

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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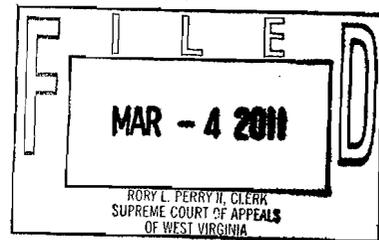
THOMAS D. LOUDIN and
ALICE M. LOUDIN,

Appellants/Plaintiffs below,

v.

NATIONAL LIABILITY & FIRE
INSURANCE COMPANY, JACK SERGENT,
D.L. THOMPSON and CONSOLIDATED
CLAIM SERVICE, INC.,

Appellees/Defendants below.



Appeal from a final order
Of the Circuit Court of Upshur
County (08-C-100)

APPELLEES' BRIEF

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Insurance Company, Jack Sergent, D.L. Thompson
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STATEMENT OF THE CASE

I. Procedural History

The Appellants/Plaintiffs below, Thomas D. Loudin and Alice M. Loudin, (hereinafter “Appellants”) filed their Complaint against William Loudin (“Defendant William Loudin”) and National Liability & Fire Insurance Company, Jack Sergeant, D.L. Thompson and Consolidated Claim Service, Inc. (hereinafter “Appellees”) on September 4, 2008, in the Circuit Court of Upshur County, West Virginia (R. 1-18)¹. In their Complaint, Appellants asserted claims for negligence against Defendant William Loudin, and claims for common law bad faith, breach of insurance contract, breach of the implied covenant of good faith and fair dealing, violations of the West Virginia Unfair Trade Practices Act (“UTPA”), and the tort of outrage against Appellees (R. 1-18). Defendant William Loudin filed his Answer to the Complaint on September 25, 2008 with the assistance of Attorney James Wilson, who had been retained by Appellee National Liability & Fire Insurance Company to defend William Loudin (R. 344-351). Appellees filed their own Answer to the Complaint on September 30, 2008 (R. 19-35).

Subsequently, the Appellants’ claim for negligence against Defendant William Loudin was settled on or about September 15, 2009 (R. 352-357). Appellee National Liability & Fire Insurance Company paid Appellants \$150,000.00 in exchange for a release of Defendant William Loudin for any and all liability arising from the incident that formed the basis for Appellants’ lawsuit (R. 352-357). On December 8, 2009, pursuant to a motion to amend their complaint that was granted by the Circuit Court, Appellants filed an Amended Complaint (R. 206-220). The only substantive change to Appellants’ Complaint was the removal of Defendant

¹ “R.” refers to the Record in this matter, as assembled, paginated, and indexed by the Circuit Court of Upshur County, West Virginia pursuant to Rule 9 of the pre-December 1, 2010 version of the Rules of Appellate Procedure. Appellees would ask the Court to note that, for certain portions of the Record that contain two similar handwritten page numbers at the bottom center of the page, the underlined page numbers are the accurate page numbers.

William Loudin as a party and the removal of the claim of negligence against Defendant William Loudin from the Complaint (R. 206-220). On December 28, 2009, Appellees filed their Answer to the Amended Complaint (R. 221-232).

After extensive written discovery was exchanged, but before depositions were taken, Appellees filed a Motion for Summary Judgment on March 16, 2010 (R. 276-387). Appellants responded on April 29, 2010 (R. 388-499), and Appellees filed a Reply in Support of their Motion for Summary Judgment on May 3, 2010 (R. 500-516), along with an Appendix of authorities cited by the parties in their respective memoranda (R. 517-728).

On May 5, 2010, the Circuit Court heard arguments on Appellees' Motion for Summary Judgment (R. 739). By Order entered May 27, 2010, the Circuit Court granted Appellees' Motion for Summary Judgment (R. 730-737). The findings of fact and conclusions of law made by the Circuit Court culminated in the following rulings by the Circuit Court:

1. Appellants Thomas and Alice Loudin were third party claimants when they made their liability claim against Defendant William Loudin under the liability portion of the National Policy.
2. Because they were third party claimants when they made their liability claim against Defendant William Loudin, Appellants Thomas and Alice Loudin had no legal right to sue Appellees for common law bad faith, breach of the insurance contract, breach of the implied duty of good faith and fair dealing, or violations of the UTPA.
3. Appellees' conduct in the handling of Appellants Thomas and Alice Loudin's liability claim against Defendant William Loudin may not reasonably be regarded as so extreme and outrageous as to constitute intentional or reckless infliction of emotional distress, otherwise known as the tort of outrage.

(R. 730-737).

Appellants timely filed a Petition for Appeal on September 3, 2010, and this Court granted the Petition on November 23, 2010.

II. Statement of Facts

Appellant Thomas Loudin owns a 1993 International truck (R. 9). For the period of time relevant to the incident described below, Appellant Thomas Loudin insured his 1993 International truck through Appellee National Liability & Fire Insurance Company (hereinafter “National”) via Policy Number 73 TRN 410540 (hereinafter the “National Policy”)(R. 277-314).

On September 4, 2006, Appellant Thomas Loudin was performing maintenance on his 1993 International truck with the assistance of his brother, Defendant William Loudin (R. 9). At some point, the truck moved, and Appellant Thomas Loudin was injured as a result (R. 9).

The National Policy contains a form of coverage described as Auto Medical Payments Coverage (R. 284 and 286-287). In essence, this form of coverage pays reasonable medical expenses incurred by an insured who sustains bodily injury caused by an accident (R. 286). This insurance coverage has a \$5,000.00 limit of liability (R. 284 and 286). On or about October 12, 2006, National paid Appellant Thomas Loudin \$5,000.00 under the Auto Medical Payments form of coverage (R. 331).

The National Policy also contains a form of coverage described as Liability Coverage (R. 284 and 298-302). In essence, this form of coverage pays all sums that an insured is legally obligated to pay as damages to another person, because of bodily injury to that other person, caused by an accident that is the result of the insured’s use of a covered auto (R. 298). This insurance coverage has a \$1,000,000.00 limit of liability (R. 284 and 301-302). This form of coverage also provides a legal defense to the insured against any lawsuit by the injured person seeking damages (R. 298).

In addition to the Auto Medical Payments claim referenced above, Appellants Thomas and Alice Loudin also made a pre-lawsuit negligence claim against Defendant William Loudin

under the Liability Coverage contained in the National Policy (R. 340-343). The demand was in the amount of \$700,000.00 (R. 342). Appellants' claim against Defendant William Loudin did not settle at that time; hence, Appellants Thomas and Alice Loudin filed the instant lawsuit against Defendant William Loudin for personal injury, claiming that Defendant William Loudin negligently operated the truck and caused Appellant Thomas Loudin's injuries (R. 9).

Appellants also sued Appellees in the same lawsuit in which they sued Defendant William Loudin (R. 1-18). Appellants based their claims against the Appellees on the manner in which the Appellees handled the Appellants' liability claim against Defendant William Loudin (R. 1-18 and 184-197). Appellants did not base their claims against the Appellees on the manner in which the Appellees handled Appellant Thomas Loudin's \$5,000.00 Auto Medical Payments claim (R. 1-18 and 184-197).

Pursuant to the terms of the National Policy, Appellee National Liability & Fire Insurance Company hired attorney James Wilson to defend Defendant William Loudin in the personal injury lawsuit that had been filed against him by Appellants Thomas and Alice Loudin (R. 344-351). Eventually, Appellee National Liability & Fire Insurance Company paid a monetary settlement of \$150,000.00 to Appellants Thomas and Alice Loudin to resolve their personal injury lawsuit against Defendant William Loudin (R. 352-357).

SUMMARY OF ARGUMENT

The Circuit Court's grant of summary judgment for Appellees should be affirmed by this Court because the Circuit Court's decision was correct under the law, and was not premature.

The main legal question at issue in this appeal, a question of first impression for this Court, is the following:

When a named insured under a liability insurance policy brings a liability claim against another insured under that same liability insurance policy, is the claimant a first party claimant (such that he/she may sue the insurance company for bad faith) or is the claimant a third party claimant (such that he/she cannot sue the insurance company for bad faith)?

As applied to the parties to this appeal, the question is whether Appellants were third party claimants or first party claimants when they brought their negligence claim against Defendant William Loudin. If they were third party claimants when they brought their negligence claim against Defendant William Loudin, they cannot sue Appellees for the way Appellees handled their claim against Defendant William Loudin. If they were first party claimants when they brought their negligence claim against Defendant William Loudin, then they may sue Appellees for the way Appellees handled their claim against Defendant William Loudin.²

When Appellants brought their negligence claim against Defendant William Loudin, they were making a third party insurance claim, not a first party insurance claim, despite the fact that Appellant Thomas Loudin purchased the insurance policy in question. Six other courts across the country have decided this precise issue, and they have all decided it the same way: When one insured under a liability insurance policy makes a negligence claim against another insured under the same liability insurance policy, the claimant is a third party claimant, and as such, has no right to sue the insurance company for bad faith in the handling of his/her claim. While this Court has yet to address this precise issue, the applicable insurance regulations in West Virginia

² To further elaborate: West Virginia has never allowed third party claimants to sue the tortfeasor's insurance company for common law bad faith, breach of the insurance contract, or breach of the implied duty of good faith and fair dealing, based on the insurance company's handling of the third party claimant's negligence claim against the tortfeasor. Likewise, ever since the passage of W. Va. § 33-11-4a in 2005, third party claimants have no right under West Virginia law to sue the tortfeasor's insurance company for alleged violations of the West Virginia Unfair Trade Practices Act ("UTPA"). Essentially, only first party claimants may sue insurance companies for any type of alleged "bad faith"; third party claimants may not do so.

clearly define Appellants as third party claimants, not first party claimants, when they brought their negligence claim against Defendant William Loudin.

The decision by the Circuit Court in this regard was not premature. Sufficient discovery had taken place to establish the uncontroverted facts that formed the basis for the Circuit Court's decision on the overriding issue of law here: That Appellants were third party claimants when they brought their negligence claim against Defendant William Loudin, and as such, they have no right to sue Appellees under any theories of common law or statutory bad faith. No further discovery would have changed these uncontroverted facts.

Regarding Appellants' claim of the tort of outrage, West Virginia law calls upon the Circuit Court to act a gatekeeper for such claims. If the actions of the defendant cannot reasonably be regarded as so extreme and outrageous as to constitute intentional or reckless infliction of emotional distress, then the Circuit Court has a responsibility to prohibit the case from going forward. The Circuit Court performed an analysis of the actions of Appellees in this matter, and decided, pursuant to West Virginia law, that the actions of the Appellees cannot reasonably be regarded as so extreme and outrageous as to constitute intentional or reckless infliction of emotional distress. In essence, Appellees disputed Appellants' allegations regarding liability and damages in their claim and lawsuit against Defendant William Loudin, Appellees paid a lawyer to defend Defendant William Loudin when Appellants sued him, and Appellees eventually paid a monetary settlement to Appellants in order to secure a release of liability for Defendant William Loudin. The Circuit Court appropriately found that there was nothing extreme or outrageous about the actions of Appellees.

The Circuit Court made the right decision under the law, did not abuse its discretion, and did not decide Appellees' Motion for Summary Judgment prematurely. The Circuit Court's grant of summary judgment to Appellees should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION³

Oral argument is necessary in this matter because none of the criteria contained in Rule 18(a) of the Revised Rules of Appellate Procedure apply here.

The time allotted for argument under Rule 20 of the Revised Rules of Appellate Procedure is appropriate in this matter because the central issue of law in this appeal is an issue of first impression for this Court.

ARGUMENT

The main legal question at issue in this appeal is a question of first impression for this Court, and it is the following:

When a named insured under a liability insurance policy brings a liability claim against another insured under that same liability insurance policy, is the claimant a first party claimant (such that he/she may sue the insurance company for bad faith) or is the claimant a third party claimant (such that he/she cannot sue the insurance company for bad faith)?

I. THE SIX COURTS THAT HAVE DECIDED THIS QUESTION HAVE ALL FOUND THAT CLAIMANTS SUCH AS APPELLANTS ARE THIRD PARTY CLAIMANTS, NOT FIRST PARTY CLAIMANTS

Courts in six other jurisdictions have decided this precise issue. All six courts have held that such a claimant is a third party claimant, despite the fact that the claimant is an insured (even a named insured) under the insurance policy in question.

In Gillette v. Gillette, 837 N.E. 2d 1283 (Ohio App. 2005), a woman, Joyce Gillette, was a passenger in a vehicle owned and being driven by her husband, Joseph Gillette, when the

³ While the pre-December 1, 2010 Rules of Appellate Procedure apply to this appeal, Appellees have included this information in case it is useful to the Court.

vehicle crashed due to her husband's negligence. The Gillettes carried insurance on their vehicle with Nationwide Mutual Insurance Company ("Nationwide"). Mrs. Gillette brought three types of claims under the Nationwide policy: a first party claim under the "Family Compensation" coverage available under the policy; a first party claim under the "Medical Payments" coverage available under the policy; and a third party liability claim against her husband under the "Auto Liability" coverage available under the policy. A dispute arose between Mrs. Gillette and Nationwide over these three claims. She sued Nationwide for bad faith as a result. The trial court in that matter granted summary judgment for Nationwide on all three claims, because it viewed Mrs. Gillette as a third party claimant, rather than a first party claimant. In Ohio, only first party claimants may sue for bad faith.

The Tenth Circuit Court of Appeals of Ohio reversed the trial court as to Mrs. Gillette's bad faith claims arising from Nationwide's handling of her "Family Compensation" and "Medical Payments" claims, because those claims were first party claims. However, the appellate court affirmed the grant of summary judgment to Nationwide on the issue of whether Mrs. Gillette could sue Nationwide for bad faith arising from its handling of her liability claim against her husband. The appellate court's analysis follows:

In the case at bar, appellant [Mrs. Gillette] asserted a third party claim against Nationwide, i.e., a claim pursuant to the "Auto Liability" portion of the policy. If appellant were not the spouse of the named insured under the policy and thus an insured herself, our analysis would end with the rule that a third-party claimant cannot assert a bad-faith claim against an insurer. However, appellant, as an insured, *does* have a contractual relationship with Nationwide, and Nationwide owes appellant certain duties under the policy. Therefore, we must address a question of first impression in Ohio: whether a third-party claimant who is also an insured may bring a claim for bad faith against an insurer.

Although no court in Ohio has addressed this issue, at least five courts in other jurisdictions have done so. All five courts concluded that an insured spouse must be treated as a third party claimant when seeking benefits based upon a coinsured's liability coverage. [citations omitted here, but shown below]

We find the reasoning in these decisions sound and consistent with Ohio jurisprudence.

In sum, we conclude that although appellant is an insured under the Nationwide policy, where she seeks liability coverage for the negligence of the named insured-her husband-she stands in the shoes of a third-party claimant who is not owed any contractual duty by the insurer. Thus, we conclude that appellant is barred from asserting a claim for bad faith for Nationwide's delay in paying her benefits pursuant to the "Auto Liability" section of the policy.

Gillette v. Gillette, 837 N.E. 2d at 1287-1289.

In Smith v. Allstate Ins. Co., 202 F. Supp. 2d 1061 (D. Ariz. 2002), a woman, Cordelia Smith, was a passenger in a vehicle being driven by her husband when the vehicle crashed due to her husband's negligence. The Smiths carried insurance on their vehicle with Allstate Insurance Company ("Allstate"). Mrs. Smith brought a liability insurance claim against her husband under their joint insurance policy with Allstate. After resolution of that claim, Mrs. Smith sued Allstate for breach of the covenant of good faith and fair dealing based on the manner in which Allstate handled her liability insurance claim against her husband. The United States District Court for the District of Arizona granted Allstate's motion to dismiss Mrs. Smith's lawsuit against it. That court held that, when Mrs. Smith brought her liability insurance claim against her husband under their jointly owned insurance policy, she was acting as a third party claimant, not a first party claimant, and therefore had no right to sue Allstate for breach of the duty of good faith and fair dealing based on the manner in which Allstate handled her claim. This was true despite the fact that Mrs. Smith was a co-insured under the insurance policy in question. Smith, *supra* at 1065.

In Sperry v. Sperry, 990 P. 2d 381 (Utah 1999), a married couple, Annette and Robert Sperry, lost their son in an automobile accident due to the negligence of the husband, Mr. Sperry.

The Sperry family insured the vehicle in question through AMCO Insurance Company (“AMCO”). Mrs. Sperry brought a liability insurance claim against her husband for the death of their son in the automobile accident. She also sued AMCO for bad faith. AMCO filed a motion to dismiss the bad faith allegations, based on the fact that Mrs. Sperry was a third party claimant, and therefore could not sue AMCO for bad faith. The trial court granted AMCO’s motion to dismiss, and that decision was affirmed by the Supreme Court of Utah. The court in Sperry held that Mrs. Sperry was a third party claimant, not a first party claimant, and therefore had no right to sue AMCO for bad faith. This was true despite the fact that Mrs. Sperry was a co-insured under the insurance policy in question. Sperry, supra at 384.

In Herrig v. Herrig, 844 P. 2d 487 (Wy. 1992), the daughter of a married couple, Rodney and Angela Herrig, was severely injured in an automobile accident due to the negligence of the wife, Mrs. Herrig. The Herrigs insured their vehicle through Farmers Insurance Exchange (“Farmers”). Mr. Herrig brought a liability insurance claim against his wife for the injuries sustained by their daughter. He later sued both his wife for negligence and Farmers for various forms of common law and statutory bad faith. Farmers filed a motion to dismiss the bad faith allegations, based on the fact that Mr. Herrig was a third party claimant, and could therefore not sue Farmers for bad faith. The trial court granted Farmers’ motion to dismiss, and that decision was affirmed by the Supreme Court of Wyoming. The court in Herrig held that Mr. Herrig was a third party claimant, not a first party claimant, and therefore had no right to sue Farmers for bad faith. This was true despite the fact that Mr. Herrig was a co-insured under the insurance policy in question. Herrig, supra at 492.

In Rumley v. Allstate Indem. Co., 924 S.W. 2d 448 (Tex. 1996), a woman, Joyce Rumley, was a passenger in a vehicle being driven by her husband when the vehicle crashed due

to her husband's negligence. The Rumleys carried insurance on their vehicle with Allstate Insurance Company ("Allstate"). Mrs. Rumley brought a liability insurance claim against her husband under their joint insurance policy with Allstate. Mrs. Rumley also sued Allstate for common law and statutory bad faith based on the manner in which Allstate handled her liability insurance claim against her husband. Allstate filed a motion for summary judgment based on the fact that Mrs. Rumley was a third party claimant, and could therefore not sue Allstate for bad faith. The trial court granted Allstate's motion for summary judgment, and that decision was affirmed by the Court of Appeals of Texas. The court in Rumley held that Mrs. Rumley was a third party claimant, not a first party claimant, and therefore had no right to sue Allstate for bad faith. This was true despite the fact that Mrs. Rumley was a co-insured under the insurance policy in question. Rumley, supra at 450.

In Wilson v. Wilson, 468 S.E. 2d 495 (N.C. 1996), a woman, Aishah Wilson, was a passenger in a vehicle being driven by her husband when the vehicle crashed due to her husband's negligence. Mr. Wilson insured the vehicle with Nationwide Mutual Fire Insurance Company ("Nationwide"). Mrs. Wilson brought a liability insurance claim against her husband under the liability insurance policy they had with Nationwide. Mrs. Wilson later sued both her husband for negligence and Nationwide for statutory bad faith. Nationwide filed a motion to dismiss Mrs. Wilson's bad faith allegations against it. The trial court granted Nationwide's motion to dismiss, and that decision was affirmed by the Court of Appeals of North Carolina. The court in Wilson found that, even if one assumes that Mrs. Wilson is a named insured, she was a third party claimant when she brought her liability insurance claim against her husband, not a first party claimant, and therefore had no right to sue Nationwide for statutory bad faith. Wilson, supra at 498-499.

II. WEST VIRGINIA LAW IS CONSISTENT WITH THE LAW IN THE SIX OTHER JURISDICTIONS THAT HAVE DECIDED THIS QUESTION

While the main issue in this appeal is a question of first impression for this Court, West Virginia law recognizes a significant difference between claims made by first party claimants and those made by third party claimants. The clearest definitions of these terms are found in the regulations promulgated by the West Virginia Insurance Commissioner for the handling of insurance claims: Sections 114-14-2.3 and 114-14-2.8 of the West Virginia Code of State Rules.

Section 114-14-2.3 defines the term "first-party claimant":

2.3. "First-party claimant" or "Insured" means an individual, corporation, association, partnership or other legal entity asserting a right to payment under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by such policy or contract.

Section 114-14-2.8 defines the term "third-party claimant":

2.8. "Third-party claimant" means any individual, corporation, association, partnership or other legal entity asserting a claim against any individual, corporation, association, partnership or other legal entity insured under an insurance policy or insurance contract of an insurer.

When one applies these definitions to the uncontroverted facts of the instant case, and the specific type of insurance coverage at issue (i.e., liability insurance), it is clear that Appellants were third party claimants when they made their negligence claim against Defendant William Loudin.

The portion of the National Policy that is at issue here is the Liability Coverage. The Liability Coverage states, in relevant part:

[National] will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".

[National has] the right and duty to defend any “insured” against a “suit” asking for such damages[.]

(R. 298)

Appellants made a pre-lawsuit negligence claim against Defendant William Loudin under the Liability Coverage portion of the National Policy (R. 340-343). The demand was in the amount of \$700,000.00 (R. 342). Appellants later filed the instant lawsuit against Defendant William Loudin for personal injury, claiming that Defendant William Loudin negligently operated the truck and caused Appellant Thomas Loudin’s injuries (R. 9). Pursuant to the terms of the National Policy, Appellee National hired attorney James Wilson to defend Defendant William Loudin in the personal injury lawsuit that had been filed against him by Appellants (R. 344-351). Eventually, Appellee National paid a monetary settlement of \$150,000.00 to Appellants to resolve their personal injury lawsuit against Defendant William Loudin (R. 352-357).

Examining the Liability Coverage portion of the National Policy and Section 114-14-2.3 of the West Virginia Code of State Rules together, one must ask: What contingency or loss covered by that portion of the policy occurred when Appellants brought their liability claim against Defendant William Loudin?

The answer: Defendant William Loudin potentially became liable to pay damages to Appellants, and he was also sued by Appellants. These contingencies, of course, correspond directly to the main duties that an insurance company owes to an insured under a policy of liability insurance: The duty to indemnify, and the duty to defend. These are the only contingencies covered by the Liability Coverage portion of the National Policy. Therefore, according to Section 114-14-2.3 of the West Virginia Code of State Rules, Defendant William

Loudin was a first party claimant (and the only first party claimant) as to any benefits available under the Liability Coverage portion of the National Policy.

Looking at the same portions of the National Policy and the above regulation, one should also ask: Were Appellants first party claimants when they brought their liability claim against Defendant William Loudin?

The answer: They cannot be. Appellants were never at risk of being legally obligated to pay damages to anyone for bodily injury arising from the accident in question. Appellants were never sued by anyone for personal injury arising from the accident in question. These are the only two benefits available under the Liability Coverage portion of the National Policy: The right to be indemnified by National for damages owed by the insured to someone who claimed to be hurt in the accident, and the right to be defended if that hurt person sues. These benefits were only available to Defendant William Loudin, because he is the only person against whom a liability claim had been made, and the only person who was sued due to the accident in question.

Of course, Defendant William Loudin's status as an insured under the Liability Coverage portion of the National Policy is precisely what makes Section 114-14-2.8 of the West Virginia Code of State Rules directly applicable to Appellants. When Appellants brought their liability claim against Defendant William Loudin, they asserted a claim against an individual insured under an insurance policy. According to Section 114-14-2.8, Appellants were third party claimants when they brought their liability claim against Defendant William Loudin.

III. THIRD PARTY CLAIMANTS CANNOT SUE THE TORTFEASOR'S INSURANCE COMPANY FOR COMMON LAW BAD FAITH OR ALLEGED UTPA VIOLATIONS

As a matter of law, there are no valid claims that Appellants Thomas and Alice Loudin can bring against the Appellees. Since they were third party claimants regarding their claim

against Defendant William Loudin, their allegations that the Appellees committed bad faith and/or violated the UTPA in the handling of that claim are inherently third party bad faith claims. Such claims made under the UTPA can no longer be brought in Circuit Court; they must be filed as administrative proceedings before the West Virginia Insurance Commissioner. See W. Va. Code § 33-11-4a(a), which states that such an administrative proceeding is a third party claimant's sole remedy under the UTPA. Likewise, there is no such thing as a common law bad faith, or breach of duty of good faith and fair dealing, claim for third party claimants under West Virginia law. See Elmore v. State Farm, 504 S.E.2d 893 (W. Va. 1998). As third party claimants, Appellants Thomas and Alice Loudin simply have no viable causes of action against the Appellees.

IV. APPELLANTS' TORT OF OUTRAGE CLAIM WAS APPROPRIATELY ADJUDICATED AND DISMISSED BY THE CIRCUIT COURT

This Court set out the elements of the tort of outrage in Syllabus Point 3 of Travis v.

Alcon Laboratories, Inc., 504 S.E.2d 419 (W.Va. 1998), as follows:

In order for a plaintiff to prevail on a claim for intentional or reckless infliction of emotional distress, four elements must be established. It must be shown: (1) that the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that the actions of the defendant caused the plaintiff to suffer emotional distress; and, (4) that the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

The Court went on to hold, in Syllabus Point 4 of Travis v. Alcon Laboratories, that it is the Circuit Court's duty to first determine whether a defendant's actions might reasonably be interpreted as outrageous:

In evaluating a defendant's conduct in an intentional or reckless infliction of emotional distress claim, the role of the trial court is to first determine whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to constitute the intentional or reckless infliction of emotional distress. Whether

conduct may reasonably be considered outrageous is a legal question, and whether conduct is in fact outrageous is a question for jury determination.

In the instant case, the Circuit Court of Upshur County applied this legal standard to the facts of this case and concluded that:

[T]he [Appellees'] conduct in the handling of Thomas and Alice Loudin's liability claim against William Loudin may not reasonably be regarded as so extreme and outrageous as to constitute intentional or reckless infliction of emotional distress, otherwise known as the tort of outrage.

(R. 730-737)

As is clear from the Supreme Court's pronouncements in Travis v. Alcon Laboratories, Id., the Circuit Court was required to first make a determination as a matter of law whether Appellees' actions might reasonably be interpreted as outrageous. The Circuit Court was justified in its determination that the Appellees' alleged claim handling misconduct did not rise to the level of outrageous conduct.

Appellants made a pre-lawsuit negligence claim against Defendant William Loudin under the Liability Coverage portion of the National Policy (R. 340-343). The demand was in the amount of \$700,000.00 (R. 342). Appellants later filed the instant lawsuit against Defendant William Loudin for personal injury, claiming that Defendant William Loudin negligently operated the truck and caused Appellant Thomas Loudin's injuries (R. 9). Pursuant to the terms of the National Policy, Appellee National hired attorney James Wilson to defend Defendant William Loudin in the personal injury lawsuit that had been filed against him by Appellants (R. 344-351). Approximately a year after the lawsuit was filed, Appellee National paid a monetary settlement of \$150,000.00 to Appellants to resolve their personal injury lawsuit against Defendant William Loudin (R. 352-357).

Appellants offered the trial court absolutely no evidence to suggest that this claim was handled in any way that would qualify as outrageous conduct by Appellees. The trial court recognized what this Court ought to recognize: that there was a serious issue in the underlying case regarding liability for the accident, and due to Appellants' shaky case against Defendant William Loudin, the case settled for approximately a fifth of what Appellants originally demanded. There was no evidence presented to the trial court to suggest anything other than rather normal claims handling by Appellees in the context of a disputed liability claim. The trial court appropriately found that Appellees' conduct cannot be reasonably seen as outrageous, and performed its duty under Travis v. Alcon Laboratories, Id. There was no error in doing so.

V. APPELLANTS' ARGUMENTS AND WHY THEY MUST FAIL

Sections I. through IV. of the arguments contained in this Brief were spent providing this Court with the reasoning behind the trial court's grant of summary judgment for Appellees. Section V. of this Brief will be spent demonstrating to this Court why the arguments presented by Appellants in this appeal must fail.

A. The Circuit Court's entry of summary judgment was not premature

Appellants cite Rule 56(f) of the West Virginia Rules of Civil Procedure, Williams v. Precision Coil, Inc., 459 S.E.2d 329 (W.Va. 1995), and Board of Education of the County of Ohio v. Van Buren and Firestone Architects, Inc., 267 S.E. 2d 440 (W. Va. 1980), for the proposition that the trial court granted Appellees' motion for summary judgment prematurely; that the trial court should have allowed Appellants to pursue more discovery prior to ruling on Appellees' motion for summary judgment. As will be shown below, this argument is completely without merit.⁴

⁴ It should be noted that a trial court's decision not to allow further discovery under Rule 56(f) is reviewed on appeal for an abuse of discretion. Drake v. Snider, 608 S.E. 2d 191, 194 (W. Va. 2004).

Rule 56(f) of the West Virginia Rules of Civil Procedure states:

When affidavits are unavailable.—Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Syllabus Point 3 of Williams v. Precision Coil, Inc., *supra*, states:

If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

This Court has expressed the view, in dicta, both in Williams v. Precision Coil, Inc., *Id.*, and in Board of Education of the County of Ohio v. Van Buren and Firestone Architects, Inc., *supra*, that summary judgment should be considered after the nonmoving party has had adequate time for discovery, and that a grant of summary judgment prior to the completion of discovery is precipitous. Williams v. Precision Coil, Inc., *supra* at 338, Board of Education of the County of Ohio v. Van Buren and Firestone Architects, Inc., *supra* at 443. This Court has also expressed the view (again, in dicta) that a continuance of a summary judgment motion is mandatory upon a good faith showing by an affidavit that the continuance is needed to obtain facts essential to justify opposition to the motion. Williams v. Precision Coil, Inc., *supra* at 339.

However, the above syllabus points and dicta cannot be interpreted as automatically calling for a continuance of a motion for summary judgment, and the grant of more time to conduct discovery, every time the nonmoving party invokes Rule 56(f) and/or files a Rule 56(f) affidavit with the trial court. Such a conclusion would be contrary to West Virginia law.

In Conley v. Stollings, 679 S.E. 2d 594 (W. Va. 2009), Ms. Conley, the mother of a young boy killed in an ATV accident, sued several parties for the wrongful death of her son: the landowner at the time of the accident (Mr. Stollings), the former landowners (the Richards family) an even prior landowner (The West Virginia Department of Transportation, Division of Highways), and an oil & gas company that had access to the property (Cabot). After some discovery, but prior to the close of discovery, several of the parties moved for summary judgment. Ms. Conley opposed the motions for summary judgment, particularly the one filed by Cabot, by filing with the court a Rule 56(f) affidavit advising the trial court that additional discovery was needed in order to oppose the motion for summary judgment. The trial court granted summary judgment for several of the parties, including Cabot.

This Court affirmed the Circuit Court's grant of summary judgment to Cabot, despite the fact that discovery had not been completed, and despite the fact that Ms. Conley filed a Rule 56(f) affidavit seeking more discovery. This Court did so because:

[I]t is clear that [Ms. Conley] would be unable to establish the existence of a genuine issue of material fact with regard to whether or not Cabot had any ownership, possessory, or controlling interest in the subject property.

The record shows that the parties had already conducted discovery for several months before the appellees filed their motions for summary judgment. If Cabot owned the mineral rights to the subject property as Ms. Conley contends, then she should have been able to submit documentation to that effect as it would have been a matter of public record. She failed to do so [footnote omitted]. Therefore, even if Ms. Conley was given additional time for discovery, she would not be able to produce any evidence to support her assertions with regard to Cabot.

Conley v. Stollings, *Id.* at 600.

In Crum v. Equity Inns, Inc., 685 S.E. 2d 219 (W. Va. 2009), Mr. Crum sued several parties for personal injury he sustained when a light fixture at a hotel fell on his head. One of the

defendants, Equity Inns, filed a motion for summary judgment based on the opinion of its expert witness that the light fixture fell due to improper installation by another defendant, and not due to any negligence on the part of Equity Inns. Mr. Crum opposed the motion for summary judgment, seeking further discovery, but failed to produce any evidence to oppose the findings of the expert witness hired by Equity Inns. The trial court granted Equity Inns' motion for summary judgment.

This Court affirmed the trial court's grant of summary judgment to Equity Inns. While the Court acknowledged that Mr. Crum was not obligated to conform to the precise affidavit requirements contained in Rule 56(f) in order to effectively invoke the rule (citing Syllabus Point 1 of Powderidge Unit Owners Ass'n v. Highland Properties, Ltd., 474 S.E. 2d 872 (W. Va. 1996)), the Court found that Mr. Crum failed to satisfy even the minimum requirements for informally invoking the rule. Those requirements are:

1. [A]rticulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the party.
2. [D]emonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period.
3. [D]emonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material.
4. [D]emonstrate good cause for failure to have conducted the discovery earlier.

Crum v. Equity Inns, Inc., supra at 800, citing Syl. Pt. 1 of Powderidge, Id.

The lesson to be taken from these cases is that it is not enough for a party opposing a motion for summary judgment to simply file a Rule 56(f) affidavit, or ask for more time to conduct discovery. The party opposing a motion for summary judgment has to demonstrate to the trial court (and, on appeal, to this Court) that additional discovery would actually accomplish

something relevant to the motion for summary judgment. The party opposing the motion for summary judgment must show that the discovery sought would make a difference to the inquiry; in other words, the opposing party must show that the discovery sought would be material to the basis for the moving party's motion for summary judgment, and that it would create a genuine issue of fact.

This Court acknowledged the importance of such a materiality requirement in footnote 11 of Williams v. Precision Coil, Inc., supra at 337 (citing footnote 2 of Crain v. Lightner, 364 S.E. 2d 778, 782 (W. Va. 1987)), in the midst of the Court's discussion of the proper methods for opposing a motion for summary judgment, including a Rule 56(f) affidavit:

We find it significant that this Court in *Crain* suggested that even if the non-moving party responded in one or more of these ways, if "the court determines that the movant has shouldered his or her ultimate burden of persuading the court that there is no genuine issue of *material* fact," the granting of summary judgment is appropriate. (Emphasis added). 178 W. Va. at 769 n. 2, 364 S.E. 2d at 782 n. 2.

Williams v. Precision Coil, Inc., supra at 337 n. 11.

The law is clear: If the Rule 56(f) affidavit submitted by the nonmoving party fails to show a genuine issue of material fact, then summary judgment is appropriate, even if discovery in the case has not been completed, and despite the existence of the Rule 56(f) affidavit.

Viewed in light of the above, have Appellants demonstrated that the trial court abused its discretion when it denied Appellants' request for time to conduct more discovery prior to the trial court ruling on Appellees' motion for summary judgment?

The answer: No. Summary judgment was appropriate because nothing about the Rule 56(f) affidavit submitted by Appellants demonstrated any potential issue of material fact that would be substantiated through additional discovery.

The Rule 56(f) affidavit submitted by Appellants (R. 447-448) states that Appellants wanted to take the depositions of several claims adjusters and investigators associated with Appellees. Appellants wanted to ask those witnesses these questions:

- At what point did the Appellees claim Appellant Thomas Loudin lost his rights as an insured?
- Why is Appellant Thomas Loudin listed throughout the claims file and journal as the insured, if Appellees contend that they were treating William Loudin as their insured?
- Was Appellant Thomas Loudin notified that Appellees intended to remove him from his position as a named insured and deprive him of the duties he is owed in said position?
- What portions of the insurance contract do Appellees believe support their contention that Appellant Thomas Loudin is not entitled to the duty of good faith and fair dealing?
- What portions of the insurance contract provide that Appellant Thomas Loudin cannot assume the position of an injured party and simultaneously be an insured to which common law and statutory duties are owed?

(R. 447)

These questions asked of claims adjusters and/or claims investigators associated with Appellees would have no hope of generating evidence that would be material to the central legal issue in this appeal:

When a named insured under a liability insurance policy brings a liability claim against another insured under that same liability insurance policy, is the claimant a first party claimant (such that he/she may sue the insurance company for bad faith) or is the claimant a third party claimant (such that he/she cannot sue the insurance company for bad faith)?

Appellant Thomas Loudin never “lost” his rights as an insured, and Appellees never “removed” Appellant Thomas Loudin as an insured under the insurance policy in question. If these are the questions that Appellants want to ask of people associated with Appellees, they truly do not understand the law that applies here, nor do they understand the issue of law upon which this appeal turns. Appellant Thomas Loudin purchased an insurance policy that contains

several types of coverage. Among those is Liability Coverage. There is no question that the only type of coverage under the National Policy that is at issue here is the Liability Coverage. When Appellant Thomas Loudin blamed his brother William Loudin for his injuries, and wanted Appellee National to pay him \$700,000.00 to compensate him for those injuries, he was making a liability insurance claim against William Loudin under the Liability Coverage portion of the National Policy. This did not mean that Appellant Thomas Loudin “lost” whatever status he has as an insured under the insurance policy, nor does it mean that anyone “removed” him as an insured. As to the accident, Thomas Loudin was never an insured under the Liability Coverage portion of the National Policy, because no one ever claimed to have been hurt by the negligence of Appellant Thomas Loudin and sought damages for such, nor did anyone ever sue Appellant Thomas Loudin for such injuries. Those are the things that would have made Appellant Thomas Loudin an insured under the Liability Coverage portion of the National Policy. Instead, those things happened to Defendant William Loudin; Appellant Thomas Loudin blamed William Loudin for his injuries, and claimed entitlement to damages from William Loudin. He later sued William Loudin to recover such damages. So, Defendant William Loudin was the insured under the Liability Coverage portion of the National Policy, and Appellant Thomas Loudin, being the person making those claims against William Loudin, was inherently a third party claimant, rather than a first party claimant.

Appellants argue that there is a question of fact as to whether Appellant Thomas Loudin was a first party claimant because, at various times, Appellees refer to Appellant Thomas Loudin in their claim file and investigation file as the “insured.” Appellants wish to depose various claims adjusters and investigators regarding these references in the claim and investigation files. This argument has no merit.

First, it is clear from examining the claim and investigation file references in context that Appellees used the term “insured” as a shorthand way of referring to Appellant Thomas Loudin as the person who purchased the insurance policy. The references cited by Appellants do not come from any actual analysis of who is, or who is not, covered under various portions the insurance policy. The references cited by Appellants mainly come from the RE: line of various reports, the portion of those reports that identifies the claim at issue (R. 449-498). This is not analysis; it is shorthand.

Second, it is critical to understand that all of these references to Thomas Loudin as the insured are made in the context of the Appellees’ handling of Appellant Thomas Loudin’s liability claim against Defendant William Loudin under the Liability Coverage portion of the National Policy. In other words, what the Appellees were actually doing, and the precise nature of Appellant Thomas Loudin’s claim against Defendant William Loudin, are far more important determining factors than the shorthand method that the Appellees used to refer to Appellant Thomas Loudin.

It should come as no surprise to anyone that Appellee National, the company that entered into an insurance contract with Appellant Thomas Loudin, commonly referred to Mr. Loudin as its insured. That is what insurance companies call the people to whom those companies sell insurance: their insureds. Moreover, regarding his claim for Auto Medical Payments benefits, Thomas Loudin was indeed not only an insured, but a first party claimant. However, it is not the claim for Auto Medical Payments that forms a basis for Appellants’ lawsuit against Appellees for bad faith.

Appellants base their bad faith claims against the Appellees on their handling of the Appellants' liability claim against Defendant William Loudin.⁵

Throughout the arguments regarding Appellees' motion for summary judgment, the Appellees have challenged Appellants to cite any portion of the claim file or investigation file that indicates that there is any first party benefit to be paid to Appellants Thomas or Alice Loudin as a result of the accident in question, other than the Auto Medical Payments claim that was promptly paid by Appellee National, and which does not form a basis for Appellants' claims against Appellees. There is no such benefit, and there is no part of either the claim file or the investigation file which would indicate that Thomas or Alice Loudin qualified as first party claimants in regard to their liability claim against William Loudin.

The terminology used by any of the Appellees to refer to Appellant Thomas Loudin really has no bearing on the central legal issue at stake in this appeal. How Appellees may refer to Appellant Thomas Loudin (and regardless of whether they may use the word "insured" to do so) is irrelevant. What matters is what types of insurance coverage exists under the insurance policy in question that applies to the accident in question, what types of claims Appellants Thomas and Alice Loudin brought against the National Policy, and what Appellees actually did regarding those claims. The fact is that, other than the claim for Auto Medical Payments benefits (which, again, were promptly paid and do not form a basis for this lawsuit), Appellants Thomas and Alice Loudin only brought one type of claim under the National Policy for injuries sustained in the accident in question: A liability claim against Defendant William Loudin. The only insurance coverage under the policy that would apply to such a claim is the Liability Coverage portion of the National Policy which covered Defendant William Loudin. When Appellants Thomas and Alice Loudin brought a

⁵ Appellants have admitted that their bad faith claims against Appellees are based solely on the Appellees' handling of Appellants' liability claim against Defendant William Loudin, and are not in any way based on the manner in which Appellees handled Appellants' Auto Medical Payments claim (Appellants' Brief, p. 1)

liability claim against Defendant William Loudin, accusing Defendant William Loudin of negligently causing injury to Appellant Thomas Loudin, and expecting to receive money from Appellee National to compensate them for Appellant Thomas Loudin's physical injuries, they were inherently bringing a third party claim under the policy, no matter what anyone wants to call Appellant Thomas Loudin.

It is clear from the issues addressed above that the central question in this appeal is a question of law, not of fact. Moreover, the facts that drive the outcome of this question are not in dispute. As such, this Court's analysis of this pure question of law will not be affected in any way by what the witnesses associated with Appellees might say at their depositions.

The proposed questions outlined in Appellants' Rule 56(f) affidavit are designed by Appellants for one purpose: to cross-examine the witnesses on issues of law, not issues of fact. However, such testimony will be irrelevant for this Court's purposes. It will have no bearing on this Court's legal determination to learn whether Appellee Dan Thompson thought Thomas Loudin "lost" his rights as an insured. What matters is not what Dan Thompson thinks the law is; what matters is what the law actually is. Even if the witnesses were to say that they personally think Appellants were first party claimants when they brought their liability claim against Defendant William Loudin, such an "admission" cannot determine questions of law.

For example: If a witness associated with the Appellees were to "admit" that a plaintiff could maintain a personal injury lawsuit against someone who was 30% responsible for the accident, even though the plaintiff was 70% responsible for the accident, would this Court allow such a plaintiff to recover damages? Of course not. As a matter of law, West Virginia does not recognize pure comparative fault; only those plaintiffs who are less than 50% responsible for their own injuries may recover damages in West Virginia. See Bradley v. Appalachian Power

Co., 256 S.E. 2d 879 (W. Va. 1979). This would be true regardless of any “admissions” to the contrary made by any witness about what they thought the law was.

In like manner, the central issue addressed by the Appellees’ Motion for Summary Judgment, and hence this appeal, is a pure question of law:

When a named insured under a liability insurance policy brings a liability claim against another insured under that same liability insurance policy, is the claimant a first party claimant (such that he/she may sue the insurance company for bad faith) or is the claimant a third party claimant (such that he/she cannot sue the insurance company for bad faith)?

There are no factual “admissions” that could alter the nature of this legal determination. Either a person in Thomas Loudin’s shoes has an actionable bad faith claim against the Insurance Defendants, or he does not. That question is a purely legal question dependent upon facts that are not in dispute. No matter what any witnesses might say at their depositions, no such evidence can change that outcome.

What type of evidence would change the outcome? It would have to be evidence that calls into question the basic facts of this case: Were there other insurance policies in place? Were there any other first party insurance coverages that could have provided first party benefits to Appellants, much the same way that the Auto Medical Payments did? Did Appellants bring other claims besides their Auto Medical Payments claim and their liability claim against William Loudin under the Liability Coverage portion of the National Policy? But, of course, none of those facts are in dispute. There were no other coverages in place, there were no other types of claims made. The relevant facts are not in dispute here.

This Court should recognize what the trial court recognized: further discovery in this matter would be futile. There is no indication that Appellants would ever be able to discover evidence that would change the basic facts of this case. Following this Court’s decisions

regarding Rule 56(f) affidavits, there is no reason for this Court to find that the trial court abused its discretion in not allowing further discovery prior to ruling on Appellees' motion for summary judgment. The decision to grant Appellees' motion for summary judgment was not premature.

B. Appellants misstate both West Virginia law and Ohio law regarding the difference between third and first party claimants

1. West Virginia law

Appellants cite Allstate v. Gaughan, 508 S.E. 2d 75 (W. Va. 1998) and State ex rel. Brison v. Kaufman, 584 S.E. 2d 480 (W. Va. 2003), as support for their theory that they were making a first party claim when they brought a liability claim against Defendant William Loudin under the Liability Coverage portion of the National Policy. As the Court will see from a review of those cases, neither one deals with the central legal issue at stake here; both deal with discovery issues that arise in bad faith cases. However, to the extent that any guidance may be taken from these cases as to how this Court has addressed the nature of first party claims versus third party claims, that guidance leads to the conclusion that Appellants were third party claimants when they brought a liability claim against Defendant William Loudin.

Appellants cite Allstate v. Gaughan, *supra*, for the proposition that a first party bad faith action is a claim where an insured sues his or her own insurer for failing to use good faith in settling a claim filed by the insured (Appellants' Brief, p. 6). It is important to note that, while the Court in Allstate v. Gaughan generally discusses the differences between first and third party bad faith claims, that general discussion is not memorialized in a syllabus point. This is important because Appellants rely upon this general discussion in Allstate v. Gaughan as being a Gospel-like legal definition by this Court of the difference between first and third party claims, a general principle of law that may be cited as the "law of the State of West Virginia" on what is, and what is not, a first or third party claim. However, since the general discussion in question

was not reduced to a syllabus point, and was not the central issue of the case, such reliance by Appellants is clearly unwarranted. The Constitution of West Virginia, Article 8, Section 4, requires new points of law to be articulated through syllabus points. Syl. Pt. 2, Walker v. Doe, 558 S.E. 2d 290 (W. Va. 2001). There are no new points of law in Allstate v. Gaughan that define what a first party bad faith claim is versus a third party bad faith claim. Hence, the dicta in question should not be taken as the definitive word on when a claim qualifies as a first party bad faith claim.

Moreover, in its general discussion of first party and third party claims in West Virginia, this Court gave examples of each type. Footnote 14 of Allstate v. Gaughan gave examples of first party bad faith claims, and footnote 16 gave examples of third party bad faith claims. Interestingly, when one reviews the underlying facts of the cases in question, a pattern becomes clear: None of the first party bad faith claims listed in footnote 14 are based on events that are factually similar to the claim made by Appellants against Defendant William Loudin, yet the underlying facts in the third party bad faith claims listed in footnote 16 are very much like Appellants' claim against Defendant William Loudin. The only characteristic that Appellant Thomas Loudin's claims share with the footnote 14 first party bad faith examples is that the insured is suing his/her own insurance company. This is also the only characteristic that makes Appellants' claims different from the footnote 16 third party bad faith examples: The fact that Appellant Thomas Loudin is suing his own insurance company.

So, what can be gleaned from the general discussion contained in Allstate v. Gaughan is that, but for the fact that Appellant Thomas Loudin happened to be the person who bought the insurance policy in question, Appellant Thomas Loudin's bad faith claim against the Appellees

would certainly be categorized as a third party bad faith claim, not as a first party bad faith claim.

We again come back to the central issue, one that is not addressed by Allstate v. Gaughan:

When a named insured under a liability insurance policy brings a liability claim against another insured under that same liability insurance policy, is the claimant a first party claimant (such that he/she may sue the insurance company for bad faith) or is the claimant a third party claimant (such that he/she cannot sue the insurance company for bad faith)?

No guidance on this issue is provided by State ex rel. Brison v. Kaufman, *supra*, either.

As stated above, the Brison case deals with discovery in a bad faith case. Appellants rely upon it for the proposition that first party bad faith lawsuits usually arise when an insured brings an action against his or her own insurance carrier for failing to use good faith in settling a claim (Appellants' Brief, p. 6). Actually, the portion of Brison upon which Appellants rely more precisely focuses on insurance coverage disputes. The cited portion of the Brison case states:

[I]n a first-party bad faith action, a lawsuit is usually brought by an insured against his or her own insurance company for failing to use good faith in settling a claim for insurance coverage.

State ex rel. Brison v. Kaufman, 584 S.E. 2d at 486.

As with the Allstate v. Gaughan case, this Court's general discussion of the differences between first party and third party claims is not reduced to a syllabus point. Therefore, to assign ultimate importance to the language used by the Court as the last word on how to define first and third party claims, as Appellants seem to do, would be improper.

The fact is that this Court has never addressed the central issue of this appeal. The law in West Virginia on this issue, to the extent there is law, is found in the regulations promulgated by the West Virginia Insurance Commissioner for the handling of insurance claims: 114-14-2.3 and 114-14-2.8 of the West Virginia Code of State Rules, which are addressed in more detail in Section II above.

Appellants' liability claim against Defendant William Loudin was unquestionably a third party claim under the regulatory definitions. This is also clear from a review of the examples of first party and third party bad faith claims contained in footnotes 14 and 16, respectively, of Allstate v. Gaughan, supra. The only fact that would make anyone question whether Thomas Loudin's bad faith claim is a third party bad faith claim is the fact that he is the person who bought the insurance policy. Yet, as shown by Gillette v. Gillette, supra, and the other five out-of-state cases cited above, courts consistently treat such a claimant as a third party claimant, not a first party claimant.

2. Ohio law

Appellants cite case law from the State of Ohio in support of their position that their liability claim against Defendant William Loudin was a first party claim, rather than a third party claim: Dennis v. State Farm, 757 N.E. 2d 849 (Ohio App. 2001), and Simpson v. Permanent General Insurance Co., 2003 WL 1090627 (Ohio App. 2003) (Appellants' Brief, p. 7). However, these particular cases have nothing to do with the central legal issue at stake in this appeal. That legal issue is this:

When a named insured under a liability insurance policy brings a liability claim against another insured under that same liability insurance policy, is the claimant a first party claimant (such that he/she may sue the insurance company for bad faith) or is the claimant a third party claimant (such that he/she cannot sue the insurance company for bad faith)?

Dennis v. State Farm, supra, has nothing to do with that legal issue. The dispute in that case was over the propriety of deposing a claims adjuster in a lawsuit over the payment of underinsured motorist insurance benefits. Appellants cite Dennis v. State Farm for the proposition that a first party claim exists where an insured is seeking payment under the terms of the insurance contract between the insured and the insurance company (Appellants' Brief, p. 7).

Language to that effect can be found in the Dennis v. State Farm opinion: 757 N.E. 2d at 855. However, as the Court will see from reviewing the Dennis v. State Farm opinion, neither the case as a whole nor the specific portion cited by Appellants have any relevance to the central legal issue presented by this appeal.

In like manner, Simpson v. Permanent General Insurance Co., *supra*, has nothing to do with the central legal issue defined above. The Simpson case is a bad faith case arising from a dispute over the payment of uninsured/underinsured motorist benefits. Appellants cite the Simpson case for the proposition that a first party claim can be distinguished from a third party claim because a first party claim is one in which there is a contract between the insured and the insurer (Appellants' Brief, p. 7). Language to that effect can be found in the concurring opinion in the Simpson case: 2003 WL 1090627 at p. 4. However, as the Court will see from reviewing the Simpson opinion, neither the case as a whole nor the specific portion cited by Appellants have any relevance to the central legal issue presented by this appeal.

Since Appellants have cited two Ohio opinions in support of their appeal, it can reasonably be inferred that Appellants believe the law of the State of Ohio should be accepted by this Court as highly persuasive authority on the central legal issue presented here. The most relevant expression of Ohio law on the central legal issue in this appeal is the case of Gillette v. Gillette, *supra*, more closely examined in Section I above. If this Court chooses to be guided by Ohio law, then it will affirm the decision of the Circuit Court to grant summary judgment for the Appellees.

C. Appellants' attempts to manufacture questions of fact based on quoting sections of the claim file and training documents must fail

Appellants argue that there is a question of fact as to whether Appellant Thomas Loudin was a first party claimant because, at various times, Appellees refer to Appellant Thomas Loudin

in their claim file and investigation file as the “insured.” Appellees have addressed this argument in Section V.A. above. As shown above, this argument has no merit.

Appellants further cite portions of the training materials at National regarding how claims adjusters should memorialize their claim files for potential testimony in later years based on that file (Appellants’ brief, pp. 7-9). Frankly, it is difficult to understand where Appellants find any possible relevance to this appeal in Appellee National’s training documents (R. 499) and how Appellee National trains its claims personnel to maintain their claim files. Appellee National trains its claims personnel to properly document their claim files. As part of that training, Appellee National asks its claims personnel to consider how they would react to being required to testify about a claim three years after creating a poorly documented file. How this translates into anything that supports Appellants’ arguments is indeed a mystery.

D. Appellants’ attempts to distinguish the case law from the six courts that have already decided this issue must fail

In looking at Appellants’ attempts to distinguish the six cases from other courts that have already decided the central legal issue of this appeal (cited and described in Section I above), one has to seriously question whether Appellants even read those cases. Appellants argue that the six cases are distinguishable from the instant case because, in those six other cases, the two insureds in question (the one suing and the one being sued) held separate insurance policies with the same insurance company (Appellants’ Brief, pp. 10-11). This is utterly wrong. In fact, in each of the six cases cited in Section I above, there was only a single insurance policy at issue, either one held jointly by the two spouses or one held by the tortfeasor spouse that also defines the injured spouse as an insured. See Gillette v. Gillette, supra at 1284; Smith v. Allstate Ins. Co., supra at

1063; Sperry v. Sperry, *supra* at 382; Herrig v. Herrig, *supra* at 489; Rumley v. Allstate Indem. Co., *supra* at 448; and Wilson v. Wilson, *supra* at 498-499.⁶

To be sure, there is a body of case law that deals with lawsuits involving “double insureds,” where the two parties to a tort lawsuit are both insured under entirely separate insurance policies written by the same insurance company. However, that case law is not directly relevant to the instant matter, and none of the six cases cited in Section I above are those types of cases. Appellants are just completely wrong in this regard.

Further, Appellants’ other attempt at distinguishing these six cases shows an utter lack of understanding of the legal issues in this appeal. Appellants argue that, in the six cases cited in Section I of this Brief, the injured spouse was seeking payment from the tortfeasor spouse’s insurance coverage, and not the coverage provided directly to the injured spouse. That much is correct; the analysis engaged in by the six courts ultimately finds that, even if the injured spouse is an insured under the insurance policy (even a named insured), that injured spouse is making a liability claim, and is actually trying to trigger the liability insurance provided to the tortfeasor spouse, not any coverages provided to the injured spouse. However, Appellants argue that Thomas Loudin’s claim is different, because he is the one that bought the insurance policy, not his brother William. This is where Appellants’ analysis goes “off the rails.”

Buying the insurance policy does not automatically make the purchaser an insured under every form of coverage available under the policy for every type of incident. The purchaser of the insurance policy, particularly one who buys liability insurance, is provided with insurance that covers more people than just the named insured. For any given claim, the insured might be

⁶ In Wilson v. Wilson, *supra*, there was a lack of information in the appellate record as to whether Ms. Wilson qualified as an insured under Mr. Wilson’s insurance policy. However, the portion of the Wilson case that is relevant to this appeal assumes, for the sake of argument, that Ms. Wilson is an additional insured under Mr. Wilson’s policy. There is no indication that Ms. Wilson was insured under her own insurance policy with the same insurance company, as argued by Appellants.

the named insured, and it might be someone else. Whether a person is insured under the Liability Coverage portion of the National Policy depends on whether the contingencies insured under that portion of the policy are triggered. For the accident in which Appellant Thomas Loudin was injured, and for which he blames his brother, Defendant William Loudin, Defendant William Loudin is the insured under the Liability Coverage portion of the National Policy. Appellant Thomas Loudin is not the insured under that portion of the National Policy, even though he was certainly an insured under a different portion of the National Policy (i.e., the Auto Medical Payments coverage). Just like the injured spouses in the six cases, Appellant Thomas Loudin was trying to trigger coverages that apply to Defendant William Loudin when he made a liability claim against Defendant William Loudin. This is true regardless of who actually paid for the policy.

Moreover, again, Appellants are just plain wrong in their understanding of the facts of most of the six cases cited in Section I above. In four of the six cases, the injured spouses were co-named insureds; in other words, the spouses were both named insureds, having purchased the insurance policy together. See Smith v. Allstate Ins. Co., supra at 1063; Sperry v. Sperry, supra at 382; Herrig v. Herrig, supra at 489; and Rumley v. Allstate Indem. Co., supra at 448-449. Therefore, the injured spouses in those four cases were in exactly the same situation as Appellant Thomas Loudin: they each were making a liability claim against another insured under insurance policies that they, the injured spouses, had purchased and paid for, and under which they were named insureds. Yet, in all four of those cases, the court found that the injured spouses were third party claimants, not first party claimants.

There is no legitimate basis for distinguishing the six cases from other courts cited and described in Section I above. They are persuasive authority, factually applicable to the instant matter, and their logic should be adopted by this Court.

E. Appellants' reliance on the Dercoli case is misplaced

Appellants cite a 1989 Pennsylvania Supreme Court case to support their position that they were indeed first party claimants and were, therefore, capable of filing suit for bad faith/UTPA violations (Appellants' Brief, p. 11). In Dercoli v. Pennsylvania Nat. Mut. Ins. Co., 554 A.2d 906 (Pa. 1989), the Pennsylvania Supreme Court determined that a spouse passenger, an additional insured, was entitled to bad faith damages as a result of the insurance company's misconduct arising out of an automobile accident in which her husband driver was at fault. However, Appellants fail to provide to this Court the full picture of the facts in Dercoli.

At the time of the accident in Dercoli, the law in Pennsylvania still permitted the defense of interspousal immunity, and therefore the injured spouse passenger could not sue her husband, which further meant that she could not trigger coverage for her husband under the liability portion of the policy. However, she was entitled to other benefits under the insurance policy, benefits payable to her as a first party claimant. Approximately one year after the accident, the Pennsylvania Supreme Court abolished the defense of interspousal immunity, thereby permitting the spouse passenger to make a claim under the liability portion of the policy. Prior to the change in the law, the insurance company had made representations to the injured spouse passenger. The insurance company had told her that it was not necessary for her to retain a lawyer, and that she would receive all of the benefits she was entitled to under the policy. Despite having made those assurances to her, the insurance company failed to later inform her of the change in the law. The Pennsylvania Supreme Court determined that the insurance company

had a duty to inform the injured spouse of the change in the law, and that it was guilty of bad faith for failing to do so.

Clearly, during the period prior to the change in the law regarding interspousal immunity, the insurance company was dealing with its insured, the spouse passenger, solely as a first party claimant. It was paying her first party benefits. It promised her that she would get all of the benefits coming to her, and that she did not need to hire a lawyer. Under the unique facts of that case, it is understandable how the Pennsylvania Supreme Court could find that the insurance company violated its duty of good faith and fair dealing to the injured spouse.

Importantly, however, nowhere in the Dercoli case does it state that an insured passenger who files suit against a fellow insured driver would be entitled to damages as a first party claimant under the liability insurance portion of the insurance contract. The Dercoli case does not deal with the central issue of the instant appeal; rather, it is a case that deals with the ramifications of an insurance company misleading its insured as to what benefits are available and whether the insured needs legal advice. Dercoli is obviously distinguishable from, and inapplicable to, the instant matter.

F. Appellants misstate West Virginia law on the contractual duties of insurance companies

Appellants cite Miller v. Fluharty, 500 S.E. 2d 310 (W. Va. 1997), for the proposition that, in order to meet contractual obligations to policyholders, an insurer has a duty and obligation to conduct a prompt and fair investigation of **ANY** claim made by the policyholder (Appellants' Brief, p. 12). Unfortunately for Appellants, they are mistaken in their reliance upon Miller v. Fluharty, as they have only quoted a snippet of pure dicta and have treated it as if it is black letter law.

The actual quote from Miller v. Fluharty is as follows:

To meet its contractual obligation to provide coverage to a policyholder, we believe that an insurance carrier has a duty to conduct a prompt investigation of any claim made by the policyholder.

Miller v. Fluharty, 500 S.E. 2d at 319.

But, of course, Appellants fail to explain that this one sentence quote comes in the middle of a long discussion that begins as follows:

We begin by examining the duties of an insurance carrier towards a policyholder who has purchased an uninsured or underinsured motorist policy, or any other type of first-party insurance policy, and who has sustained a loss covered by that policy.

Miller v. Fluharty, 500 S.E. 2d at 318.

This demonstrates the problem with selectively quoting short pieces of dicta, and treating it as a general principle of law with broad application: it is often the case that the dicta, removed from context, has a very different meaning from its intended purpose. The section of Miller v. Fluharty cited by Appellants was never meant by this Court to be a sweeping statement of law that would resolve the legal issue presented by this appeal; it was meant to be a part of a discussion of how insurance companies should handle uninsured and underinsured motorists claims.

Appellants' reliance on Weese v. Nationwide Ins. Co., 879 F. 2d 115 (4th Cir. 1989), is even further off base. First, contrary to the representation contained in Appellants' belief (Appellants' Brief, pp. 12-13), this case was not decided by this Court (i.e., the West Virginia Supreme Court of Appeals); it was decided by the United States Court of Appeals for the Fourth Circuit. Therefore, it cannot said, based on Weese, that this Court recognizes an inherent adversarial relationship between insureds and insurance companies. While the Fourth Circuit stated such in Weese in 1989, Appellants have not offered any authority to support their contention that this Court has ever agreed with that viewpoint.

Besides, whether the relationship between the insured and the insurance company is adversarial is not the determining factor in the question of whether a claim is a first party claim or a third party claim. That question is determined by the type of benefits that are sought by the claim. In our case, Appellants made a liability insurance claim against Defendant William Loudin under the Liability Coverage portion of the National Policy. That inherently makes their claim a third party claim.

G. Appellants misapply the terms of the National Policy

Appellants argue that this Court should focus on the language of the insurance policy to determine whether they were first or third party claimants when they brought their liability claim against Defendant William Loudin under the Liability Coverage portion of the National Policy (Appellants' Brief, pp. 13-15). Unfortunately for Appellants, such a focus must lead to the conclusion that the Appellants' claim was a third party claim, not a first party claim.

It is true that, just in terms of the definition of the term "insured" contained in the National Policy, Appellant Thomas Loudin meets that definition. In fact, as the named insured, there is little chance that Appellant Thomas Loudin could ever fail to satisfy that definition. Most such definitions contain lists of categories of individuals who meet the definition, and those lists usually start with the named insured.⁷

However, the inquiry cannot end there. When examining the Liability Coverage portion of the National Policy, one must also look to whether any benefits under the policy flow to any particular insured.

The Liability coverage states:

[National] will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by

⁷ It should be noted that the same cannot be said for Appellant Alice Loudin. Ms. Loudin is not a named insured under the National Policy.

an "accident" and resulting from the ownership, maintenance or use of a covered "auto".

[National has] the right and duty to defend any "insured" against a "suit" asking for such damages[.]

(R. 298)

These are, of course, the principal duties of any insurance company under the typical liability insurance policy: the duty to indemnify the insured, and the duty to defend the insured.

One must ask: Were Appellants ever sued by anyone as a result of the incident in question? Did anyone ever make a claim against Appellants under this insurance policy as a result of the incident in question? Were Appellants ever legally obligated to pay damages to anyone as a result of the incident in question? The answer to all these questions is, of course, a resounding "no." As such, Appellee National owed no benefits to Appellants from the Liability Coverage portion of the National Policy. Did Appellee National owe such benefits to Defendant William Loudin? Yes. Defendant William Loudin was the person against whom such claims were made by Appellants. Defendant William Loudin also met the definition of an insured under the policy. Hence, Defendant William Loudin received the benefits owed to an insured under the Liability Coverage portion of the National Policy: He received indemnity and a defense. As the people making the claims against Defendant William Loudin, Appellants were third party claimants.

Appellants' reliance on the Conditions portion of the insurance policy as any indicator of whether they were first party claimants is completely without merit. Appellants claim that, since it is a condition of the policy that insureds give Appellee National access to their medical records and submit to examination by physicians chosen by Appellee National, Appellee National had to

have contemplated that someone could be both an insured and a claimant under the Liability Coverage portion of the National Policy (Appellants' Brief, pp. 14-15). This reasoning is based on Appellants' assumption that such conditions are never triggered in Auto Medical Payments claims, so they can only apply to claims made under the Liability Coverage portion of the National Policy. This logic is inherently flawed. Appellants have completely ignored the existence of uninsured and underinsured motorist benefits under this insurance policy. Medical records and independent medical examinations are requested on a regular basis in such claims. The Conditions section of the policy applies to all aspects of the policy, not just the adjustment of claims under the Liability Coverage portion of the National Policy. The Conditions section of the policy tells us nothing about whether someone qualifies as an insured under the Liability Coverage portion of the National Policy.

H. Appellants have offered no credible evidence to either the trial court or this Court that would justify a finding that Appellees' conduct in the handling of Appellants' liability claim against Defendant William Loudin could reasonably be seen as outrageous

Without providing a single piece of evidence to substantiate their claims, Appellants make the following irresponsible statement in their Appellants' Brief in order to argue that the trial court should not have granted summary judgment as to their tort of outrage claim:

- Appellees National and Consolidated acted with direct indifference and disregard in handling the Appellants' claim against William Loudin. The Appellants depended on the Appellees to properly investigate and handle their claim. By entering into an insurance contract and paying premiums, one is entitled to competent service. The Appellees intentionally misled and unduly delayed the claim process. The Appellants were caused to suffer great delay, anguish and undue expenses in legal and court costs.

(Appellants' Brief, p. 16)

As this Court stated in Williams v. Precision Coil, Inc., *supra*: “[U]nsupported speculation is not sufficient to defeat a summary judgment motion.” Williams v. Precision Coil, Inc., *supra* at 338, quoting Felty v. Graves-Humphreys Co., 818 F. 2d 1126, 1128 (4th Cir. 1987).

Appellant Thomas Loudin purchased the insurance policy in question. Appellants, being claimants, were a part of the claim handling process. Appellants were parties to the lawsuit that they filed against Defendant William Loudin. Appellants have obtained, through discovery, hundreds of pages of claim file documents, claim investigation documents, as well as claim handling guidelines and training materials. If there were any evidence that Appellee National misled Appellant Thomas Loudin when he purchased his insurance policy, Appellant Thomas Loudin should have provided evidence of such to the trial court in response to Appellees’ motion for summary judgment. The same goes for any of the other outlandish and unsubstantiated allegations being made by Appellants regarding the conduct of Appellees during the claim handling process.

This Court held in Syllabus Point 4 of Travis v. Alcon Laboratories that it is the Circuit Court’s duty to first determine whether a defendant’s actions might reasonably be interpreted as outrageous:

In evaluating a defendant’s conduct in an intentional or reckless infliction of emotional distress claim, the role of the trial court is to first determine whether the defendant’s conduct may reasonably be regarded as so extreme and outrageous as to constitute the intentional or reckless infliction of emotional distress. Whether conduct may reasonably be considered outrageous is a legal question, and whether conduct is in fact outrageous is a question for jury determination.

In the instant case, the Circuit Court of Upshur County applied this legal standard to the facts of this case and concluded that:

[T]he [Respondents’] conduct in the handling of Thomas and Alice Loudin’s liability claim against William Loudin may not reasonably be regarded as so

extreme and outrageous as to constitute intentional or reckless infliction of emotional distress, otherwise known as the tort of outrage.

(R. 730-737)

Appellants offered the trial court absolutely no evidence to suggest that this claim was handled in any way that would qualify as outrageous conduct by Appellees. The trial court recognized what this Court ought to recognize: that there was a serious issue in the underlying case regarding liability for the accident, and due to Appellants' shaky case against Defendant William Loudin, the case settled for approximately a fifth of what Appellants originally demanded. There was no evidence presented to the trial court to suggest anything other than rather normal claims handling by Appellees in the context of a disputed liability claim. The trial court appropriately found that Appellees' conduct cannot be reasonably seen as outrageous, and performed its duty under Travis v. Alcon Laboratories, Id. There was no error in doing so.

VI. IT IS BAD PUBLIC POLICY TO TREAT CLAIMANTS SUCH AS APPELLANTS AS FIRST PARTY CLAIMANTS

Having given the reasons for the Circuit Court's grant of summary judgment for Appellees in Sections I. through IV. of this Brief, and having countered all of the arguments put forth by Appellants for reversal of that decision in Section V. of this Brief, it is appropriate for Appellees to now focus on the headier issues of public policy. Since this case presents a question of first impression to this Court, and this Court is poised to make new law in the State of West Virginia, we must step back and ask: what is the right law to have here?

If the Court finds for Appellants and reverses the decision made by the Circuit Court, it will be creating special rights for a particular category of third party claimants under liability insurance policies. As the law stands right now, third party claimants have no right to sue the tortfeasor's liability insurance company for bad faith. If this Court reverses the Circuit Court, it

will be creating the ability for one special category of third party claimants to bring such lawsuits, not just under the UTPA, but also for common law bad faith. As to third party claimants who bring liability claims against other insureds under insurance policies that the third party claimant purchased, such claimants will be called first party claimants instead of what they really are, which is third party claimants. By this Court calling them first party claimants, however, they will be able to sue the liability insurance company for bad faith based on the way the insurance company handles their liability claims against other insureds under the insurance policy. This is a bad idea.

First, the Court should recognize that such a decision will provide this specific category of third party claimants even greater rights to sue the insurance company than they had prior to the 2005 changes to the UTPA. Prior to those changes, third party claimants could only sue the tortfeasor's insurance company for alleged UTPA violations; third party claimants had no right to sue the insurance company for common law bad faith. See Elmore v. State Farm, *supra*, Syllabus Point 1. If this Court finds for Appellants, the Court will be allowing this specific category of third party claimants to sue the tortfeasor's insurance company for both alleged UTPA violations and common law bad faith.

Second, the Court should recognize that allowing this specific category of third party claimants to sue the tortfeasor's insurance company for common law bad faith is completely inconsistent with this Court's previously expressed view of the relationship between the insured under a liability insurance policy, the liability insurance company, and the third party claimant. Here is how this Court has described that relationship:

[T]he relationship between an insurer and a third-party claimant in a settlement process is adversarial. "[T]hat the insurer is the representative of the insured logically imports that the third-party tort claimant's status as the adversary of the insured renders him, ipso facto, the adversary of the insured's

agent.” *Linscott v. State Farm Mutual Auto. Ins. Co.*, 368 A. 2d 1161, 1163-64 (Me. 1977). “[T]he insurer stands in the shoes of the insured in dealing with the victim.” *Long v. McAllister*, 319 N.W. 2d 256, 262 (Iowa 1982). Because the insurer is an adversary of a third-party claimant in the settlement process, the law cannot expect the insurer to subordinate its interests to those of the third party.

In addition, the insurer already has an implied duty of good faith and fair dealing to its insured. . . . The significant duty owed by the insurer to the insured certainly forecloses any like duty owed by the insurer to a third party who is the adversary of the insured. An insurer cannot logically owe a duty of good faith and fair dealing to the insured and a fiduciary duty to an adversarial third party in the same matter.

Elmore v. State Farm, *supra* at 899.

Calling Appellants first party claimants (despite the fact that they are really third party claimants) just because Appellant Thomas Loudin purchased the insurance policy in question will certainly give an extra benefit to those who purchase insurance policies, but this benefit will come at the cost of putting insurance companies in an impossible situation. As this Court recognized in Elmore, Id., a liability insurance company is supposed to be looking out for the person against whom the claim is being made, the person who is either being sued or at risk for such. If the insurance company also bears that same responsibility to the person making the liability claim, the insurance company will have conflicting duties. Those duties will be irreconcilable.

This added benefit that the Court would be providing to those who purchase insurance policies, the right to sue the insurance company for common law and statutory bad faith even when bringing a third party liability claim, is not justified in any way by a fair reading of any liability insurance policy. Those who purchase liability insurance get exactly what they pay for: Indemnity and a legal defense for any insured who gets sued for negligently causing injury to another person. Providing additional rights to those third party claimants who happen to have

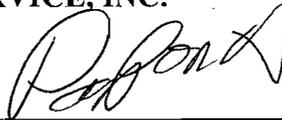
purchased the insurance policy in question is not contemplated by either party to the insurance contract.

What Appellants are asking this Court to do is make bad law. It would be illogical, it would be contrary to existing law in West Virginia, it would put insurance companies in an impossible situation of owing inconsistent duties to two adversaries, and it would make West Virginia's law on this point at odds with the law of every other jurisdiction that has dealt with this issue. As stated above, it is a bad idea.

CONCLUSION

Appellees assert that the Circuit Court of Upshur County properly granted Appellees' Motion for Summary Judgment. It is well-settled in the State of West Virginia that third party claimants may not file a private cause of action for bad faith/UTPA violations. Although this is a legal issue of first impression for this Court, six other jurisdictions have consistently held that, when an insured brings a liability claim against another insured under the same liability policy, that claim is properly treated as a third party claim. For all of the reasons herein described, and for other good reasons apparent to this Court, Appellees respectfully request that this Honorable Court affirm the rulings of the Circuit Court of Upshur County in this matter.

**APPELLEES NATIONAL LIABILITY & FIRE
INSURANCE COMPANY, JACK SERGENT, D.L.
THOMPSON, and CONSOLIDATED CLAIM
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 35763

THOMAS D. LOUDIN and
ALICE M. LOUDIN,

Appellants/Plaintiffs below,

v.

Appeal from a final order
Of the Circuit Court of Upshur
County (08-C-100)

NATIONAL LIABILITY & FIRE
INSURANCE COMPANY, JACK SERGENT,
D.L. THOMPSON and CONSOLIDATED
CLAIM SERVICES, INC.,

Appellees/Defendants below.

CERTIFICATE OF SERVICE

I, Don C. A. Parker, hereby certify that service of the foregoing **Appellees' Brief** has been made upon the parties of record by placing a true copy thereof in an envelope deposited in the regular course of the United States Mail, with postage prepaid, on this 4th day of March, 2011, addressed as follows:

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