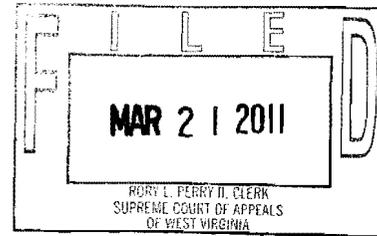


ARGUMENT DOCKET

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 SERVICE, INC.,**

Appellees/Defendants below.

APPELLANTS' REPLY BRIEF

***Counsel for Appellants Thomas Loudin
and Alice Loudin***

Erika Klie Kolenich (9880)
Klie Law Offices, PLLC
Route 4 Box 529
Buckhannon, WV 26201
(304) 472-5007
ehklie@klielawoffices.com

Ronald W. Zavolta (8739)
Zavolta Law Office
741 Fairmont Pike
Wheeling, WV 26003
(304) 217-2010

TABLE OF CONTENTS

	Page
Table of Authorities	3
Introduction	4
Argument	
<i>I: The Cases Cited by the Appellants Can Be Distinguished From the Instant Case.</i>	4
<i>II: Insurance Policies are Contracts and Therefore Must Be Governed By Contract Law.</i>	5
<i>III: All the Available Legal Sources and/or Authorities in the State of West Virginia Indicate that Appellants are First Parties.</i>	6
<i>IV: The Tort of Outrage Claim Was Improperly Dismissed by the Circuit Court as the Motion for Summary Judgment filed with and argued before the Court did not include the Tort of Outrage Claim.</i>	7
<i>V: Public Policy Requires That the Appellants' Are First Parties.</i>	8
Conclusion	9
Certificate of Attorney	11
Certificate of Service	12

TABLE OF AUTHORITIES

	Page
<u>Gillette v. Gillette</u> 837 N.E. 2d 1283 (Ohio App. 2005)	4, 5
<u>Herrig v. Herrig</u> 844 P.2d 487 (Wy. 1992)	4
<u>Rumley v. Allstate Indem. Co.</u> 924 S.W. 2d 448 (Tex. 1996)	4
<u>Sperry v. Sperry</u> 990 P.2d 381 (Utah 1999)	4
<u>State ex rel. Allstate Insurance Company v. Gaughan</u> 508 S.E.2d 75 (W.Va. 1998)	7
<u>Wilson v. Wilson</u> 468 S.E. 2d 495 (N.C. 1996)	4
West Virginia Insurance Regulations 114-14-2.3 Code of State Rules	6

INTRODUCTION

On March 4, 2011, Appellees and Amicus Curiae, West Virginia Insurance Federation, both filed extensive briefs which have several misplaced and inaccurate representations of the law as well as speculative representations regarding the potential public policy affects of the West Virginia Supreme Court of Appeals finding in favor of the Appellants. Therefore, Appellants file this reply brief to clarify and explain their position.

ARGUMENT

I: The Cases Cited by the Appellants Can Be Distinguished From the Instant Case.

Appellees have cited the following cases from other jurisdictions which they contend support their position: Gillette v. Gillette, 837 N.E.2d 1293 (Ohio App. 2005); Herrig v. Herrig, 844 P.2d 487 (Wy. 1992); Rumley v. Allstate Indem. Co., 924 S.W.2d 448 (Tex. 1996); Sperry v. Sperry, 990 P.2d 381 (Utah 1999); and Wilson v. Wilson, 468 S.E.2d 495 (N.C.1996). However, all these cases are distinguishable in that the injured party and the tortfeasor were husband and wife. The facts reflected in said cases are not the same as those at issue in the instant case. In fact in Wilson, the Court found the claimant was not even an insured under the applicable policy. Id at 497.

Additionally, Appellees fail to state the full holding of the Court in Gillette. The Court held “although the appellant is an insured under the Nationwide policy, where she seeks liability coverage for the negligence of **the named insured** she is a third party claimant. Gillette v. Gillette, 837 N.E.2d 1283, 1289 (Ohio App. 2005). Therefore, this

case would only be applicable if Thomas Loudin were making a claim against another named insured. He was not. There were no other named insureds under the applicable policy. In the instant case, William Loudin, the at fault party, was neither a named insured nor the spouse of the injured party. Therefore, the cases cited by the Appellees are distinguishable.

II: Insurance Policies are Contracts and Therefore Must Be Governed By Contract Law.

Insurance policies are contracts. Therefore, insurance policies within the State of West Virginia are governed by West Virginia law regarding contracts. The legal obligations and duties owed to and the duties of the parties to an insurance policy is a contractual law issue. Therefore, the contract must be examined. Any argument to the contrary is a blatant disregard of contract law. As stated in Appellants' Brief, Appellant, Thomas Loudin is clearly a named insured pursuant to the contract. There is no language in the insurance contract that puts any type of qualification or limitation on Thomas Loudin as an insured or the duty of good faith owed by the carrier. Thomas Loudin is always an insured who is owed a duty of good faith and fair dealing under the applicable insurance contract. This does not change merely because he was injured and made a bodily injury claim.

The West Virginia Insurance Federation claims that Appellants are using "hocus pocus" to turn liability coverage into something it is not. However, certainly if all claims made by Thomas Loudin are not the same in terms of whether he is owed a duty of good faith and fair dealing, it should state the same in the insurance policy. Appellants and those in their positions look to the contract to define the respective duties and

obligations under the same. If Appellants cannot rely on the written contract **drafted by Appellee** National Fire and Liability Insurance Company to ascertain the parties' respective obligations and duties, where can they look?

The Appellees are seeking to create a definition under or law where the same does not exist. There is a common law duty of good faith and fair dealing owed in all contracts. The Appellees are seeking to change law and eliminate the same.

Appellees argue they used the term "insured" as a short hand term to refer to the person who purchased the insurance policy. They further argue that the same is irrelevant and should be ignored. Even after the bodily injury claim was filed Appellee's still clearly viewed Thomas Loudin as their insured as they identified him as the same in the claims file. They now want the Court and the law to ignore the same even though it is directly contrary to their position.

III: All the Available Legal Sources and/or Authorities in the State of West Virginia Indicate that Appellants are First Parties.

Pursuant to West Virginia Insurance Regulation 114-14-2.3 Appellant, Thomas Loudin, is a first party claimant. The applicable regulation defines a first party claimant as an individual asserting a right to payment under an insurance policy arising out of an occurrence covered by such policy. Appellees cannot refute that Thomas Loudin was an individual asserting a right to payment under his insurance policy arising out of an occurrence covered by the policy. If the occurrence was not covered under the policy, certainly neither party would be before the court. Had the drafters of the Insurance Regulation wished to exclude those persons making bodily injury claims under their own policies, certainly they would have stated such an exclusion or qualification. The West

Virginia Insurance Federation claims that Appellants are ignoring the insurance regulations. Quite to the contrary, we ask the Court to look to the black letter definition of a first party claimant/insured as set forth in the regulations. Such an analysis and review supports Appellants' position.

Appellees also seek to downplay the direct quote in Allstate v. Gaughan as dicta and not from a syllabus point. 508 S.E.2d 75 (W.Va. 1998). However, it is a direct quote from this Court and other than the insurance regulations is the closest thing we have to law or a definition regarding a first party claim under West Virginia law.

Merely because Appellant's were not at risk of being legally obligated for some sort of liability or monetary judgment does not indicate that they are not first party insureds. Further, merely because Appellees were in an adversarial relationship with the Appellants does not make this a third party claim. This logic is grossly misplaced. In the instance of an uninsured or underinsured claim, the insured is still a first party insured even though he or she is not at risk to become legally obligated and is in an adversarial relationship with the insurer.

IV: The Tort of Outrage Claim Was Improperly Dismissed by the Circuit Court as the Motion for Summary Judgment filed with and argued before the Court did not include the Tort of Outrage Claim.

The Circuit Court did not correctly grant Summary Judgment as to the tort of outrage claim. The tort of outrage claim never included in Appellee's motion for summary judgment (Record Page 225-230) nor did Appellant's have an opportunity to respond to the same through written response or oral argument (Record Page 243). Appellants had zero notice that Appellees were seeking summary judgment on the tort

of outrage claim until they received the proposed order granting the same prepared by Appellees. Appellants properly pointed out to the Court that they objected to the inclusion of the tort of outrage claim in the order granting Defendants' Motion for Summary Judgment as it had not previously been brought before the Court. (Record Page 245, 249). Nonetheless the Court entered the Order without granting Appellants an opportunity to fully respond. Therefore, Plaintiffs were not permitted the opportunity to argue this issue.

Appellees claim that the Circuit Court has an obligation to first make a determination as a matter of law if the Defendant's actions might be reasonably interpreted to be outrageous. In the instant case the Circuit Court had no information regarding whether the Appellee's conduct was outrageous because Appellant's were still involved in discovery and were not permitted an opportunity to make arguments or provide to the court information regarding the acts of the Appellees.

V: Public Policy Requires That the Appellants' Are First Parties.

A ruling in favor of the position set forth by the Appellant's would favor the public policy of West Virginia. West Virginia residents who purchase insurance contracts in the State of West Virginia should be able to rely on their insurance carriers to treat them in a fair and reasonable manner in regards to claims made under their own policies. If the insureds are not able to rely on their carriers to do so, it should be a requirement that the same be plainly stated in the insurance contract.

Appellees claim that to hold in favor of the Plaintiffs would create a new class of Plaintiff in West Virginia and place some sort of burden on the industry. However, the same is an over exaggeration and simply not true. There will still be one type of plaintiff

in a bad faith claim, those who have an insurance contract and are in privity of contract with the defendant insurance carrier such as plaintiffs claiming bad faith in relation to underinsured or uninsured motorist coverage claims.

Appellees further argue that recognizing both Plaintiffs and Defendants as first parties and owing them the same duties puts the insurer in an untenable position. If the Court really examines what the Appellees are saying, it gets to the root of their position very quickly. Certainly it does not put the insurer in an untenable position if they examine and adjust the claim in a fair and equitable manner. The Appellees are directly asking the Court for an excuse to treat their policyholders in a disparate manner when they make claims. A ruling in favor of the Appellees' position would merely be a ruling against West Virginia residents and a pass presented to the West Virginia insurance industry to treat those residents in an iniquitous manner regarding claims made under their own policies.

CONCLUSION

Appellants assert that the Circuit Court of Upshur County erred in granting Appellees' Motion for Summary Judgment. The law and authority available in West Virginia as well as the insurance contract at issue impose a duty of good faith and fair dealing upon the Appellees in regards to handling Appellants' claim. Further, good public policy would require that the Appellants be able to rely upon their insurance contract and the definition of a first party claimant set forth in the West Virginia Insurance Regulations in understanding the duties owed both by them and to them.

Respectfully Submitted,

Thomas D. Loudin, et ux.

A handwritten signature in black ink, appearing to read 'Erika', written over a horizontal line.

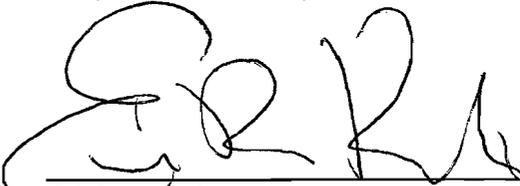
Counsel for Plaintiff

Erika Klie Kolenich (9880)
Klie Law Offices
Route 4 Box 529
Buckhannon, WV 26201
(304) 472-5007
Facsimile: (304) 472-1126
ehklie@klielawoffices.com

Ronald W. Zavolta
Zavolta Law Offices
741 Fairmont Pike
Wheeling, WV 26003
(304) 217-2010

CERTIFICATE BY ATTORNEY

I hereby certify, pursuant to the West Virginia Rules of Appellate Procedure, that the facts alleged are faithfully represented and that they are accurately presented to the best of my ability.



Of Counsel

Erika Klie Kolenich (9880)
Klie Law Offices
Route 4 Box 529
Buckhannon, WV 26201
(304) 472-5007
Facsimile: (304) 472-1126
ehklie@klielawoffices.com

Ronald W. Zavolta
Zavolta Law Offices
741 Fairmont Pike
Wheeling, WV 26003
(304) 217-2010

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 SERVICE, INC.,**

Appellees/Defendants below.

CERTIFICATE OF SERVICE

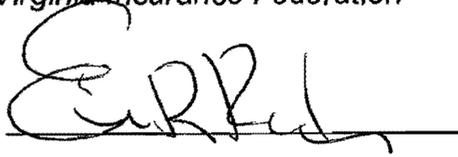
The undersigned hereby certifies that service of the foregoing, Appellant's Reply Brief has been made upon the parties of record by placing a true and accurate copy thereof in the United States mail first class postage prepaid, on the 21st day of March 2011, to the following:

Don C.A. Parker
Spilman, Thomas & Battle, PLLC
P.O. Box 273
Charleston, WV 25321-0273

*Counsel for Appellees, National Liability & Fire Insurance Company, Jack Sergent, D.L.
Thompson and Consolidated Claim Service, Inc.*

Jill Cranston Bentz
Mychal Sommer Schulz
Jacob A. Manning
Dinsmore & Shohl, LLP
900 Lee Street

Charleston, WV 25301
Counsel for Amicus Curiae, West Virginia Insurance Federation

A handwritten signature in black ink, appearing to read 'E. K. K.', written over a horizontal line.

Counsel for Plaintiff

Erika Klie Kolenich (9880)
Klie Law Offices
Route 4 Box 529
Buckhannon, WV 26201
(304) 472-5007
Facsimile: (304) 472-1126
ehklie@klielawoffices.com