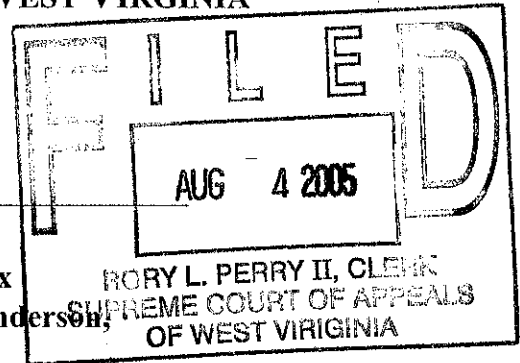


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 32690

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**LILLIAN GIBSON, Administratrix**  
**of the Estate of Angela Dawn Huffman Anderson,**  
*Appellant,*



v.

**NORTHFIELD INSURANCE COMPANY,**  
**NORTHLAND INSURANCE COMPANY,**  
**and JUPITER HOLDINGS, INC.,**  
*Appellees.*

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**THE NORTHFIELD APPELLEES' RESPONSE BRIEF**

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ARISING FROM AN ORDER DENYING  
APPELLANT'S AMENDED PETITION FOR DECLARATORY RELIEF  
ENTERED ON APRIL 8, 2004 IN CIVIL ACTION NO. 01-C-2304  
IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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## **TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	ii
<b>I. NATURE OF THE PROCEEDINGS AND THE RULINGS BELOW .....</b>	<b>2</b>
<b>II. STATEMENT OF FACTS .....</b>	<b>3</b>
<b>A. The Identity and Role of Persons and Entities Described in Appellant’s Brief .....</b>	<b>4</b>
1. <i>Appellant and other personal injury claimants</i> .....	4
2. <i>The City of Charleston’s true insurer</i> .....	5
3. <i>The City of Charleston</i> .....	7
<b>B. The ALA Policy and the Appellant’s Claim .....</b>	<b>7</b>
<b>III. RESPONSE TO APPELLANT’S ASSIGNMENT OF ERROR .....</b>	<b>11</b>
<b>IV. POINTS AND AUTHORITIES RELIED UPON .....</b>	<b>11</b>
<b>V. DISCUSSION OF LAW AND NOTE OF ARGUMENT .....</b>	<b>13</b>
<b>A. The Dismissal of Northland and Jupiter Was Appropriate .....</b>	<b>13</b>
<b>B. West Virginia Code § 16-4C-1, et seq., Does Not Regulate the Conduct of Insurers .....</b>	<b>13</b>
<b>C. The Plain, Unambiguous Policy Provisions Must Be Applied and Not Construed .....</b>	<b>16</b>
<b>D. The ALA Policy Does Not Violate W.Va. Code § 16-4C-16(1) .....</b>	<b>18</b>
1. <i>Appellant’s claim did not arise from an error or omission in the “provision of emergency medical services”</i> .....	19
2. <i>The ALA policy limits satisfied W.Va. Code § 16-4C-16(1)</i> .....	22
<b>E. The Events of May 8, 1999 Constituted a Single “Occurrence” .....</b>	<b>23</b>
<b>F. The ALA Policy Was a Custom-Designed Policy and Permissibly Limited Liability, Notwithstanding W.Va. Code § 16-4C-16(1) .....</b>	<b>25</b>
<b>G. Appellant’s Public Policy and Other Arguments Are Without Merit .....</b>	<b>31</b>
<b>VI. CONCLUSION AND REQUEST FOR RELIEF .....</b>	<b>35</b>

## TABLE OF AUTHORITIES

### Reported Cases of the Supreme Court of Appeals of West Virginia

<i>Auber v. Jellen</i> 196 W.Va. 168, 469 S.E.2d 104 (1996) .....	24
<i>Bell v. State Farm Mut. Auto. Ins. Co.</i> 157 W.Va. 623, 207 S.E.2d 147 (1974) .....	16
<i>D'Annunzio v. Security-Connecticut Life Ins. Co.</i> 186 W.Va. 39, 410 S.E.2d 275 (1991) .....	12, 17
<i>Eggleston v. W.Va. Dept. of Highways</i> 189 W.Va. 230, 429 S.E.2d 63 (1993) .....	25, 30
<i>Luikart v. Valley Brook Concrete &amp; Supply, Inc.</i> __ W.Va. __, 613 S.E.2d 896 (2005)( <i>per curiam</i> ) .....	17
<i>Payne v. Weston</i> 195 W.Va. 502, 466 S.E.2d 161 (1995) .....	16, 17
<i>Russell v. State Automobile Mut. Ins. Co.</i> 188 W.Va. 81, 422 S.E.2d 803 (1992) .....	12, 17
<i>Shamblin v. Nationwide Mut. Ins. Co.</i> 175 W.Va. 337, 332 S.E.2d 639 (1985) .....	12, 17, 23
<i>Trent v. Cook</i> 198 W.Va. 601, 482 S.E.2d 218 (1996) .....	12, 25, 26, 30
<i>W.Va. Highlands Conservancy, Inc. v. Public Service Comm'n</i> 206 W.Va. 633, 527 S.E.2d 495 (1998) .....	11, 13
<i>West Virginia Ins. Co. v. Lambert</i> 193 W.Va. 681, 458 S.E.2d 774 (1995) .....	17

### Other Reported Cases

<i>Merrill v. Packard</i> 395 So.2d 285 (Fla. D.C.A.3d 1981) .....	21
<i>Transamerica Corp. v. Reliance Ins. Co. of Illinois</i> 884 F. Supp. 133 (D. Del. 1995) .....	6
<i>Truck Insurance Exchange v. Rohde</i> 49 Wash.2d 465, 303 P.2d 659 (1956) .....	24
<i>United States v. Bestfoods</i> 524 U.S. 51, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998) .....	11, 13

### Unreported Cases

<i>Aetna Cas. &amp; Surety Co. v. Clayton</i> – see Attachment II 1995 WL 330815 (4 <sup>th</sup> Cir. (W.Va.) June 5, 1995) .....	24
---	----

**West Virginia Statutes and Regulations**

W.Va. Code § 16-4C-1, *et seq.* ..... 13, 14  
W.Va. Code § 16-4C-3(d) ..... 12, 19  
W.Va. Code § 16-4C-16(1) ..... 2, 3, 11, 12, 14, 15, 16, 18, 19, 22, 25, 26, 33, 36  
W.Va. Code § 16-4C-16(2) ..... 14  
W.Va. Code § 16-4C-16(3) ..... 15  
W.Va. Code § 16-4C-23 ..... 20  
W.Va. Code § 17D-4-2 ..... 15, 16  
W.Va. Code § 17D-6-1 ..... 15, 16  
W.Va. Code §§ 29-12A-1 to -18 ..... 12, 26  
W.Va. Code § 29-12A-16(a) ..... 12, 26  
W.Va. Code § 33-6-31(a) ..... 16  
W.Va. Code § 33-6-31(b) ..... 12, 15, 16, 26  
W.Va. Code § 33-12-10 ..... 6, 14  
W.Va. Code § 33-12-12 ..... 6, 14  
W.Va. Code § 33-12C-1, *et seq.* ..... 14  
C.S.R. § 68-48-1.1. .... 20  
C.S.R. § 68-48-13.1.b.3 ..... 21

**West Virginia Court Rules**

W.Va. R. Civ. P. Rule 26(b)(2) ..... 34, 35  
W.V.R.E. Rule 403 ..... 25

**Other Court Rules**

CTA4 L.R. & I.O.P. Rule 36(c) ..... 24

**Secondary Sources**

Couch on Insurance, 3<sup>rd</sup> ed., § 131:38 (2000) ..... 8, 21  
Couch on Insurance, 3<sup>rd</sup> ed., § 131:40 (2000) ..... 21

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LILLIAN GIBSON, Administratrix  
of the Estate of Angela Dawn Huffman Anderson,

*Appellant,*

v.

Appeal No. 32690

[Kanawha County Civil Action No. 01-C-2304

*Charles E. King, Jr., Circuit Judge]*

NORTHFIELD INSURANCE COMPANY,  
NORTHLAND INSURANCE COMPANY,  
and JUPITER HOLDINGS, INC.,

*Appellees.*

**THE NORTHFIELD APPELLEES' RESPONSE BRIEF**

Appellees Northfield Insurance Company (hereafter, "Northfield"), Northland Insurance Company (hereafter, "Northland")<sup>1</sup> and Jupiter Holdings, Inc. (hereafter, "Jupiter"), all collectively referred to hereafter as the Northfield Appellees, by their counsel, Michael J. Farrell, Robert L. Hogan and Farrell, Farrell & Farrell, L.C., respectfully submit their *Response Brief* in opposition to the *Appellant's Brief in Support of Petition for Appeal* (hereafter, "*Appellant's Brief*") filed in this matter on behalf of Appellant, Lillian Gibson, in her capacity as Administratrix of the Estate of Angela Dawn Huffman Anderson. For reasons set forth more fully below, the Northfield Appellees respectfully request that this Honorable Court dismiss this appeal as having been improvidently granted, or alternatively, that this Honorable Court affirm the Circuit Court of Kanawha County, West Virginia's April 8, 2004 *Order Denying Petitioner's Amended Petition for Declaratory Relief*.

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<sup>1</sup>Northfield was substituted for Northland and, therefore, Northland is or should no longer be a party to this litigation. Because the Appellant persists in referencing Northland in her pleadings, and to the extent the Appellant may contend that Northland remains a party herein, Northland joins in this *Response Brief*.

## **I. NATURE OF THE PROCEEDING AND THE RULINGS BELOW**

This appeal arose from a declaratory judgment proceeding in the Circuit Court of Kanawha County, West Virginia, which has been designated Civil Action No. 01-C-2304. In Civil Action No. 01-C-2304, the Appellant sought a judicial declaration to invalidate provisions of a Public Entities All Lines Aggregate (hereafter, "ALA") insurance policy issued by Northfield to the City of Charleston, West Virginia,<sup>2</sup> by which the Automobile Liability policy limit of One Million Dollars (\$1,000,000.00) was eroded by the insured's defense fees and costs. Alternatively, the Appellant requested that the Circuit Court reform the ALA policy such that it provided a non-eroding policy limit of One Million Dollars (\$1,000,000.00) for Automobile Liability.

After giving the Appellant ample time in which to conduct discovery, after giving the Appellant the opportunity to fully brief the issues, and after having heard the oral arguments of counsel, the Honorable Charles E. King, Jr., Circuit Judge, entered the April 8, 2004 *Order Denying Petitioner's Amended Petition for Declaratory Relief* (hereafter, "the April 8, 2004 Order"). In the April 8, 2004 *Order*, Judge King held that Appellant was not entitled to declaratory relief because:

- a. West Virginia Code § 16-4C-16(1), requiring persons and entities who employ emergency medical service personnel to obtain error and omission liability insurance in an amount of at least One Million Dollars (\$1,000,000.00) per incident, regulates only those persons and entities who provide emergency medical services, and does not regulate insurance companies, and is therefore inapplicable to the Northfield Appellees;
- 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;

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<sup>2</sup> A certified copy of the ALA policy at issue in this matter was attached as Exhibit G to *Petitioner's Memorandum of Law in Support of Amended Petition for Declaratory Relief*.

- c. even if W.Va. Code § 16-4C-16(1) did apply to Northfield – and it does not – the ALA policy did not violate that statute because it provided Automobile Liability insurance with a policy limit of One Million Dollars (\$1,000,000.00) per incident and because the aforementioned statute does not prohibit eroding policy limits;
- d. the May 8, 1999 events from which the Appellant’s claim arose were a single occurrence and the ALA policy limits must be applied accordingly;
- e. the Appellant’s public policy arguments are without merit;
- f. the ALA policy was a custom-designed policy issued to a government entity, and therefore, liability under the policy could be permissibly limited notwithstanding W.Va. Code § 16-4C-16(1); and
- g. the appellant established no basis in fact or law to grant declaratory relief against Northland Insurance Company or Jupiter Holdings, Inc.

Appellant now appeals from the April 8, 2004 *Order*.

## II. STATEMENT OF FACTS<sup>3</sup>

This declaratory judgment action arose from a May 8, 1999 motor vehicle accident at the intersection of U.S. Route 119 (Corridor G) and MacCorkle Avenue in Charleston in which the Appellant’s decedent was tragically killed. The accident involved an ambulance owned and operated by Northfield’s insured, the City of Charleston, and a group of several motorcycles. The accident resulted in injuries to other motorcycle operators and passengers. For purposes of this appeal, the multi-vehicle accident is adequately described in the corresponding West Virginia Uniform Traffic Crash Report, a copy of which was attached as Exhibit H to *Petitioner’s Memorandum of Law in*

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<sup>3</sup> *Appellant’s Brief* contains numerous factual representations without citation to any specific portion of the record. Upon information and belief, some of the factual representations contained in *Appellant’s Brief* are not contained in the record of this civil action. The Northfield Appellees’ practical inability and failure to specifically address each and every factual representation contained in *Appellant’s Brief* should not be deemed to constitute an admission or concession as to the accuracy of any such representation.

*Support of Amended Petition for Declaratory Relief* (hereafter, “*Appellant’s Circuit Court Memorandum*”). The Appellant’s wrongful death claim against the City was subsequently resolved by settlement for the sum of Five Hundred Thirty-Eight Thousand Three Hundred Sixty-One Dollars and Eighty-Six Cents (\$538,361.86), *see Appellant’s Circuit Court Memorandum*, Exhibit A, representing the balance of the City’s Automobile Liability insurance policy limits after payment of other claims arising from the same occurrence and the City’s related defense costs and expenses.<sup>4</sup>

**A. The Identity and Role of Persons and Entities Described in *Appellant’s Brief***

At the outset, the identity and role of various persons and entities described in *Appellant’s Brief* must be clarified so as to avoid unnecessary confusion.

1. *Appellant and other personal injury claimants*

Appellant is prosecuting this civil action in her capacity as Administratrix of the Estate of Angela Dawn Huffman Anderson. As noted, Mrs. Anderson died as a result of injuries sustained in the motor vehicle accident. *Appellant’s Brief* makes reference to claims prosecuted by the Greathouse and Schoolcraft claimants, as well as a personal injury claim made by Mrs. Anderson’s husband, Robert T. Anderson, Jr.<sup>5</sup> Those claimants are not seeking the declaratory relief sought by the Appellant in this case, and none of them are parties in this matter.

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<sup>4</sup> The gratuitous accusation that Northfield is or has been guilty of “low-balling,” *Appellant’s Brief* at p. 4, n.2, is completely unsupported by the record. The reference to a voice mail allegedly left by the City’s counsel, *Appellant’s Brief* at p. 6, n.6, is unverified. More generally, the Appellant’s discussion of mediation and settlement negotiations, *see, e.g., Appellant’s Brief* at pp. 4-5, is irrelevant. This civil action does not involve a claim for unfair claim settlement practices. The only question resolved in the declaratory judgment action below and the only issue on appeal for this Court concerns the scope of Northfield’s coverage for this unfortunate occurrence.

<sup>5</sup> The personal injury claim of Mr. Anderson (who was driving the motorcycle on which the decedent was a passenger) was settled for the sum of One Hundred Fifty Thousand Dollars (\$150,000.00).

2. *The City of Charleston's true insurer*

The City of Charleston was insured at the time of the May 8, 1999 accident by Northfield Insurance Company. See Attachment I, Affidavit of Randy Robinson. Unfortunately, notwithstanding numerous efforts to clarify the record and explain the true identity of the insurer in this matter to Appellant and her counsel, *Appellant's Brief* inaccurately represents (at page 3) that the subject policy was issued by Northland Insurance Company and its holding company, Jupiter Holdings, Inc. Furthermore, the Appellant erroneously speculates that "the insurer actually is Lloyds of London through Northland."

Northfield Insurance Company ("Northfield") and Northland Insurance Company ("Northland") are distinct insurance companies which, along with Northland Casualty Company, sometimes use the common trade name, "Northland Insurance Companies." Northland was mistakenly named as a respondent in the original petition for declaratory relief filed below. The Northfield Appellees advised Appellant of her error and agreed that Northfield could be substituted for Northland. Appellant subsequently amended her petition to add Northfield as a respondent party, and in a December 18, 2001 *Agreed Order* presented by Appellant's counsel and entered by Judge King, the Circuit Court ordered "[t]hat the style of the case be changed to remove defendant Northland Insurance Company as stated in Plaintiff Gibson's amended complaint." Inexplicably, Appellant nevertheless continues to refer to Northland in her pleadings and to prosecute the case as if Northland was still a party. The Northfield Appellees have consequently been compelled to respond accordingly.

The distinction between Northland and the City's true insurer, Northfield, is very important.

Northland is an admitted, licensed insurance carrier in West Virginia. In contrast, Northfield is (and at all relevant times was) an eligible excess and surplus lines insurer in this State, as contemplated by W.Va. Code § 33-12-10 (1957) and W.Va. Code § 33-12-12 (1957). As such, Northfield's rates and forms were not subject to approval by the West Virginia Insurance Commission.

As for Jupiter Holdings, Inc. ("Jupiter"), it is merely a holding company related to Northfield. Appellant concedes the same, *see, e.g., Appellant's Brief* at p. 3, and offers absolutely no evidence or argument demonstrating why corporate formalities should be disregarded or why Jupiter otherwise should be a party in this litigation. There is no evidence of record that Jupiter insured the City or was involved in either the underwriting of the City's ALA policy or any determination regarding coverage for the Appellant's claim.

Based on the foregoing, neither Northland nor Jupiter are proper parties in this matter. However, Appellant's speculative reference to Lloyds of London requires even more clarification since there is no evidence of record regarding the same. First of all, Lloyds of London is not an insurance company, but rather, an insurance marketplace based in the United Kingdom in which various insurance investors or syndicates buy and sell insurance risks.<sup>6</sup> Second, Appellant's observation that "many of the words used in the policy are words commonly used in the United Kingdom," *Appellant's Brief* at p. 22, is explained by the City of Charleston's lengthy status as an insured in the same Public Entities All Lines Aggregate Insurance program. The City began buying ALA policies in the early 1990s. The terms and conditions were slightly modified from year-to-year as needed. In the early years of the insurance relationship, certain underwriters in the Lloyds of

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<sup>6</sup> For a brief description of the Lloyds of London marketplace, *see, e.g., Transamerica Corp. v. Reliance Ins. Co. of Illinois*, 884 F. Supp. 133, 137 (D. Del. 1995).

London marketplace collectively insured a majority percentage of the City's risk. Over a period of several years, the percentage of risk insured by underwriters at Lloyds diminished and the percentage of risk insured by Northfield increased. By the 1999-2000 policy period, Northfield had assumed responsibility for all of the City's risk insured by the ALA policy, and the underwriters at Lloyds had zero responsibility. *See* Attachment I, Affidavit of Randy Robinson. However, much of the policy language that originated with underwriters at Lloyds in the early years of the ALA program continued as the policies evolved, and thus, remained in the 1999-2000 ALA policy.

In sum, **Northfield** is the only entity that should properly be a respondent party in this matter.

### 3. *The City of Charleston*

Although *Appellant's Brief* makes multiple representations regarding the City of Charleston as well as actions undertaken by the City and its counsel, the City is no longer a party to this proceeding. The City was dismissed via an *Order of Dismissal* entered in this civil action on July 29, 2002. Appellant misunderstands the insurer-insured relationship created by the ALA policy. Appellant's efforts to wrongfully impute the words or actions of the City or its counsel to the City's insurer, Northfield, are factually unsupported, unfair and misleading.

### **B. The ALA Policy and the Appellant's Claim**

The Public Entities All Lines Aggregate ("ALA") policy issued to the City of Charleston was issued by Northfield. *See* Attachment I, Affidavit of Randy Robinson. The City's ALA policy is a unique form of insurance that provided coverage for multiple types of risk including (but certainly not limited to) Automobile Liability and Errors or Omissions Liability. *See, e.g., Appellant's Circuit Court Memorandum*, Exhibit G at p. 1. By incorporating a variety of features, such as various self-

insured retentions and the “Assured’s Loss Fund,” *see, e.g., Appellant’s Circuit Court Memorandum*, Exhibit G at pp. 2- 4, the ALA policy was intended, in part, to help the City control its own exposure and resulting costs.

Coverage was available to the City for the personal injury claims arising from the May 8, 1999 motor vehicle accident under Section III-A of its ALA policy, relating to Automobile Liability.<sup>7</sup> Indeed, *Appellant’s Brief* reflects Appellant’s recognition that this is an automobile liability claim, not an errors or omissions<sup>8</sup> claim. *See, e.g., Appellant’s Brief* at p. 7 (“*The following policy language is important to the resolution of the coverage issues: Section III - AUTOMOBILE LIABILITY*”).

Section III-A of the ALA policy states, in relevant part, as follows:

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**

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<sup>7</sup> Section III of the ALA policy, concerning Automobile Liability, contains a common exclusion which provides that the insurance provided within that Section does not apply to any claim for damages which is covered under any other Section of the ALA policy. *Appellant’s Circuit Court Memorandum*, Exhibit G, ALA Policy at p. 20. Although Section IV of the ALA policy, concerning Errors or Omissions Liability, is inapplicable to this claim, it also contains a similar exclusion. *Appellant’s Circuit Court Memorandum*, Exhibit G, ALA Policy at p. 22.

<sup>8</sup> With regard to errors or omissions liability, a leading treatise opines:

Errors and omissions policies form the equivalent to malpractice insurance for occupations other than those in the legal and medical fields. Such policies are designed to insure members of a particular professional group from liability arising out of special risks such as negligence, omissions, mistakes and errors inherent in the practice of their profession, . . . .

No matter the occupation of the insured, the terms of the policies are quite similar, requiring that an act or omission arise out of the provision of “professional services” in the context of the particular occupation of the insured. Accordingly, while certain general principles can be gleaned which apply to all such policies, the determination of what constitutes a “professional service” is unique to each insured profession.

Couch on Insurance, 3<sup>rd</sup> ed., § 131:38 at p. 131-49 (2000).

**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 any 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 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.

*Appellant’s Circuit Court Memorandum*, Exhibit G, ALA Policy at p. 19 (*emphasis added*). The ALA policy states that Northfield’s limit of liability for such coverage “shall not exceed the difference between . . .” One Million Dollars (\$1,000,000.00) per “each and every loss and/or occurrence, combined single limit, . . . ultimate net loss, and an underlying Self-Insured Retention (S.I.R.) of . . .” Fifty Thousand Dollars (\$50,000.00) per “each and every loss and/or claim and/or occurrence ultimate net loss . . .” *Appellant’s Circuit Court Memorandum*, Exhibit G, ALA Policy at pp. 2-3.

For purposes of Section III of the ALA policy, the term “ultimate net loss” is defined as:

. . . 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.**

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

*Appellant’s Circuit Court Memorandum*, Exhibit G, ALA Policy at pp. 41-42 (*emphasis added*). In short, by virtue of the definition of “ultimate net loss,” the coverage for such matters as “expenses

for lawyers” is encompassed within the listed ALA policy limits, not in addition to those limits.

With regard to the defense of claims, *Appellant’s Brief* reflects a fundamental misunderstanding of Northfield’s role. The ALA policy was issued on the condition that the City retain Willis Corroon Administrative Services, Inc., to serve as its “service organisation” (i.e., third-party administrator). *Appellant’s Circuit Court Memorandum*, Exhibit G, ALA Policy at p. 5. The ALA policy further provides:

[Willis Corroon] shall perform the following duties:

- (a) Investigate and settle or defend all claims or losses – it is understood that, when so requested, [Willis Corroon] will afford [Northfield] **an opportunity to be associated with** the [City] and [Willis Corroon] in the defence or control of any claim, suit or proceeding.
- (b) Maintenance of accurate records of all details incident to payments.
- (c) Furnish monthly claims records on an approved form.

The acceptance of these services **to the conclusion of all liabilities hereunder** shall be a **condition precedent to any liability which may attach to [Northfield]** in accordance with the terms and conditions of this Insurance.

*(emphasis added)*. These provisions are factually and legally significant. Based on these provisions, the primary responsibility for the defense or settlement of claims against the City lay with Willis Corroon and the City, while Northfield’s right was limited to “associating” with them upon request. In fact, the use of Willis Corroon’s services – including its investigation, settlement and defense of claims – “to the conclusion of all liabilities” was a condition precedent to any obligation of indemnity owed by Northfield. The consequence of these provisions is that the right to select defense counsel was held by Willis Corroon and the City, not Northfield. *See Attachment I, Affidavit of Randy Robinson.*

### **III. RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. The Circuit Court correctly recognized that W.Va. Code § 16-4C-16(1) does not apply to insurers, but rather, applies only to persons and entities (such as the City of Charleston) who employ emergency medical service personnel.
2. The Circuit Court correctly concluded that the Appellant's claim did not arise from an "error or omission in the provision of emergency medical services."
3. The Circuit Court correctly applied the unambiguous language of the ALA policy issued by Northfield to the City.
4. The Circuit Court correctly concluded that W.Va. Code § 16-4C-16(1) does not prohibit eroding policy limits and that the City, as the insured, could have procured additional insurance had it wished to do so.
5. The Circuit Court correctly concluded that the event which regrettably claimed the life of the Appellant's decedent and caused injury to other motorcyclists was a single occurrence.
6. The Circuit Court correctly concluded that the ALA policy issued by Northfield to the City was a "custom-designed" policy as contemplated by West Virginia law.
7. The Circuit Court correctly concluded that Appellant's unsupported public policy arguments were without merit.
8. The Circuit Court correctly denied the Appellant's request for declaratory relief, which was without any adequate or sufficient basis in fact or in law.

### **IV. POINTS AND AUTHORITIES RELIED UPON**

1. The law presumes that two (2) separately incorporated businesses are distinct entities. *See, e.g., W.Va. Highlands Conservancy, Inc. v. Public Service Comm'n*, 206 W.Va. 633, 640, 527 S.E.2d 495, 502 (1998), *citing United States v. Bestfoods*, 524 U.S. 51, \_\_\_, 118 S.Ct. 1876, 1888, 141 L.Ed.2d 43, \_\_\_ (1998).
2. 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 in this article, in an amount no less than one million dollars per incident, . . . W.Va. Code § 16-4C-16(1).

3. Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation; rather, full effect will be given to the plain meaning intended. Syl. Pt. 1, *Russell v. State Automobile Mut. Ins. Co.*, 188 W.Va. 81, 422 S.E.2d 803 (1992).
4. An insurance contract should never be interpreted so as to create an absurd result. Syl. Pt. 2, *D'Annunzio v. Security-Connecticut Life Ins. Co.*, 186 W.Va. 39, 410 S.E.2d 275 (1991).
5. "Emergency medical services" means all services which are set forth in Public Law 93-154, "The Emergency Medical Services Systems Act of 1973," and those included in and made a part of the emergency medical services plan of the department of health and human resources inclusive of, but not limited to, responding to the medical needs of an individual to prevent the loss of life or aggravation of illness or injury. W.Va. Code § 16-4C-3(d).
6. An important factor in evaluating whether circumstances constitute one (1) or more "occurrences" is the relative closeness of the connection in time and space between cause and result. See, e.g., *Shamblin v. Nationwide Mut. Ins. Co.*, 175 W.Va. 337, 341-43, 332 S.E.2d 639, 642-44 (1985).
7. West Virginia Code § 29-12A-16(a) (1992) conveys broad discretion to both the West Virginia State Board of Risk and Insurance Management, as well as governmental entities, with regard to the type and amount of insurance to obtain. Consequently, when an insurer issues a custom-designed insurance policy to a governmental entity pursuant to the *Governmental Tort Claims and Insurance Reform Act*, West Virginia Code §§ 29-12A-1 to -18 (1992), that entity may incorporate language absolutely limiting liability under the policy, even if such language would otherwise violate the provisions of West Virginia Code § 33-6-31(b)(1996). Syl. Pt. 1, *Trent v. Cook*, 198 W.Va. 601, 482 S.E.2d 218 (1996).

**V. DISCUSSION OF LAW AND NOTE OF ARGUMENT**

**A. The Dismissal of Northland and Jupiter Was Appropriate**

*Appellant's Brief* and the entire record in this matter are devoid of any facts that suggest, much less demonstrate, that the Appellant is entitled to declaratory relief (or any relief) from Northland or Jupiter. The law presumes that two separately incorporated businesses are distinct entities. *See, e.g., W.Va. Highlands Conservancy, Inc. v. Public Service Comm'n*, 206 W.Va. 633, 640, 527 S.E.2d 495, 502 (1998), *citing United States v. Bestfoods*, 524 U.S. 51, \_\_\_, 118 S.Ct. 1876, 1888, 141 L.Ed.2d 43, \_\_\_ (1998). There is no evidence of record that should cause this Court or any court to disregard the corporate identity and form of the respective Appellees in this instance. The erroneous, non-record representations of Appellant and her counsel are manifestly insufficient to overcome the presumption of distinct entities. Appellant has not assigned as error the Circuit Court's determination that the dismissal of Northland and Jupiter was warranted and has offered no argument to the contrary. Furthermore, Northland has been dismissed via a December 18, 2001 *Agreed Order*. Accordingly, to the extent that *Appellant's Brief* may relate to any claim applicable to Northland or Jupiter, all requests for relief against those entities should be affirmed because it is uncontested that their dismissal by the Circuit Court was plainly right. Otherwise, Northland and Jupiter adopt the arguments advanced below on behalf of the City's true insurer, Northfield.<sup>9</sup>

**B. West Virginia Code § 16-4C-1, et seq., Does Not Regulate the Conduct of Insurers**

Appellant seeks to impose an obligation upon Northfield that properly lies with Northfield's insured, the City of Charleston. West Virginia's Emergency Medical Services Act of 1996

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<sup>9</sup> *See also Northland Insurance Company and Jupiter Holdings, Inc.'s Motion to Dismiss* served in the civil action below on September 18, 2001 and a related *Reply* served therein on November 6, 2001.

(hereafter, “the Act”) is set forth in W.Va. Code § 16-4C-1, *et seq.* In seeking declaratory relief, the Appellant relies upon the Act, and more specifically, W.Va. Code § 16-4C-16(1), which states in pertinent part:

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 in this article, in an amount no less than one million dollars per incident,

....

*(emphasis added)*. Those persons and entities who provide emergency medical services and who purchase the required insurance are immune from liability in excess of their policy limits in the absence of intentional or malicious conduct. W.Va. Code § 16-4C-16(2).

Northfield is an insurance company. It does not “employ emergency medical service personnel” or “provide ambulance services.” Northfield is not in the position of obtaining an insurance policy for such risks. Rather, it is in the business of underwriting and issuing insurance policies. More specifically, Northfield is an eligible, non-licensed excess and surplus line insurer as contemplated by W.Va. Code § 33-12-10 (1957), W.Va. Code § 33-12-12 (1957) and the current W.Va. Code § 33-12C-1, *et seq.* (2003). In short, the arguments in *Appellant’s Brief* regarding these issues are without merit because they are entirely predicated on W.Va. Code § 16-4C-16(1) and alleged public policy arguments relating to the same. Because Northfield is not subject to that statute, the Appellant is not entitled to relief from Northfield or any of the Northfield Appellees.

The duty to comply with W.Va. Code § 16-4C-16(1) by obtaining proper insurance lies with

entities that “**employ** emergency medical service personnel” or “**provide** ambulance services” – in this instance, the City of Charleston. (*emphasis added*). Similarly, the duty to furnish proof of such insurance to the Insurance Commissioner pursuant to W.Va. Code § 16-4C-16(3) expressly lies with the “person or entity required to **obtain**” such a policy. (*emphasis added*). Nothing in W.Va. Code § 16-4C-16(1) imposes a duty upon Northfield to market or sell an insurance policy with specific policy limits. Assuming, *arguendo*, that the Northfield policy had limits which did not meet the requirements of W.Va. Code § 16-4C-16(1), nothing prevented the City from purchasing additional insurance from Northfield or some other insurer so as to meet those requirements. Nothing in the *Appellant’s Brief* and nothing in the evidence of record suggests that Northfield assumed a duty to provide legal advice to the City or any other insured with regard to compliance with W.Va. Code § 16-4C-16(1) or any other rule, regulation or statute.

The obligation to obtain insurance imposed by West Virginia Code § 16-4C-16(1) stands in sharp contrast with the obligation to provide uninsured motorist insurance imposed by W.Va. Code § 33-6-31(b). Unlike W.Va. Code § 16-4C-16(1), the provisions of W.Va. Code § 33-6-31(b) generally place the obligation to provide proper uninsured motorist coverage on the seller, not the purchaser, of an automobile liability insurance policy, stating:

Nor shall any such policy or contract **be so issued or delivered** unless it shall contain an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than the requirements of section two, article four, chapter seventeen-d of this code,<sup>10</sup> . . . .

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<sup>10</sup> Although not relevant to the matters at issue herein, Northfield observes that there is no obligation to sell uninsured motorist coverage when the purchaser of an automobile liability policy is a government entity such as the City of Charleston. West Virginia Code § 17D-6-1 provides that “[t]his chapter shall not  
(continued...)

(emphasis added). Cf. also W.Va. Code § 33-6-31(a) (“No policy or contract . . . shall be issued or delivered by any insurer licensed in this state upon any motor vehicle . . . , unless . . . .”) Because of the important contrast in how the Legislature imposed obligations regarding the purchase of errors or omissions liability insurance relating to the provision of emergency medical services, as set forth in W.Va. Code § 16-4C-16(1), versus the obligations regarding the issuance and delivery of automobile liability insurance, as described in W.Va. Code § 33-6-31(b), Appellant’s reliance on *Bell v. State Farm Mut. Auto. Ins. Co.*, 157 W.Va. 623, 207 S.E.2d 147 (1974) and other law pertaining to minimum coverages for automobile liability is simply misplaced and misleading.

Because W.Va. Code § 16-4C-16(1) does not regulate the conduct of Northfield, the Appellant’s request for declaratory relief was properly denied. Because the Circuit Court’s decision was plainly right, this appeal should be dismissed as having been improvidently granted, or alternatively, the Circuit Court’s April 8, 2004 *Order* should be affirmed.

**C. The Plain, Unambiguous Policy Provisions Must Be Applied and Not Construed**

In West Virginia, insurance policies are controlled by the rules of construction applicable to contracts generally. *Payne v. Weston*, 195 W.Va. 502, 507, 466 S.E.2d 161, 166 (1995). Where the provisions of an insurance policy contract are clear and unambiguous<sup>11</sup> they are not subject to

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<sup>10</sup>(...continued)

apply with respect to any vehicle owned by the United States, this State or any political subdivision of this State or any municipality therein.” Therefore, notwithstanding the requirements for uninsured motorist insurance published in W.Va. Code § 17D-4-2, Chapter 17D (via W.Va. Code § 17D-6-1) requires no uninsured motorist coverage for government-owned vehicles.

<sup>11</sup> As Justice Cleckley wrote in *Payne*:

The term “ambiguity” is defined as language “reasonably susceptible of two different meanings” or language “of such doubtful meaning that reasonable minds might be

(continued...)

judicial construction or interpretation; rather, full effect will be given to the plain meaning intended. Syl. Pt. 1, *Russell v. State Automobile Mut. Ins. Co.*, 188 W.Va. 81, 422 S.E.2d 803 (1992). The doctrine of reasonable expectations, now relied upon by Appellant, is a doctrine of construction that is inapplicable when the contract is unambiguous, except in very limited circumstances not present here. Cf. *Luikart v. Valley Brook Concrete & Supply, Inc.*, \_\_\_ W.Va. \_\_\_, \_\_\_, 613 S.E.2d 896, 903 (2005)(*per curiam*). An insurance contract should never be interpreted so as to create an absurd result. Syl. Pt. 2, *D'Annunzio v. Security-Connecticut Life Ins. Co.*, 186 W.Va. 39, 410 S.E.2d 275 (1991). Stated differently, West Virginia courts “will not rewrite the terms of the policy; instead [they] enforce it as written.” *Payne*, 195 W.Va. at 507, 466 S.E.2d at 166.

The relevant ALA policy provisions pertaining to eroding policy limits are plain and unambiguous, and not even “torture” of the policy language would suggest otherwise. The definition of “ultimate net loss” clearly reflects that

. . . law costs, premiums on attachment of appeal bonds, expenses for lawyers and investigators and other persons for litigation, settlement, adjustment and investigation

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<sup>11</sup>(...continued)

uncertain or disagree as to its meaning[.]” Syl. Pt. 1, *in part, Shamblin v. Nationwide Mut. Ins. Co.*, 175 W.Va. 337, 332 S.E.2d 639 (1985). Only if the court makes the determination that the contract cannot be given a certain and definite legal meaning, and is therefore ambiguous, can a question of *fact* be submitted to the jury as to the meaning of the contract. It is only when the document has been found to be ambiguous that the determination of intent through extrinsic evidence becomes a question of fact. Where a provision of an insurance policy is ambiguous, it is construed against the drafter, especially when dealing with exceptions and words of limitation. See Syl. Pt. 1, *West Virginia Ins. Co. v. Lambert*, 193 W.Va. 681, 458 S.E.2d 774 (1995).

However, a court should read policy provisions to avoid ambiguities and not tort the language to create them. “If a court properly determines that the contract is unambiguous on the dispositive issue, it may then properly interpret the contract as a matter of law . . . .”

*Payne*, 195 W.Va. at 507, 466 S.E.2d at 166.

of claims or suits which are paid as a consequence of any occurrence covered hereunder

are included in the “ultimate net loss” and therefore count toward the applicable ALA Automobile Liability policy limits. *Appellant’s Circuit Court Memorandum*, Exhibit G, ALA Policy at p. 41. The definition and application of the ALA policy’s definition of “occurrence,” discussed below, is equally clear.

In sum, the unambiguous terms and conditions of the ALA policy issued by Northfield to the City of Charleston clearly reflect that (a) the May 8, 1999 motor vehicle accident gave rise to covered Automobile Liability claims, (b) the multiple claims were the product of a single occurrence, and (c) the available cumulative limit of coverage for the several claims was One Million Dollars (\$1,000,000.00), subject to the City’s self-insured retention and the erosion of the limit by attorney fees and other similar expenses. There is and can be no other rational interpretation of the ALA policy terms. Accordingly, Appellant’s argument that the ALA policy language is ambiguous and supports her position is completely without merit.

**D. The ALA Policy Does Not Violate W.Va. Code § 16-4C-16(1)**

Even if Northfield did have a duty to comply with W.Va. Code § 16-4C-16(1) – and it did not – the Appellant is not entitled to the relief requested because the ALA policy does not violate that statute. There are two reasons why the ALA policy does not violate W.Va. Code § 16-4C-16(1); namely, because (1) the accident did not arise from an error or omission in the provision of emergency medical services and (2) even if it did, the ALA policy limits satisfied the requirements of the statute.

1. *Appellant's claim did not arise from an error or omission in the "provision of emergency medical services"*

West Virginia Code § 16-4C-16(1) establishes a requirement of minimum policy limits only as to "damages arising from any error or omission in the provision of emergency medical services." It is notable that the Appellant's claim and the personal injury claims of other motorcyclists involved in the May 8, 1999 accident have always been handled, covered and paid by Northfield as Automobile Liability claims, not claims for Errors or Omissions Liability associated with the provision of emergency medical services. Even *Appellant's Brief* (at page 7) reflects Appellant's recognition that her claim was an automobile liability claim, not an errors or omissions claim.

According to W.Va. Code § 16-4C-3(d):

"Emergency medical services" means all services which are set forth in Public Law 93-154 "The Emergency Medical Services Systems Act of 1973" and those included in and made a part of the emergency medical services plan of the department of health and human resources inclusive of, but not limited to, responding to the medical needs of an individual to prevent the loss of life or aggravation of illness or injury.

This definition, the Emergency Medical Services System Act of 1973 and the Bureau of Public Health's regulations each indicate that "the provision of emergency medical services" generally refers to the professional evaluation and care of the sick and the injured, not driving to the location of a sick or injured patient. The phrase "responding to the medical needs of an individual" as used in W.Va. Code § 16-4C-3(d) clearly refers to the act of evaluating and treating a patient, not the act of physically traveling to or from that patient's location.

The Emergency Medical Services Systems Act of 1973, a copy of which was attached as Exhibit 1 to the Appellees' *Opposition to Petitioner's Memorandum of Law in Support of Amended*

*Petition for Declaratory Relief* (hereafter, “*Appellees’ Circuit Court Opposition*”) reflects an intent to, among other things, provide infrastructure sufficient to permit the effective delivery of health care services under emergency conditions in specific geographic areas. It does not purport to regulate ambulance driving in any significant way.

West Virginia Code § 16-4C-23 authorizes the Department of Health and Human Resources to promulgate legislative rules to carry out the purposes of the Emergency Medical Services Act. The Department has enacted such rules and regulations via its Bureau for Public Health, and they are set forth under Title 64, Series 48 of the Code of State Regulations.<sup>12</sup> The statement of purpose for these regulations actually distinguishes between “transportation” and “emergency medical services,” to-wit:

This rule is intended to insure adequate provision of transportation of incapacitated individuals and emergency medical services to the citizens of West Virginia; . . . .

C.S.R. § 68-48-1.1. If “transportation” were part and parcel of “emergency medical services,” the reference to both terms in C.S.R. § 68-48-1.1 would be redundant. A review of all of the regulations set forth in Title 64, Series 48 of the Code of State Regulations indicates, in part, an intent to ensure that the vehicles and equipment maintained by emergency medical services agencies meet certain standards. However, even several years after the motor vehicle accident from which this civil action arose, the Bureau of Public Health had not significantly regulated the driving of ambulances beyond meeting the basic requirement that the driver hold for a valid motor vehicle operator’s permit, a matter obviously incidental to driving the ambulance. The successful completion of an emergency

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<sup>12</sup> A copy of the regulations was attached as Exhibit 2 to *Appellees’ Circuit Court Opposition*.

vehicle operator's training course became a requirement only in September 2002. *See, e.g.*, C.S.R. § 68-48-13.1.b.3.

The fact that the underlying motor vehicle accident occurred while the City's ambulance was en route to an emergency is not contested, but is inconsequential to the determination of available coverage. The issue of whether this act constitutes "the provision of emergency medical services" is purely a question of law, and neither the testimony of the City's ambulance driver nor the arguments of the City's counsel, as interpreted or construed by Appellant's counsel, are relevant. The Northfield Appellees submit, and the Circuit Court has agreed, that there is a valid distinction between driving an ambulance and providing professional medical services to a patient. Appellant has offered no authority for the proposition that the accident arose in the context of "providing emergency medical services" beyond the opinion of her own counsel.

Again, it is important to recall that the Appellant's claim is for coverage under the Automobile Liability provisions of the ALA policy issued to the City of Charleston, not for coverage under the Errors or Omissions Liability provisions. Treatises and courts have held that errors and omissions policies provide no coverage for bodily injury claims arising out of a collision between an ambulance and another vehicle. *See, e.g., Couch on Insurance*, 3<sup>rd</sup> ed., § 131:38 at p. 131-50, and § 131:40 at p. 131-51 (2000), *citing Merrill v. Packard*, 395 So.2d 285 (Fla. D.C.A.3d 1981). Appellant's claim simply did not arise from an "error or omission" in the provision of health care services by emergency medical personnel. The City's ambulance driver was not providing medical services at the time of the accident; rather, he was driving an ambulance. Appellant's claim was not a claim for malpractice arising from the negligent provision of professional services. Appellant's

claim arose from a motor vehicle accident, to which W.Va. Code § 16-4C-16(1) does not apply.

Because W.Va. Code § 16-4C-16(1) is inapplicable, Northfield could not have violated that statute even if it, rather than the City, was subject to that statute.

2. *The ALA policy limits satisfied W.Va. Code § 16-4C-16(1)*

West Virginia Code § 16-4C-16(1) requires policy limits of not less than One Million Dollars (\$1,000,000.00) per incident. For Automobile Liability, the ALA policy had applicable limits of One Million Dollars (\$1,000,000.00) for “each and every loss and/or occurrence, combined single limit,” subject to the “ultimate net loss” definition and the City’s self-insured retention. *Appellant’s Circuit Court Memorandum*, Exhibit G, ALA Policy at p. 3. Even if Northfield was subject to W.Va. Code § 16-4C-16(1), it did not violate that statute because the ALA Automobile Liability policy limits under which the Appellant’s claim was covered and paid meet the statutory threshold of One Million Dollars (\$1,000,000.00). Nothing in W.Va. Code § 16-4C-16(1) prohibits eroding policy limits. Indeed, the Appellant has not cited and cannot cite any statute, regulation or court opinion that forbids eroding policy limits in this or any other context. Policies with eroding limits are not uncommon, especially in the context of policies purchased by sophisticated insureds.<sup>13</sup>

Furthermore, it is important to recognize that Northfield sold the City an ALA policy based on an agreed-to premium. The Appellant’s claim for relief effectively seeks to enlarge the limits of the ALA policy without a concurrent, corresponding addition to the premium. To grant the Appellant’s claim for relief without a corresponding change in the City’s insurance premium would expand the risk beyond that which the parties to the insurance contract contemplated at the time it

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<sup>13</sup> Virtually all insurance policies have an aggregate that erodes if multiple claims are made.

was purchased.

**E. The Events of May 8, 1999 Constituted a Single “Occurrence”**

The ALA policy defines “occurrence” as:

. . . an accident or a happening or event or a continuous or repeated exposure to conditions which result in bodily injury or damage to property during the policy period. All bodily injuries to one or more persons and/or property damage arising out of an accident or a happening or event or a continuous or repeated exposure to conditions shall be deemed to be one occurrence.

*Appellant’s Circuit Court Memorandum*, Exhibit G, ALA Policy at p. 6. This Court, in analyzing the concept of a single “occurrence” in the context of insurance policy language, has observed that ordinary people use such terms to describe an “event,” no matter how many persons or things are involved. This Court has concluded that the important point in evaluating whether circumstances constitute one or more “occurrences” is the relative closeness of the connection in time and space between cause and result. *See, e.g., Shamblin*, 175 W.Va. at 341-43, 332 S.E.2d at 642-44. In reaching that conclusion, the Court noted that the definition of “occurrence” contained in the insurance policy at issue in *Shamblin* – injury or damage “arising out of continuous or repeated exposure to substantially the same general conditions” – was consistent with an emphasis on closeness in time and space. *Shamblin*, 175 W.Va. at 342, 332 S.E.2d at 643. Accordingly, the Court in *Shamblin* found that there was only one “occurrence” in circumstances in which two allegedly negligent acts by drivers of separate, insured vehicles, occurring close in time, led to a collision between one of the insured vehicles and a third vehicle. Notably, the definition of “occurrence” in the *Shamblin* policy is very similar to definition of “occurrence” contained in the ALA policy issued by Northfield to the City of Charleston.

Here, the Appellant concedes that the event from which this proceeding arose involved a series of collisions between an ambulance and multiple motorcycles traveling as a group, with all of the collisions necessarily occurring within a matter of seconds. The witness statements contained in the West Virginia Uniform Traffic Crash Report (*see Appellant's Circuit Court Memorandum, Exhibit H*) plainly demonstrate that this unfortunate event occurred suddenly and unexpectedly. In that regard, this facts of this case are very comparable to those at issue in *Truck Insurance Exchange v. Rohde*, 49 Wash.2d 465, 303 P.2d 659 (1956). *Rohde* arose from a motor vehicle accident in which the driver of an automobile negligently crossed the center line and collided successively with three motorcycles approaching from the opposite direction in echelon formation. The Supreme Court of Washington, *en banc*, concluded that the event in *Rohde* constituted a single "accident" or "occurrence" for purposes of determining the applicable limits of the negligent driver's insurer. There is no material difference between this case and *Rohde*.<sup>14</sup> *Cf. also Auber v. Jellen*, 196 W.Va. 168, 469 S.E.2d 104 (1996)(*series of five examinations over 20-month period in which physician-insured failed to diagnose rectal cancer constituted a single "incident" for purposes of determining*

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<sup>14</sup> Similar insurance policy language relating to the term, "accident," applied in the context of somewhat analogous factual circumstances, is discussed in an unpublished opinion of the United States Court of Appeals for the Fourth Circuit in the matter of *Aetna Cas. & Surety Co. v. Clayton*, 1995 WL 330815 (4<sup>th</sup> Cir. (W.Va.) June 5, 1995). *See* Attachment II. In *Clayton*, a motor carrier hauling several automobiles sped into a construction area on Interstate 79 in Braxton County, West Virginia, struck a car and utility trailer, propelling them into a second car, before all three vehicles impacted construction equipment. After those vehicles came to rest, a Lincoln Continental being hauled on the forward, overhead ramp of the motor carrier fell forward and down, landing on top of one of the cars struck by the motor carrier. Eight persons in the two cars struck by the motor carrier were killed. Applying New York law, and upon the assumption that only 30 seconds elapsed between the motor carrier's initial impact with the first car and the Lincoln's fall onto the roof of that car, the Fourth Circuit rejected an argument that because the failure to properly secure the Lincoln for hauling was a separate act of negligence occurring several days before the collision, the initial impact and the fall of the Lincoln constituted separate "accidents" for purposes of determining coverage. *But see* Rule 36(c) of the Fourth Circuit's *Local Rules & Internal Operating Procedures*.

*limit of liability under medical malpractice insurance policy).*

Appellant's contention that the evidentiary arguments made by the City's counsel in the *Greathouse/Schoolcraft* matter impact this analysis is a red herring. The City's prosecution of a routine motion (made pursuant to W.V.R.E. Rule 403) to exclude allegedly prejudicial evidence of other injuries incurred by other parties in the same motor vehicle accident (*see Appellant's Circuit Court Memorandum*, Exhibit C) has absolutely no bearing on whether or not Northfield must provide coverage for one or more "occurrences." The merit of the City's Rule 403 or other motion(s), or any lack thereof, was a routine evidentiary matter to be resolved by the Circuit Court in the *Greathouse/Schoolcraft* matter pursuant to the *West Virginia Rules of Evidence* and has nothing to do with the scope of insurance coverage available for the single occurrence at issue here.

**F. The ALA Policy Was a Custom-Designed Policy and Permissibly Limited Liability, Notwithstanding W.Va. Code § 16-4C-16(1)**

Although not essential to the Court's resolution of this matter, the Northfield Appellees also prevail because the ALA policy issued by Northfield to the City of Charleston was custom-designed. A custom-designed policy is simply a policy "whose terms stand in contrast in some manner to those of standardized insurance policies" routinely issued to private individuals. *Trent*, 198 W.Va. at 607, 482 S.E.2d at 224. The term "custom-designed policy" is a term of art that originated in our jurisprudence in *Eggleston v. W.Va. Dept. of Highways*, 189 W.Va. 230, 429 S.E.2d 63 (1993). As this Court has observed, the terminology is "perhaps not well chosen," in that "custom-designed policy" does not necessarily imply that a sophisticated level of negotiation or reasoning preceded its purchase by a governmental entity. *Trent*, 198 W.Va. at 607, 482 S.E.2d at 224.

In Syllabus Point 1 of *Trent v. Cook*, 198 W.Va. 601, 482 S.E.2d 218 (1996), this Court held:

West Virginia Code § 29-12A-16(a) (1992) conveys broad discretion to both the West Virginia State Board of Risk and Insurance Management, as well as governmental entities, with regard to the type and amount of insurance to obtain. Consequently, when an insurer issues a custom-designed insurance policy to a governmental entity pursuant to the *Governmental Tort Claims and Insurance Reform Act*, West Virginia Code §§ 29-12A-1 to -18 (1992), that entity may incorporate language absolutely limiting liability under the policy, even if such language would otherwise violate the provisions of West Virginia Code § 33-6-31(b)(1996).

Under the same rationale of *Trent v. Cook* that permitted approval of insurance policy language that was otherwise contrary to West Virginia's uninsured and underinsured motorist requirements, the ALA policy at issue in this case could permissibly limit the City's liability, notwithstanding W.Va. Code § 16-4C-16(1), because the City's ALA policy was custom-designed.

As discussed above, the City of Charleston's ALA policy was a unique, Public Entities All Lines Aggregate Policy, providing coverage for multiple types of risks and crafted to meet the specific needs of the City. Plainly, the ALA policy differs from standardized insurance policies commonly issued to private individuals. Two different Kanawha County Circuit Judges have now determined that the City's ALA policy was custom-designed – Judge King in these proceedings below, and the Honorable Louis H. Bloom, who reached the same conclusion regarding an earlier edition of the City's ALA policy in prior litigation commonly referred to as the *Walker* litigation.<sup>15</sup>

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<sup>15</sup> Judge Bloom's conclusion was announced in footnote 4 at page 8 of a *Memorandum Order Granting Summary Judgment* entered on June 21, 2001 in the combined actions of *Walker v. Doe*, Civil Action No. 97-C-731, and *Walker v. Nesbitt*, Civil Action No. 98-C-1124. ("For reasons articulated by the City, the Court is of the opinion that the City's insurance policy is a custom-designed policy.") A copy of Judge Bloom's *Memorandum Order* was attached as Exhibit 4 to *Appellees' Circuit Court Opposition*, filed below. The *Walker* litigation addressed issues pertaining to uninsured and underinsured motorist coverage. The ALA policy at issue in this case (see *Appellant's Circuit Court Memorandum*, Exhibit G) is substantially identical to the earlier version at issue in the *Walker* litigation. See *Appellees' Circuit Court Opposition*, Exhibit 2. Accordingly, the ALA policy at issue in this case is presumptively a custom-designed policy. Cf. *Trent*, 198 W.Va. at 607, 482 S.E.2d at 224.

The factual basis for Judge King's determination that the City's ALA policy is a custom-designed policy is contained, in large measure, in various Exhibits to a *Supplement to the Northfield Defendants' Opposition to Petitioner's Memorandum of Law in Support of Amended Petition for Declaratory Relief* (hereafter, "*Northfield's Supplement*") and a *Second Supplement to the Northfield Defendants' Opposition to Petitioner's Memorandum of Law in Support of Amended Petition for Declaratory Relief* (hereafter, "*Northfield's Second Supplement*"), both filed in the Circuit Court below.<sup>16</sup> A brief review of those Exhibits plainly shows that Judge King and Judge Bloom were correct in concluding that the City's ALA policy is custom-designed.

For example, David Shirlaw is a risk and insurance management consultant who was previously retained by the City of Charleston to prepare specifications for its property casualty insurance program. *See, e.g., Northfield's Supplement*, Exhibit 3 at pp. 4-6. As Mr. Shirlaw testified in the *Walker* litigation, the term "custom-designed policy" is akin to the industry term "manuscript policy." *Northfield's Supplement*, Exhibit 3 at p. 10. Mr. Shirlaw was of the opinion that the ALA policy was a custom-designed or manuscript policy and not an ordinary "shelf product." *See, e.g., Northfield's Supplement*, Exhibit 3 at pp. 18-43. Mr. Shirlaw explained that sections of the City's ALA policy were different from standard policies in various ways. *Northfield's Supplement*, Exhibit 3 at pp. 20-22. Self-insured retention and "ultimate net loss" provisions within the ALA policy were unique and differed from standardized insurance forms, according to Mr. Shirlaw. *Northfield's Supplement*, Exhibit 3 at pp. 22-25. Services and provisions

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<sup>16</sup> *See* Exhibits 3 through 8 of *Northfield's Supplement*, which consist of excerpts from the deposition testimony given in the *Walker* litigation by David Shirlaw (Exhibit 3), Frank A. Baer, III (Exhibit 4), Janet Buckley (Exhibit 5), Kenneth Brendle (Exhibit 6), Kathleen E. Minnie (Exhibit 7) and William Kenny (Exhibit 8). *See also* Exhibit A to *Northfield's Second Supplement* (Affidavit of Frank A. Baer, III).

pertaining to claims handling differed from standard policies. *Northfield's Supplement*, Exhibit 3 at pp. 26-28. Mr. Shirlaw noted the existence of an endorsement changing the policy period, which reflected apparent negotiations between the insurer and insureds. *Northfield's Supplement*, Exhibit 3 at pp. 29-31.

Frank A. Baer, III, is an insurance agent affiliated with Commercial Insurance Services, Inc. (hereafter, "CIS"). CIS was the producing agent that advised the City regarding insurance matters and facilitated the City's purchase of ALA policies. *See, e.g., Northfield's Supplement*, Exhibit 4 at p.7; *Northfield's Supplement*, Exhibit 5 at pp. 6-9. Mr. Baer has testified that the City's ALA policy is the only policy of its kind among West Virginia municipalities. *Northfield's Supplement*, Exhibit 4 at pp. 51, 188. He confirmed that the negotiation of the City's ALA policy was the product of a series of discussions involving a number of parties, including the City Council and its Finance Committee. *Northfield's Supplement*, Exhibit 4 at p. 14, 195-200. Mr. Baer confirmed that terms and conditions of the ALA policy were modified on an annual basis through discussions. *Northfield's Supplement*, Exhibit 4 at p. 45. He explained that the City's self-insured retainer limit structure was very unusual and unique. *Northfield's Supplement*, Exhibit 4 at pp. 31-33. According to Mr. Baer, the ALA policy had many features that differed from standard policies. For example, Mr. Baer stated that the Policy's "ultimate net loss" provision differs from a standard policy. *Northfield's Supplement*, Exhibit 4 at pp. 192, 207. He noted that the "unbundled" nature of the ALA policy (by which the insurance, loss control and claims administration aspects of the agreement are separate) differed from more common policies. *Northfield's Supplement*, Exhibit 4 at pp. 51-54, 188. Further, Mr. Baer's Affidavit provided in connection with this civil action confirms the

evolution of the City's ALA policies over the years. *Northfield's Second Supplement*, Exhibit A.

Ken Brendle was a manager of Northfield's public entity division, which was responsible for the ALA policy at issue in this case. *Northfield's Supplement*, Exhibit 6 a pp. 4-5. Mr. Brendle's testimony explains how manuscript ALA policies allow sophisticated insurance buyers to obtain various types of coverage within a single package, to utilize a more efficient technique of financing their risk and to take a more direct role in handling claims than would be true in a standard insurer-insured relationship. *Northfield's Supplement*, Exhibit 6 at pp. 38-40. Mr. Brendle stated that of the approximately 40 ALA policies issued by Northfield nationwide, "there are probably no two that are alike." *Northfield's Supplement*, Exhibit 6 at pp. 44-45. He confirmed that the City was able to negotiate changes in policy wording if it desired, *Northfield's Supplement*, Exhibit 6 at p. 45, which is not the norm in the context of standard policies, and provided examples of changes that might be negotiated. *Northfield's Supplement*, Exhibit 6 at pp. 46-50.

Finally, William Kenny, a former City Manager, has confirmed that the ALA policy he procured for the City of Charleston was "considerably different than what [he] was familiar with when [he] was with private enterprise," even through the private entities may have been larger than the City from a revenue standpoint. *Northfield's Supplement*, Exhibit 8 at p. 120. Mr. Kenny also contrasted the policies on the basis of control of claims adjustment, risk management services and settlement issues. *Northfield's Supplement*, Exhibit 8 at pp. 120-21.

However, Appellant claims that the Affidavit of Gregory Burton (*see Appellant's Brief*, Exhibit B), the City Manager at the time the subject ALA policy was purchased, suggests that the City's ALA policy was not custom-designed. A careful reading of Mr. Burton's Affidavit reveals

nothing more than Mr. Burton's lack of recollection regarding any negotiation concerning specific policy language. Mr. Burton's Affidavit does not disclose any misconception on the part of the City or himself with regard to the insurance that was purchased. The Affidavit does not even describe what particular coverage or policy limits Mr. Burton believed he was purchasing for the City, as Appellant contends. *Cf., e.g., Appellant's Brief* at p. 9 ("Mr. Burton believed that he was acquiring for the City the \$1 million in coverage required by law.") Appellant should not exaggerate and misconstrue Mr. Burton's Affidavit. As *Trent* and *Eggleston* indicate, it is not the amount or degree of negotiation that matters, nor the particular words used in the policy. In determining whether a policy is a custom-designed policy, the important factor is whether the policy is different from more common, standardized policies. The evidence described above highlights many of the differences between the City's ALA policy and more standardized policies. Mr. Burton's Affidavit does not address any of the unique aspects of the City's ALA policy. Perhaps it is not surprising that Mr. Burton's knowledge and recollection is less detailed than that of the individuals discussed above. The City had been purchasing ALA policies since the early 1990s, well before Mr. Burton became City Manager. The terms and conditions of the City's ALA policies gradually evolved over time. It is reasonable to assume that because the City's insurance program had been in place for several years before Mr. Burton's involvement, there would have been fewer issues to discuss during his tenure.<sup>17</sup> It is significant to note that the City itself has asserted in this litigation that the ALA policy

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<sup>17</sup> Appellant also complains that the April 8, 2004 *Order* "did not even address the affidavit of Mr. Burton." *Appellant's Brief* at p. 22. There is a very simple explanation for this omission. The April 8, 2004 *Order* was a proposed *Order* tendered for entry by the Appellees' counsel, which Judge King eventually chose to sign and enter. At the time the proposed *Order* was prepared, the Appellees' counsel had no knowledge that Mr. Burton's affidavit had been filed in the record, since Appellant's counsel failed to serve (continued...)

was custom-designed.<sup>18</sup> Mr. Burton's Affidavit simply fails to rebut the overwhelming evidence that the City's ALA policy was a custom-designed, manuscript-type policy.

Finally, Appellant's argument that the City's ALA policy was "a 'boiler plate' one used all over the country" and that the Northfield Appellees have disclosed documentation in response to discovery requests reflecting that there are "*hundreds* of municipal entities who had purchased the same policy," *see Appellant's Brief* at p. 21 (*emphasis added*), grossly misrepresents the facts. To the contrary, the exhibit listing municipal entities who were insured via All Lines Aggregate policy forms that were similar to the City of Charleston's listed only 28 other entities.<sup>19</sup>

#### **G. Appellant's Public Policy and Other Arguments Are Without Merit**

Appellant has raised a variety of public policy and other arguments in support of her claim for declaratory relief, but none of those arguments are sound. Appellant contends, in sum and substance, that:

1. it is against public policy for an insurer not to pay the costs of the defense of its insured;
2. it is against public policy for an insurer to underwrite or market a policy which provides less insurance coverage than that purportedly required by law;
3. it is against public policy to permit the issuance of any insurance policy with

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<sup>17</sup>(...continued)

Appellees with any pleading demonstrating that such a filing had been made. It was only after Appellant filed her petition for appeal in this matter and the Appellees' counsel personally inspected the court file in anticipation of preparing a response that the Appellees' counsel learned that Appellant's counsel had made multiple court filings in this case without effectuating proper service upon opposing counsel.

<sup>18</sup> *See, e.g.*, the Eighth Affirmative Defense alleged in the *Answer of the City of Charleston to Petition by Lillian Gibson, Administratrix, for Declaratory Relief*, filed on or about January 7, 2002.

<sup>19</sup> Appellant attached the proprietary listing of 29 public entities (including the City of Charleston) insured via All Lines Aggregate policies to *Appellant's Circuit Court Memorandum* as Exhibit F.

policy limits that are eroded by defense costs;

4. an insurer has no right to “unilaterally determine” the amount by which insurance policy limits are eroded; and,
5. a claimant has a right to “make a policy limits demand” and a corresponding right “to know the policy limits,” and that eroding policy limits deprive a plaintiff of this right.

Even a cursory review of the Appellant’s contentions reveals that the matters which Appellant contends constitute “public policy” are not “public policy” at all. Rather, these contentions are mere opinions or conclusions of the Appellant or her counsel which lack any predicate.

The contention that it is against public policy for an insurer not to pay the costs of defending its insured is inexplicable. The City is not a party in this case and does not contend that it was inadequately represented in connection with Appellant’s claim. There is no contention that any reimbursable fees and costs incurred in the City’s defense went unpaid. It is true enough that under the American rule, each party in litigation must generally bear its own attorney fees and costs, as the Appellant asserts. How that principle is applicable and relevant in view of the facts, circumstances and issues presented by this appeal are at best, uncertain. Inasmuch as there is no dispute regarding the payment of defense costs of Northfield’s insured, what Appellant really seems to be arguing is that public policy forbids an insurer and an insured to contractually agree that defense costs will be paid within an established limit, rather than above and beyond a set limit established for the compensation of any injury or damages caused by the insured. There is no basis for such a public policy, and none is offered by the Appellant.

Likewise, Appellant has failed to suggest any basis for the purported public policy forbidding an insurer from underwriting or marketing a policy which provides less insurance coverage than that

which a public entity or other insured may be required by law to purchase. The obligations (if any) of a public entity or other insured – whether arising under W.Va. Code § 16-4C-16(1) or otherwise – are distinct from the obligations of an insurer. Appellant offers no basis to support the notion that an insurer of a public entity necessarily assumes any obligation to that public entity beyond the terms of its insurance contract. There is no public policy announced in any statute, rule or case law that requires the expansion of an insurer’s obligation in this regard. Nothing prevents a public entity or any insured from acquiring multiple policies of insurance from one or more insurers to meet any requirement imposed on the insured by law.

Notwithstanding West Virginia’s public policy favoring settlements, there is no public policy that prohibits the issuance of an insurance policy with eroding policy limits.<sup>20</sup> Such policies are permitted in this and many other States. Such policies are no more nor any less likely to encourage settlements than policies without eroding policy limits. Appellant offers no evidence, no studies, no expert opinions and no treatises suggesting otherwise. Indeed, virtually all insurance policies are subject to an aggregate limit that erodes if multiple claims are made. The suggestion at page 25 of *Appellant’s Brief* that this Appellant or any plaintiff would “become so frightened of the policy limits eroding every day if they do not settle, that they settle out of panic,” is nothing more than wild hyperbole. The existence of eroding policy limits is just one of many factors that a claimant and her lawyer should consider in evaluating her claim and the wisdom of settlement.

Curiously, Appellant also argues that an insurer and/or an insured’s attorney has no right to “unilaterally determine” the amount by which policy limits are eroded via defense costs. This

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<sup>20</sup> Such limits are sometimes referred to as “wasting” limits, “exhausting” limits or “defense within” limits.

perplexing argument begs the question: who should participate in this decision? In the usual course of litigation, an insured, its insurer and its defense counsel jointly develop and agree to carry out a litigation plan in which the cost of defense is invariably a factor.<sup>21</sup> If anything, insurers may seek to minimize defense costs to the extent consistent with the professional judgment of defense counsel and the wishes of the insured. Defense counsel typically seek to provide services that are competent and effective, but at a price that is competitive with their peers. Knowledgeable insureds – and particularly, insureds who (like the City) are responsible for the first Fifty Thousand Dollars (\$50,000.00) of any claim by virtue of a self-insured retention – want an efficient defense that will not lead to increased insurance premiums later. Appellant is arguing in favor of an entirely new adversarial system of justice in which plaintiffs may examine or question defense counsel’s fees and in which courts will take on the additional task of approving them (apparently with respect to each and every claim that may be raised, including claims that might result in the retention of counsel but which end in a pre-suit settlement). Under the Appellant’s proposed system, West Virginia courts will be extremely busy indeed. Again, there is no basis in law or in fact for Appellant’s argument, and none has been offered.

Whether plaintiffs or claimants have a “right” to make a policy limits settlement demand is unclear, although there is certainly nothing to prevent them from doing so at any time. Nothing about the ALA policy at issue in this case deprived Appellant of this alleged “right” or opportunity. As for the “right to know the policy limits,” W.Va. R. Civ. P. Rule 26(b)(2) permits a party to

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<sup>21</sup> Appellant’s assertions that defense costs are predicated on “defense counsel’s own unsupervised and untrammelled charges” and that “counsel for insurers . . . have open checkbooks to draw down policy proceeds at their will and pleasure,” *Appellant’s Brief* at p. 25, are patently absurd.

discover this information. Appellant does not contend that she made a Rule 26(b)(2) request, that the City or its counsel failed to respond to such a request or that Northfield somehow prevented the Appellant from obtaining such information. Even if such a request was made and a response to the same was somehow deficient, that would not alter the terms of the policy or change the insured's right to continue its defense.

In sum, all of the Appellant's public policy and related arguments are predicated on what the Appellant and her counsel desire the law or public policy to be, not on applicable West Virginia public policy itself. Respectfully, this Court should not invade the province of the Legislature or the Insurance Commissioner in this regard. Because Appellant offers no meritorious basis for her public policy and related arguments, they do not support her claim for relief.

Finally, Appellant has pointed out that Northfield and others are defendants in a lawsuit filed by the City of Charleston in the matter of *City of Charleston v. Citigroup, Inc.*, which is now pending in the Circuit Court of Kanawha County as Civil Action No. 02-C-2921. Civil Action No. 02-C-2921 involves issues that are very distinct from the issues in this case. Consequently, it is irrelevant to this Court's analysis of this appeal.<sup>22</sup>

## **VI. CONCLUSION AND REQUEST FOR RELIEF**

This Court should not invalidate provisions of the City's ALA policy and/or reform the ALA policy, thereby enlarging the policy limits beyond that contemplated by the premium paid by the City to Northfield. *Appellant's Brief* raises issues that more properly relate to the obligations of the City,

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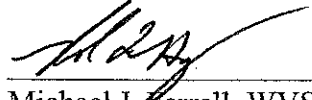
<sup>22</sup> In Civil Action No. 02-C-2921, the City essentially alleges that Northfield and others failed to make a commercially reasonable offer of uninsured motorist insurance coverage. The matters at issue in Civil Action No. 02-C-2921 involve the sale and procurement of an ALA policy that preceded the similar ALA policy at issue in this case and have nothing to do with the issue of eroding policy limits.

not Northfield or the Northfield Appellees. Ultimately, *Appellant's Brief* fails to demonstrate that the Northfield Appellees owe any duty with respect to W.Va. Code § 16-4C-16(1) and certainly fails to demonstrate that Northfield violated that provision. Indeed, the Appellant has failed to demonstrate that W.Va. Code § 16-4C-16(1) – concerning Errors or Omissions Liability insurance in the context of providing emergency medical services – is applicable to the facts and circumstances of this case, which involves an Automobile Liability claim. Because the Northfield ALA policy was a custom-designed insurance policy issued to a governmental entity, the City of Charleston, it could permissibly vary from the requirements of W.Va. Code § 16-4C-16(1) even if it was applicable. Even if W.Va. Code § 16-4C-16(1) did apply, there has been no violation of that provision because there is no prohibition against eroding policy limits and because the ALA policy limits meet the statutory requirement. Finally, the argument that the motor vehicle accident from which the Appellant's claim herein arose constitutes multiple "occurrences" is contrary to common sense and West Virginia law, and does not alter the outcome of this appeal. Finally, Jupiter and Northland were properly dismissed from this case because they were never proper parties and because *Appellant's Brief* offers no evidence or argument to the contrary.

For all of the reasons set forth above and for such additional reasons as may become apparent or known to the Court, the Northfield Appellees respectfully request that this Honorable Court dismiss this appeal as having been improvidently granted. Alternatively, the Northfield Appellees respectfully request that the Court affirm the April 8, 2004 *Order* of the Circuit Court of Kanawha County, West Virginia. The Northfield Appellees further ask that they be granted such additional or alternative relief as this Court may deem just and appropriate.

**NORTHFIELD INSURANCE COMPANY,  
NORTHLAND INSURANCE COMPANY,  
and JUPITER HOLDINGS, INC.,**

**BY COUNSEL.**



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