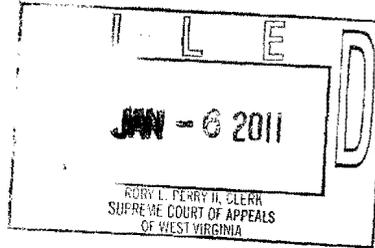


**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**NO. 35698**



MICHAEL W. WITT,

Plaintiff below, Appellant

v.

ROBERT K. SUTTON; STATE FARM  
MUTUAL AUTOMOBILE INSURANCE  
COMPANY; a Illinois Corporation; and  
ST. PAUL FIRE AND MARINE INSURANCE  
COMPANY, a Minnesota corporation,

Defendants below, Appellees.

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**BRIEF OF APPELLANT**

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## **I. INTRODUCTION**

Michael Witt was seriously injured in a crash while driving a vehicle owned by his employer. At the time, Mr. Witt's personal auto insurance policy provided medical payments coverage to him for this crash as the named insured on the policy (first-named on the declarations), whether driving his own car or driving on the job. The policy exceptions in the medical payments section and in the liability section provide coverage while in an employer's vehicle. Despite the contradictory, convoluted and ambiguous language, nevertheless, the policy provides medical payments coverage to the appellant if one painstakingly studies the policy language.

Medical payments coverage is an important protection that an insured purchases to cover his own medical bills if he is in an accident. Medical payments coverage is more closely akin to a personal accident policy that should follow the named insured, not his vehicle.

The court below improperly accepted State Farm's representations as to the applicable policy language and how to interpret it. Therefore, the order granting summary judgment should be reversed.

## **II. KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL**

This is an appeal from a January 21, 2010, Order of the Circuit Court of Kanawha County, which granted summary judgment to State Farm Mutual Automobile Insurance Company (hereinafter sometimes referred to as "State Farm"). The court below improperly found that State Farm had issued an automobile liability policy to appellant, Michael Witt, which denied coverage for the vehicle in which he was riding and which was owned by his employer. This ruling is plainly wrong because Mr. Witt was the "named insured" on the policy. A "named

insured” is covered whether riding in their own vehicle when they are injured or in their employer’s vehicle. (See **Exhibit 1**, Declarations Page.)

### **III. STATEMENT OF FACTS**

Appellant’s cause of action arose out of an automobile accident on June 11, 2003. Mr. Witt was driving his employer’s vehicle at the time of the accident. Mr. Witt was severely injured and needed an MRI to determine the treatment required. As a result of State Farm’s denial of medical payments benefits, Mr. Witt was denied an MRI and the treatment, which should have been paid for and which would have resulted in Mr. Witt’s recovery from his injuries. By State Farm wrongfully denying coverage, appellant’s injury became permanent. The ruling by the Circuit Court denies Mr. Witt the opportunity to pursue either his medical payments benefits or any damages against State Farm.

Appellant filed this civil action on June 8, 2005, against the defendant tortfeasor, the underinsured motorist carrier of appellant’s employer, St. Paul Fire and Marine Insurance Company, and appellant’s own medical payments carrier, State Farm Mutual Automobile Insurance Company. The appellant settled with the tortfeasor, Robert Sutton, and St. Paul Fire and Marine, leaving only defendant State Farm.

Mr. Witt purchased \$10,000 medical payments coverage. He believed, as would any reasonable person, that should he be in a serious accident, regardless of whether he was in his own car, he would have \$10,000 available immediately to pay for necessary medical procedures.

#### **A. The Policy**

The place one would first look in order to determine if he has medical payments coverage would be “Section II - Medical Payments - Coverage C.” There, Mr. Witt’s policy states “We will pay reasonable medical expenses incurred, for *bodily injury* caused by accident

...” (See **Exhibit 2**, Medical Payments Section, at p. 11.) The policy goes on in the following section:

**“Persons for Whom Medical Expenses Are Payable**

“We will pay medical expenses for *bodily injury* sustained by:

- “1. a. the first *person* named in the declarations;  
“b. his or her *spouse*; and  
“c. their *relatives*.

“These *persons* have to sustain the *bodily injury*:

- “a. while they operate or *occupy* a vehicle covered under the liability section; or  
“b. through being struck as a *pedestrian* by a motor vehicle or trailer.”

\*\*\*

- “2. any other *person* while *occupying*:

- “a. a vehicle covered under the liability coverage, except a *non-owned car*. Such vehicle has to be used by a *person* who is insured under the liability coverage; or  
“b. a *non-owned car*. The *bodily injury* has to result from such *car*’s operation or occupancy by the first *person* named in the declarations, his or her *spouse* or their *relatives*.”

Clearly, the policy creates two classes of insureds: (1) the first person named in the declarations, which is Mr. Witt and his relatives, and (2) “any other person while occupying” certain classes of vehicles. It should be noted that “non-owned car” is only mentioned in the “we will pay medical expenses for bodily injury sustained by” for “other person[s],” not for the first-named insured. Nowhere in the “Medical Payments” coverage section of the policy does it state that the first-named insured’s coverage is limited in any way by a “non-owned car” definition.

State Farm argued to the Circuit Court that its first-named insureds were not covered for medical payments if they were driving their employer’s cars. State Farm bases this argument on the definition of a “non-owned car,” which is a car, among other things, not owned by the insured’s employer. However, this is a bogus argument because State Farm, in its medical payments section and liability section, provides coverage to the first-named insured for accidents arising out of use of an employer’s car, as set out below:

In the medical payments section, State Farm sets out what is not covered, as follows:

**“What is Not Covered**

“There is no coverage:

“1. While a *non-owned car* is used:”

\*\*\*

“b. In any other business or job. This does not apply when the first *person* named in the declarations, his or her *spouse* or any *relative* is operating or *occupying* a *private passenger car*.”

(**Exhibit 2**, at p. 13.) Therefore, in the medical payments section, this policy states that the first-named insured is covered. Any reference to “non-owned car” does not limit coverage for the first-named insured.

The medical payments section refers the policyholder to the liability section “while they operate or occupy a vehicle covered under the liability section; or through being struck as a pedestrian. . . .” (*Id.* at p. 11.) The liability section, however, provides coverage for other cars. (See **Exhibit 3**, Liability Section, at pp. 7-8.) In the liability section, the policy discusses non-owned cars, but, once again, the policy language excludes the first-named from business or employment exclusions. The policy states:

**“There is No Coverage for Non-Owned Cars:”**

\*\*\*

“2. While:”

\*\*\*

“b. Used in any other business or occupation. This does not apply to a *private passenger car* driven or *occupied* by the first *person* named in the declarations, his or her *spouse* or their *relatives*.”

This is further reinforced in the “There is No Coverage” section where the policy states there is no coverage for any bodily injury to:

**“2. For Any Bodily Injury To:”**

“a. A fellow employee while on the job and arising from the maintenance or use of a vehicle by another employee in the employer’s business. *You and your spouse* are covered for such injury to a fellow employee.”

(*Id.* at pp. 8-9.) Therefore, neither the medical payments section nor the liability section precludes coverage while the first-named insured is using his employer's car.

From a reading of the medical payments section, there is no reason for the first-named insured even to refer to the definition of a "non-owned car." However, even if one did, the definition is confusing. The definition of a "non-owned car" is stated in a double negative: A "Non-Owned Car<sup>1</sup> means a *car* not owned, registered or leased by:"

"1. You" ["the named insured or named insureds shown on the declarations page."]

\*\*\*

"4. an employer of *you, your spouse* or any *relative.*"

(*See Exhibit 4*, Defined Words, at pp. 3-4.) However, a "Non-owned car does not include a:"

"2. *car* which has been operated or rented by or in the possession of an *insured* during any part of each of the last 21 or more consecutive days. If the *insured* is an *insured* under one or more other car policies issued by us, the 21 day limit is increased by an additional 21 days for each such additional policy."

(*Id.*) A plain reading of the medical payments coverage section provides medical payments for the first-named insured but does not for "other persons" except for fellow employees.

Why is it necessary to read the Liability Section, the Definitions Section, and the Medical Payments Section to determine if a "named insured" is covered for the absolute simplest of automobile insurance benefits under his policy?

## **B. Appellant's Expert**

The circuit court struck plaintiff's expert's report from the record. Plaintiff contends that it was error for the circuit court to strike the expert's report. Marshall Reavis did more than offer an ultimate opinion as to coverage; he explained the historical development of the medical

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<sup>1</sup> In *Drake v. Snyder*, 216 W.Va. 574, 580, 608 S.E.2d 191, 197 (2004), the West Virginia Supreme Court found the definition of "non-owned car" as it relates to the term "household" to be ambiguous: "We are not persuaded by the circuit court's reasoning because it is premised upon finding the definition of non-owned car to be unambiguous. We believe the definition is, in fact, ambiguous."

payments provision in the policy at issue, and it would have been helpful to the circuit court to refer to the report. Mr. Reavis explained that the medical payments coverage became popular as part of the Family Auto Policy introduced during the mid-1950s. (See **Exhibit 5**, Affidavit of Marshall W. Reavis, III, Ph.D.) This coverage was unique because it covered the operator, not the vehicle. The underwriting objective was to avoid or reduce third-party actions and to meet the moral obligations to insureds and their guest passengers. Mr. Reavis explained that the coverage in this policy included non-owned vehicles without restrictions.

Mr. Reavis then explains State Farm's attempts at amending the language but, in doing so, State Farm makes an "exception to the exclusion," by saying: "This does not apply when the first person named in the declarations . . . is operating or occupying a private passenger car."

(*Id.*)

#### **IV. ASSIGNMENTS OF ERROR**

- A. THE MEDICAL PAYMENTS PROVISION OF THE STATE FARM POLICY IS AMBIGUOUS AND MUST BE INTERPRETED TO PROVIDE COVERAGE.**
- B. EXPERT OPINION ON HISTORICAL BACKGROUND OF INSURANCE INDUSTRY PRACTICES MAY BE CONSIDERED BY THE TRIER OF FACT.**

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

1. Where provisions in an insurance policy are plain and unambiguous and where such provisions are not contrary to a statute, regulation, or public policy, the provisions will be applied and not construed. Syl. Pt. 2, *Shamblin v. Nationwide Mutual Insurance Co.*, 175 W.Va. 337, 332 S.E.2d 639 (1985), quoting Syllabus, *Farmers' & Merchants' Bank v. Balboa Insurance Co.*, 171 W.Va. 390, 299 S.E.2d 1 (1982), quoting Syllabus, *Tynes v. Supreme Life Insurance Co.*, 158 W.Va. 188, 209 S.E.2d 567 (1974).

2. When reasonable people can differ about the meaning of an insurance contract, the contract is ambiguous, and all ambiguities will be construed in favor of the insured. Syl. Pt. 1, *D'Annunzio v. Security-Connecticut Life Ins. Co.*, 186 W.Va. 39, 410 S.E.2d 275 (1991).

3. Whenever the language of an insurance policy provision is reasonably susceptible of two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning, it is ambiguous. Syl. Pt. 1, *Shamblin v. Nationwide Mutual Insurance Co.*, 175 W.Va. 337, 332 S.E.2d 639 (1985), quoting Syllabus Point 1, *Surbaugh v. Stonewall Casualty Co.*, 168 W.Va. 208, 283 S.E.2d 859 (1981), quoting Syllabus Point 1, *Prete v. Merchants Property Ins. Co. of Ind.*, 159 W.Va. 508, 223 S.E.2d 441 (1976).

4. An insurance policy should receive a reasonable interpretation, consistent with the intent of the parties. The interpretation should be gauged by how a reasonable person in the insured's position would interpret it. Syl. Pt. 2, *D'Annunzio v. Security-Connecticut Life Ins. Co.*, 186 W.Va. 39, 410 S.E.2d 275 (1991).

5. Ambiguous and irreconcilable provisions of an insurance policy should be construed strictly against the insurer. Syl. Pt. 5, *Wehner v. Weinstein*, 216 W.Va. 309, 607 S.E.2d 415 (2004). Syl. Pt. 2, *Surbaugh v. Stonewall Casualty Co.*, 168 W.Va. 208, 283 S.E.2d 859 (1981), quoting Syllabus Point 2, *Marson Coal Co. v. Ins. Co. of State of Pa.*, 158 W.Va. 146, 210 S.E.2d 747 (1974), Syl. Pt. 4, *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987), unrelated portion overruled by *Potesta v. U.S. Fidelity & Guar. Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998), *Auber v. Jellen and Auber v. Ins. Corp. of America*, 196 W.Va. 168, 469 S.E.2d 104 (1996).

6. An insurance policy which requires construction must be construed liberally in favor of the insured. Syl. Pt. 1, *Hensley, et al. v. Erie Ins. Co.*, 168 W.Va. 172, 283 S.E.2d 227

(1981), quoting Syllabus Point 3, *Polan v. Travelers Insurance Company*, 156 W.Va. 250, 192 S.E.2d 481 (1972). *Huggins v. Tri-County Bonding Co. and Nationwide Insurance Co.*, 175 W.Va. 643, 337 S.E.2d 12 (1985).

7. Where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated, and an insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion. Syl. Pts. 5 and 7, *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987).

8. With respect to insurance contracts, the doctrine of reasonable expectations is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations. Syl. Pt. 8, *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987).

9. *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987): “An exclusion in a . . . liability policy should not be so construed as to ‘strip the insured of protection against risks incurred in the normal operation of his business,’ especially when the insurer was aware of the nature of the insured’s normal operations, when the policy was sold.” *Chemtec Midwest Services, Inc. v. Insurance Company of North America*, 279 F.Supp. 539 (W.D. Wis. 1968); see *Boswell v. Travelers Indem. Co.*, 38 N.J. Super. 599, 610, 120 A.2d 250, 255 (1956).

10. Where ambiguous policy provisions would largely nullify the purpose of indemnifying the insured, the application of those provisions will be severely restricted. Syl. Pt.

9, *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987). Syl. Pt. 6, *Wehner v. Weinstein*, 216 W.Va. 309, 607 S.E.2d 415 (2004).

11. Where an insured has a reasonable expectation of coverage under a policy, he should not be subject to technical encumbrances or to hidden pitfalls. *Gerhardt v. Continental Insurance Col.*, 48 N.J. 291, 225 A.2d 328 (1966). An insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, *id.* at 298, 225 A.2d at 332, placing them in such a fashion as to make obvious their relationship to other policy terms, *Mills v. Agrichemical Aviation, Inc.*, 250 N.W.2d 663, 673 (N.D. 1977), and must bring such provisions to the attention of the insured, *Young v. Metropolitan Life Insurance Co.*, 20 Cal. App. 3d 777, 98 Cal. Rptr. 77 (1971).<sup>2</sup>

12. “When the words of an insurance policy are, without violence, susceptible of two or more interpretations, that which will sustain the claim and cover the loss must be adopted.” Syl. Pt. 2, *Farmers Mutual Insurance Co. v. Tucker*, 213 W.Va. 16, 576 S.E.2d 261 (2002).

13. Medical payments coverage is broad “first-party” coverage closely akin to personal accident policies. See 7 J. Appleman, *Insurance Law and Practices* 4331, at 209 (1962); *Emick v. Dairyland Insurance*, 519 F.2d 1317, 1325-1326 (4<sup>th</sup> Cir. 1975) citing *Rosar v. General Ins. Co. of America*, 41 Wis.2d 95, 163 N.W.2d 129, 132 (1968); *Greer v. Associated Indemnity Corp.*, 371 F.2d 29, 33-34 (5 Cir. 1967); *Allstate Ins. Co. v. Mole*, 414 F.2d 204 (5 Cir. 1969) *supra*, at 206-07; *Sturdy v. Allied Mutual Ins. Co.*, 203 Kan. 783, 457 P.2d 34, 36 (1969); *Lipscombe v. Security Ins. Co. of Hartford*, 213 Va. 81, 189 S.E.2d 320 (1972) *supra*, 189 S.E.2d at 322-23.

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<sup>2</sup> The West Virginia Supreme Court made clear that the doctrine of reasonable expectations was limited to instances where the policy language is ambiguous. *Id.* at 496.

14. Medical payments coverage generally extends broad protection to the named insured and specified relatives for all reasonable medical expenses incurred as the result of injuries suffered in an accident “while occupying or through being struck by an automobile. . . .” (Citations omitted). **Recovery is independent of the automobile's ownership or its status as insured or uninsured, as well as irrespective of any liability on the part of the insured.** *Emick v. Dairyland Insurance*, 519 F.2d 1317, 1325-1326 (4<sup>th</sup> Cir. 1975) (Citations omitted).

15. Medical payments and uninsured motorist coverages focus on the person of the insured, rather than on his liability arising out of the operation of a particular vehicle. Although at times an unstated premise, it is precisely the floating, personal accident insurance character of medical payments and uninsured motorists coverage which has led courts to ignore the fact that these coverages have been engrafted onto liability policies insuring particular cars. *Emick v. Dairyland Insurance*, 519 F.2d 1317, 1325-1326 (4<sup>th</sup> Cir. 1975).

## **VI. DISCUSSION OF LAW AND ARGUMENT**

### **A. THE MEDICAL PAYMENTS PROVISION OF THE STATE FARM POLICY IS AMBIGUOUS AND MUST BE INTERPRETED TO PROVIDE COVERAGE.**

The Circuit Court ignored language in the policy, which sets forth that the “named insured” on medical payments coverage is covered while driving his employer’s car. This language is stated in exceptions to exclusions, but it is there. The Kanawha County Circuit Court found in the case at bar that medical payments coverage did not exist as a matter of law. (*See* ¶1 of Conclusions of Law.) Therefore, this Court should apply the *de novo* standard for review of the Circuit Court’s findings.

In *Emick v. Dairyland Insurance*, 519 F.2d 1317, 1325-1326 (4<sup>th</sup> Cir. 1975), the Fourth Circuit held:

[There is a] difference between bodily injury liability coverage, on the one hand, and medical payments coverage and uninsured motorist coverage, on the other. The latter are broad “first-party” coverages closely akin to personal accident policies. See 7 J. Appleman, *Insurance Law and Practices* 4331, at 209 (1962); *Rosar v. General Ins. Co. of America*, 41 Wis.2d 95, 163 N.W.2d 129, 132 (1968); *Greer v. Associated Indemnity Corp.*, 371 F.2d 29, 33-34 (5 Cir. 1967); *Allstate Ins. Co. v. Mole*, [414 F.2d 204 (5 Cir. 1969)] *supra*, at 206-07; *Sturdy v. Allied Mutual Ins. Co.*, 203 Kan. 783, 457 P.2d 34, 36 (1969); *Lipscombe v. Security Ins. Co. of Hartford*, 213 Va. 81, 189 S.E.2d 320 (1972) *supra*, 189 S.E.2d at 322-23. **Medical payments coverage generally extends broad protection to the named insured and specified relatives for all reasonable medical expenses incurred as the result of injuries suffered in an accident “while occupying or through being struck by an automobile . . . .”** *Allstate Ins. Co. v. Mole*, *supra*, at 206: quoting from *Government Employees Ins. Co. v. Sweet*, 186 So.2d 95, 96 (Fla.App.1966); *Rosar v. General Ins. Co. of America*, *supra*, 163 N.W.2d at 132. **Recovery is independent of the automobile's ownership or its status as insured or uninsured, as well as irrespective of any liability on the part of the insured.** See *Allstate Ins. Co. v. Mole*, *supra*, at 206; *Greer v. Associated Indemnity Corp.*, *supra* at 34.

...

It is apparent, therefore, that *both of these types of insurance coverages [medical payments and uninsured motorist coverages] focus on the person of the insured, rather than on his liability arising out of the operation of a particular vehicle. Although at times an unstated premise, it is precisely the floating, personal accident insurance character of medical payments and uninsured motorists coverage which has led courts to ignore the fact that these coverages have been grafted onto liability policies insuring particular cars, and to hold that where double premiums have been paid, whether under a single policy covering more than one automobile, or whether under separate and independent policies, double coverage has been purchased, and stacking will be allowed, absent “plain, unmistakable language’ restricting the coverage to that applicable to a single vehicle.”* *Lipscombe v. Security Ins. Co. of Hartford*, *supra*, 189 S.E.2d at 322. See also *Virginia Farm Bureau Mutual Ins. Co. v. Wolfe*, 212 Va. 162, 183 S.E.2d 145 (1971) *supra*, 183 S.E.2d at 147.

...

By contrast, bodily injury liability coverage is linked to the ownership, maintenance or use of an owned automobile or a non-owned automobile by the insured and others to whom the coverage is extended. Its basic purpose has “always been conceived to be the protection of the policyholder against loss resulting from legal liability caused by his operation of a motor vehicle” and, as such, “pertain(s) fundamentally to the vehicle.” 7 J. Appleman, *supra*, at 208-09.

...

The extension of this reasoning to non-owned vehicle bodily injury liability coverage follows naturally so long as there is no misapprehension as to the nature of such coverage. Obviously, any one insured can operate but one automobile at a time. *Bodily injury liability coverage, with its attendant limits of liability, is therefore designed to attach to whichever automobile an insured happens to be driving*, whether that automobile is one of several automobiles listed under the policy or whether it is a non-owned automobile. In the latter case, the non-owned automobile merely substitutes for, or stands in the place of, one of the named insured's owned and listed automobiles, and the bodily injury liability package, with its per person and per occurrence limits, attaches to this non-owned automobile for as long as the insured is potentially subject to liability arising out of its maintenance or use.

(Emphases added.)

The West Virginia Supreme Court of appeals has held that “[i]t is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company[.]” Syl. pt. 4, in part, *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987). See also *Horace Mann Ins. Co. v. Leeber*, 180 W.Va. 375, 378, 376 S.E.2d 581, 584 (1988) (“[A]ny ambiguity in the language of an insurance policy is to be construed liberally in favor of the insured, as the policy was prepared exclusively by the insurer.”).

An insurance policy must be read as an insured reads it -- as a whole, not just one discreet part that is divorced from the rest of the policy. As with any contract, the court reads an insurance policy **in its entirety** to determine intent, and **must construe words in their natural, plain and ordinary sense**. *Riccio v. American Republic Ins. Co.*, 705 A.2d 422, 426 (PA 2002). “Language in an insurance policy should be given its plain, ordinary meaning.” Syllabus Point 2, *Miralles v. Snoderly*, 216 W.Va. 91, 602 S.E.2d 534 (2004); Syl. pt. 1, *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 509 S.E.2d 1 (1998).

The Circuit Court arrived at its decision by taking one part of the policy, the part that defines “non-owned car,” and relied on it to the exclusion and contradiction of the section which

deals with medical payments. This analysis erroneously ignores the remaining terms of the policy in the very section relating to the medical payments coverage.

“When the words of an insurance policy are, without violence, susceptible of two or more interpretations, that which will sustain the claim and cover the loss must be adopted.” Syllabus Point 2, *Farmers Mutual Insurance Co. v. Tucker*, 213 W.Va. 16, 576 S.E.2d 261 (2002).

When a policyholder reads his State Farm medical payments section, he would reasonably believe he had coverage if he was the first-named insured. When it says that in certain situations the insured, while operating a business vehicle, is not covered, but then excludes or excepts first-named from the “not covered” categories, coverage must exist if for no other reason than it is ambiguous. *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987). Further, the policy would raise reasonable expectations of the policyholder that the medical payments provisions provided coverage. *Id.* at Syl. Pt. 8.

**B. EXPERT OPINION ON HISTORICAL BACKGROUND OF INSURANCE INDUSTRY PRACTICES MAY BE CONSIDERED BY THE TRIER OF FACT.**

In many instances there are issues of fact as to the history and application of insurance policies. In such situations, persons who are knowledgeable of history and development of the policy provisions in question can assist the trier of fact. It should not be left to State Farm’s expert to dominate the conversation. Appellant’s expert, Mr. Reavis, reviewed the historical direction of medical payments policies and could have offered information, which the circuit court considered. While the court is not bound by an expert report, the court should not have stricken the report of Marshall Reavis.

Here, the circuit court, of course, struck from the record the appellant’s insurance expert affidavit. This Court relied on *Jackson v. State Farm*, 215 W.Va. 634, 600 S.E.2d 346

(2004). In that case, this Court held that as a general rule an expert witness may not give his or her opinion on the interpretation of the law as set forth in W. Va. Code § 33-11-4(9)(a)-(o) (2002), which defines unfair claim settlement practices; the legal meaning of terms within that code section; or whether a party committed an unfair claim settlement practice as defined in that *Code* section. In *Jackson*, this Court found that an expert should not be permitted to testify that State Farm's actions violated the Unfair Claim Settlement Practices Act or that its actions constituted a "general business practice" under the Act. However, **the Court held that the insurance expert may testify to ordinary practices of claims adjustment and settlement within the insurance industry, and whether State Farm's conduct conformed to those ordinary practices.** Furthermore, the *Jackson* court upheld the longstanding premise that "an expert witness may properly state an opinion on an issue of fact, and may be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms." Citing 32 C.J.S. *Evidence* § 634, at 506, and noted Rule 704 of the West Virginia Rules of Evidence, which states that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact."

Here, the appellant's insurance expert was only providing preliminary testimony via affidavit about the meaning of the various provisions in the policy as understood and practiced in the insurance industry. The meaning of these various provisions in the insurance industry and how the insurance industry views the relationship between these various provisions is complicated, as the analysis above indicates. He did not even mention whether denials of medical payments by State Farm was a general business practice and did not mention malice on the part of the State Farm. Even assuming, but not admitting whether certain statements made in

the affidavit, i.e., that the conduct constituted bad faith, would not have been admissible to a jury, there are plenty of statements made about the insurance industry language in the policy that would be admissible to a jury, which created a genuine issue of material fact and the circuit court committed an error of law in excluding it in total.

**VII. RELIEF PRAYED FOR**

For all of the foregoing reasons, the appellant respectfully prays that this Honorable Court grant his Appeal and reverse the circuit court's order granting summary judgment to State Farm Mutual Automobile Insurance Company. Further, appellant respectfully requests that he be awarded the costs and expenses incurred in prosecuting this appeal, including reasonable attorney fees, as well as any other relief deemed appropriate by the Court.

MICHAEL W. WITT

By Counsel



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**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**NO. 35698**

MICHAEL W. WITT,

Plaintiff below, Appellant

v.

ROBERT K. SUTTON; STATE FARM  
MUTUAL AUTOMOBILE INSURANCE  
COMPANY; a Illinois Corporation; and  
ST. PAUL FIRE AND MARINE INSURANCE  
COMPANY, a Minnesota corporation,

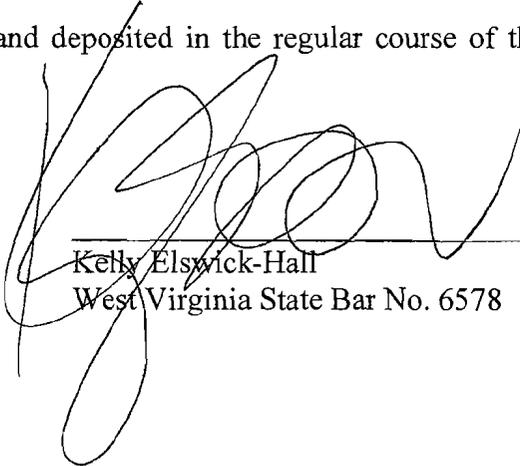
Defendants below, Appellees.

**CERTIFICATE OF SERVICE**

I, Kelly Elswick-Hall, Counsel for Appellant, do hereby certify that true and exact copies of the foregoing "Brief of Appellant" and "Appendix to Brief of Appellant" were served upon:

Sabrena Olive-Gillis  
Shaffer & Shaffer, PLLC  
Post Office Box 3973  
Charleston, West Virginia 25339-3973  
Counsel for State Farm Mutual Automobile Insurance Company

in an envelope properly addressed, stamped and deposited in the regular course of the United States Mail, this 6th day of January, 2011.



Kelly Elswick-Hall  
West Virginia State Bar No. 6578

**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**