its insured.

Id. Syl. Pt. 2 at 587, 396 S.E.2d at 768.

Thus, there is a very strong right on the part of the plaintiffs to **know** what the actual policy limits are in order to have the ability to make a policy limits demand. In this same connection, the burden is on the insurer to prove by clear and convincing evidence that it attempted in good faith to negotiate a settlement. See *id.* Syl. Pt. 3. The position of the Respondents herein is that the Plaintiff had no right to question the policy of attributing all of its expenses and fees thus far to the instant consolidated cases, nor even a right to challenge the reasonableness of the amounts billed and otherwise expended; and thus no right to even have full information upon which to determine the policy limits. The eroding limits insurance policy which is advocated by Respondents completely deprives a plaintiff of this right.

B. Unilateral Right of Insurer to Determine Amount by which Policy Limits to Be Reduced is Strong Disincentive to Settlement of Cases

Under the Respondents' contentions, all defense costs and fees come out of the policy limits strictly by use of and in the complete discretion of the defense counsel's own unsupervised and untrammelled charges. Even if the City's contention is correct as to the diminishing limits policy, neither the City nor the insurer should have the right unilaterally to make the determination of the amount which is fair, reasonable, and justified. Otherwise, counsel for insurers would have open checkbooks to draw down a policy proceeds at their will and pleasure, and plaintiffs would never have the ability to make a policy limits demand. That certainly could not be a system for the fair assessment of fees, nor would it serve the purpose of mandated insurance for public entities, e.g. to protect innocent victims. The amount to be awarded as attorney's fees is to be determined not from the point of view of the lawyer receiving the fees or his client, but from that of the presiding trial judge. See *Jordan v. National Grange Mutual Insurance Co.*, 183 W. Va. 9, 393 S.E 2d 647 (1990). The test for what is reasonable is generally based on a dozen broad factors. See *id.* (citing *Aetna* at Syl. Pt. 4). In the case at bar the City wants to calculate its own attorney fees and costs and then subtract those amounts, without any right of the plaintiffs to examine or questions such fees and costs, and without any significant judicial input. Their ongoing ability to consume the insurance proceeds in a carte blanche manner also creates a huge disincentive on the part of defendants to settle, and an immense pressure upon plaintiffs to settle before they have had a full opportunity to pursue sufficient discovery or to assess the value of the case after the full sharing of information and expert review. Just as occurred in the instant case, the plaintiffs become so frightened of the policy limits eroding every day if they do not settle, that they settle out of panic. That is especially against public policy where a public entity is involved, and where a death resulted from the tortious conduct of the City.

C. Duty of Insurer to Provide Representation to Insured

It is a longstanding principle of law in the United States that there is a duty on the part of the insurer to provide a defense to its insured. The duty to provide representation is even broader and stronger than the duty to pay the proceeds of the policy, and it is against public policy for the insurer not to pay the costs of such defense of its insured. This principle is even stronger when a public entity is the insured. The duty of an insurer to defend is a well-established principle of insurance law. This duty also arises by virtue of the language of the policy. In the instant case on page 6 of 45 of the policy, it is asserted: "This Service Organisation shall perform the following duties: (a) Investigate and settle or defend all claims or losses . . ." In fact, American courts generally require each party in litigation to bear its own attorney's fees, absent extraordinary circumstances. See Robert H. Jerry, Insurance Law. This is the law all over the United States and it is time for West Virginia jurisprudence, which certainly has enunciated this concept, to emblazon it into our law in this context.

Other Public Policy Arguments

This Court has held that when an insurer fails to satisfy a statutory criteria requisite to incorporating an exclusion in a policy of motor vehicle insurance, the enforcement of such an exclusion is violative of this State's public policy. See *Mitchell v. Broadnax*, supra.

Conclusion

In consequence of all of which, the Appellant on behalf of the wrongful death estate of Angela Dawn Huffman Anderson requests that this Court reverse the order of the Circuit Court of Kanawha County and declare:

- (1) That West Virginia Code 16-4C-16(1) requires that each emergency services provider

have insurance in an amount no less than one million dollars per incident against loss from the liability imposed by law for damages arising from any error or omission in the provision of emergency medical services.

(2) That it is a violation of law for an insurer to sell, market, or underwrite a liability policy for a municipal emergency medical services provider for less than \$1 million; and that policy limits of \$1 million minus defense fees and costs does not comport with the statute.

(3) That the damages suffered by the beneficiaries of the Estate of Angela Anderson as a result of her death under the circumstances herein constitute a "loss from the liability imposed by law for damages arising from any error or omission in the provision of emergency medical services" by the City of Charleston within the parameters of West Virginia Code 16-4C-16(1).

(4) That even if the statute does not preclude a diminishing limits type policy, that the language of the subject insurance policy provides that the policy limits of the subject insurance policy are \$1 million, and that such language does not permit the deduction of defense costs and fees from those policy limits; or in the alternative, if the policy is ambiguous and susceptible to two interpretations, that it must be interpreted against the Respondent insurers, because they were the preparers of the contract.

(5) That the Greathouse/Schoolcraft accident and the Anderson accident were separate "occurrences" under the subject insurance policy, and that the insurance limits, whatever they are ultimately interpreted to be, apply to the Anderson accident separately from the Greathouse/Schoolcraft accident.

(6) That the subject insurance policy is not custom-designed and that the City therefore cannot avoid the mandatory requirements of West Virginia Code 16-4C-16.


(7) That an eroding policy limits insurance policy is against public policy when sold to a public entity for the following reasons:

- a. A plaintiff has a right under West Virginia law to make policy limits demand, and thus a concordant right to know what the policy limits of an insurance policy.
- b. There is no unilateral right on the part of an insurer to determine the amount by which policy limits can be reduced by their costs and fees, and such a policy would be a strong disincentive to settlement of cases; and
- c. That there is a strong duty on the part of an insurer to provide a defense to its insured.

The Appellant further asks this Honorable Court to issue a written opinion making these conclusions of law and directing that this matter be remanded to the Circuit Court of Kanawha County for the entry of an order awarding to the wrongful death estate of Angela Dawn Huffman Anderson the sum of \$311,638.14, plus interest.

LILLIAN GIBSON, ADMINISTRATRIX
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