

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

Jeffrey Jenkins and
M. Jean McNabb,

Plaintiffs,

v.

Civil Action No. 10-C-164
Judge James A. Matish

City of Elkins,
a Municipal Corporation, and
Stephen P. Stanton,

Defendants,

v.

Westfield Insurance Company,

Third-Party Plaintiff,

v.

National Union Fire Insurance Company of Pittsburgh, PA, and
Bombardier Aerospace Corporation,

Third-Party Defendants.

**ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS
CITY OF ELKINS AND STEPHEN P. STANTON AND THIRD-PARTY
DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF
PITTSBURGH, PA, AND DENYING IN PART AND GRANTING IN PART
SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS JEFFREY JENKINS AND
M. JEAN MCNABB, THIRD-PARTY DEFENDANT BOMBARDIER
AEROSPACE CORPORATION, AND THIRD-PARTY PLAINTIFF WESTFIELD
INSURANCE COMPANY**

Presently pending before this Court are multiple motions for summary judgment. Westfield Insurance Company filed, "Third-Party Plaintiff Westfield Insurance Company's Motion for Summary Judgment and Memorandum in Support," on January 24, 2011. National Union Fire Insurance Company of Pittsburgh, PA, filed, on February 15, 2011, "National Union Fire Insurance

Company of Pittsburgh, PA's Motion for Summary Judgment." On March 4, 2011, Bombardier Aerospace Corporation and Gallagher Bassett Services, Inc., filed, "Motion for Summary Judgment Filed on Behalf of Bombardier Aerospace Corporation and Gallagher Bassett Services, Inc." Jeffery Jenkins and M. Jean McNabb filed, on March 4, 2011, "Plaintiffs, Jeffrey Jenkins and M. Jean McNabb's Motion for Summary Judgment as to All Insurance Coverages, Response to Motions for Summary Judgment Filed by Westfield Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA and Memorandum in Support."

Bombardier Aerospace Corporation and Gallagher Bassett Services, Inc., filed, **"Bombardier Aerospace Corporation and Gallagher Bassett Services, Inc.'s Brief in Opposition to Westfield Insurance Company's Motion for Summary Judgment,"** on March 4, 2011. National Union Fire Insurance Company of Pittsburgh, PA, filed, on March 10, 2011, **"National Union Fire Insurance Company of Pittsburgh, PA's Response to Bombardier Aerospace Corporation and Gallagher Bassett Services, Inc.'s Motion for Summary Judgment."** On March 14, 2011, Jeffery Jenkins and M. Jean McNabb filed, **"Plaintiffs, Jeffrey Jenkins and M. Jean McNabb's Responses to Motions for Summary Judgment Filed by National Union Fire Insurance Company of Pittsburgh, PA, and Bombardier Aerospace Corporation and Memorandum in Support."**

Westfield Insurance Company filed, on March 14, 2011, **"Third-Party Plaintiff, Westfield Insurance Company's Memorandum in Response to**

Bombardier Aerospace Corporation and Gallagher Basset Services, Inc.'s Motion for Summary Judgment in Response to National Union's Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment and in Support of Westfield's Motion for Summary Judgment." The City of Elkins and Stephen P. Stanton filed, "Memorandum of Law in Support of Renewed Motion for Summary Judgment of Defendants City of Elkins and Stephen P. Stanton," on March 14, 2011. National Union Fire Insurance Company of Pittsburgh, PA, filed, on March 16, 2011, "National Union Fire Insurance Company of Pittsburgh, PA's Response in Opposition to Plaintiffs' Motion for Summary Judgment and Reply in Support of its Motion for Summary Judgment."

On March 25, 2011, Westfield Insurance Company filed, **"Third-Party Plaintiff, Westfield Insurance Company's Memorandum in Response to Renewed Motion for Summary Judgment of Defendants City of Elkins and Stephen P. Stanton and Motion for Summary Judgment of National Union."** National Union Fire Insurance Company of Pittsburgh, PA, filed, on March 28, 2011, **"National Union Fire Insurance Company of Pittsburgh, PA's Reply in Support of its Motion for Summary Judgment."** Bombardier Aerospace Corporation and Gallagher Bassett Service, Inc., filed, **"Bombardier Aerospace Corporation and Gallagher Bassett Services, Inc.'s Consolidated Brief in Opposition to All Other Parties' Motions for Summary Judgment, and Reply Brief in Support of Their Motion for Summary Judgment,"** on March 29, 2011. The City of Elkins and Stephen P. Stanton filed, on March 30, 2011,

“Defendants City of Elkins and Stephen P. Stanton’s Reply to Third-party Plaintiff Westfield Insurance Company’s Response to Their Renewed Motion for Summary Judgment.” Finally, on April 5, 2011, National Union Fire Insurance Company of Pittsburgh, PA, filed, **“Joinder of Third Party Defendant National Union Fire Insurance Company of Pittsburgh, PA to Defendants City of Elkins and Stephen Stanton’s Reply to Third-party Plaintiff Westfield Insurance Company’s Response to their Renewed Motion for Summary Judgment.”**

In this case, Plaintiffs’ claims compel this Court to determine the applicability of three insurance policies which were in effect at the time of an accident. After reviewing the motions and memoranda in support thereof, the responses, and the replies, conducting a thorough examination of the record, and analyzing pertinent legal authority, this Court concludes that Defendants City of Elkins and Stephen P. Stanton’s and Third-Party Defendant National Union Fire Insurance Company of Pittsburgh, PA’s, motions for summary judgment should be **GRANTED**. Moreover, this Court concludes that Plaintiffs Jeffery Jenkins and M. Jean McNabb’s, Third-Party Defendant Bombardier Aerospace Corporation’s, and Third-Party Plaintiff Westfield Insurance Company’s motions for summary judgment should be **GRANTED IN PART** and **DENIED IN PART**.

Standard of Review

West Virginia Rule of Civil Procedure 56(c) provides, “The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show

that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” In addition, according to the West Virginia Supreme Court of Appeals, “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York, 148 W. Va. 160, 160, 133 S.E.2d 770, 771 (1963). Moreover, “[t]he Circuit Court’s function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.” Syl. Pt. 3, Painter v. Peavy, 192 W. Va. 189, 190, 451 S.E.2d 755, 757 (1994).

Findings of Fact

1. On October 27, 2008, **Plaintiff Jeffrey Jenkins** was involved in an automobile accident with **Defendant Stephen P. Stanton**. Plaintiff Jenkins suffered bodily injuries.

2. According to the State of West Virginia Uniform Traffic Crash Report, Defendant Stanton admitted fault and was cited for failure to yield the right-of-way.

3. Plaintiff Jenkins was operating a vehicle owned by his employer, **Bombardier Aerospace WVAC**, within the course and scope of his employment.

4. Similarly, Defendant Stanton was operating a vehicle owned by his employer, the **City of Elkins**, within the course and scope of his employment.

5. At the time of the accident, the City of Elkins carried its liability insurance through a special insurance program administered by the West Virginia Board of

Risk and Insurance Management (BRIM). Currently, **National Union Fire Insurance Company of Pittsburgh, PA**, provides insurance to BRIM.

6. The Plaintiffs and National Union allege that Bombardier is self-insured; however, Bombardier contends it purchased a commercial auto policy through the Greenwich Insurance Company. This policy provided coverage to the vehicle driven by Plaintiff Jenkins and was in effect at the time of the accident. Bombardier also contends **Gallagher Bassett Services, Inc.**, is a third party administrator that administers Bombardier's insurance claims. Plaintiffs and National Union presented no evidence that the Greenwich Insurance policy was inapplicable to this case.

7. **Westfield Insurance Company** also issued a personal policy of insurance to Plaintiff Jenkins and McNabb. The policy was in effect at the time of the accident.

8. Because Plaintiff Jenkins was injured while operating the vehicle within the course and scope of his employment, he received workers' compensation benefits for his injuries.

9. After learning that Plaintiff Jenkins was covered by workers' compensation, the insurer for the City of Elkins, National Union, informed Plaintiff Jenkins's attorney that the City was immune from suit pursuant to the Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1 *et seq.*

10. On April 29, 2010, Plaintiffs Jenkins and McNabb filed a complaint to recover compensatory damages, including personal injuries and medical

expenses, and loss of consortium. Plaintiffs did not seek property damages or punitive damages. The Complaint specifically named Stanton and the City of Elkins as defendants. It also named Gallagher Bassett and Westfield as notice defendants.

11. Westfield then counterclaimed against the Plaintiffs for declaratory relief and filed cross claims against Stanton, the City of Elkins, and Gallagher Bassett. It also filed a third-party action against National Union, seeking contribution or indemnity in relation to the Plaintiffs' claims.

12. In response, the Plaintiffs filed cross claims for declaratory judgment relief against Stanton, the City of Elkins, Westfield, National Union, Bombardier, and Gallagher Bassett, seeking a determination from the Court as to the applicability of insurance coverages for the Plaintiffs' claims.

Conclusions of Law

This Court is of the opinion that there are no genuine issues to any material facts that exist that would warrant a trial. At issue is whether, as a matter of law, Defendant Stanton and the City of Elkins are immune from liability and whether National Union, the City's insurer, must compensate the Plaintiffs if Defendant Stanton and the City of Elkins are immune. Furthermore, at issue is whether Bombardier and Westfield must also compensate the Plaintiffs, and if so, who has priority, or which policy must be exhausted first?

A. Stanton, City of Elkins, and the National Union Policy

This Court is of the opinion that Defendant Stanton is immune from liability pursuant to W. Va. Code § 29-12A-5(b) (2008). According to § 29-12A-5(b),

An employee of a political subdivision is immune from liability unless one of the following applies: (1) His or her acts or omissions were manifestly outside the scope of employment or official responsibilities; (2) His or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or (3) Liability is expressly imposed upon the employee by a provision of this code.

Here, the Plaintiffs, in their Complaint, conceded that Defendant Stanton acted within the scope of his employment at the time of the accident. Furthermore, the W. Va. Code does not expressly impose liability upon Defendant Stanton.

Instead, the Plaintiffs allege that Defendant Stanton acted “recklessly, willfully, and wantonly” on the day of the incident; however, they have not set forth any facts to support this contention. The only evidence submitted was the accident report, but the report reveals no such conduct. In fact, after reviewing the report in the light most favorable to the Plaintiffs, this Court is of the opinion that it reflects only mere negligence on the part of Defendant Stanton, and as a result, Defendant Stanton is immune from liability pursuant to W. Va. Code § 29-12A-5.¹

This Court is of the opinion that the City of Elkins is also immune from liability. Pursuant to W. Va. Code § 29-12A-5(a)(11), the City of Elkins is “immune from liability if a loss or claim results from . . . [a]ny claim covered by any workers’ compensation law or any employer’s liability law.” The West Virginia Supreme Court of Appeals has held that this statute is unambiguous, and it “clearly contemplates immunity for political subdivisions from tort liability in actions involving claims covered by workers’ compensation even though the

¹ Furthermore, the West Virginia Supreme Court of Appeals has previously held that despite a plaintiff’s allegation that a defendant’s actions were wanton or reckless, the Tort Reform Act still applies. Brooks v. City of Weirton, 503 S.E.2d 814 (W. Va. 1998).

plaintiff was not employed by the defendant political subdivisions at the time of the injury.” O’Dell v. Town of Gauley Bridge, 188 W. Va. 596, 609, 425 S.E.2d 551, 564 (1992).

The Court has also set forth four requirements that must be met for the Plaintiff’s claims to be barred by the Tort Reform Act: “First, the plaintiff must have been injured by the negligence of an employee of a political subdivision. Second, the plaintiff must have received the injury in the course of and resulting from his or her employment. Third, the plaintiff’s employer must have workers’ compensation coverage. Fourth, the plaintiff must be eligible for such benefits.” Id. at 603, 425 S.E.2d at 558.

All four of these requirements have been satisfied in this case. First, assuming Defendant Stanton was negligent and that his negligence caused Plaintiff’s Jenkins’s injuries, Defendant Stanton was an employee of a political subdivision. Second, Plaintiff Jenkins was admittedly driving a vehicle owned by his employer, Bombardier, within the course and scope of his employment. Third, Bombardier is a corporation regularly employing others for the purpose of carrying on business in the State and therefore, is required to subscribe to the workers’ compensation fund. W. Va. Code § 23-2-1 (2010). Fourth, Plaintiff Jenkins admitted that he was an employee of Bombardier, and accordingly, he was an employee covered by workers’ compensation. W. Va. Code § 23-2-1a.

The Plaintiffs argue that the National Union policy does not contain appropriate language and/or exclusions which specifically preserve the City’s statutory immunity. First, this Court is of the opinion that the immunity provided

under the Tort Reform Act is different from the State's immunity. Stamper by Stamper v. Kanawha County Bd. Of Educ., 191 W. Va. 297, 301, 445 S.E.2d 238, 242 (1994). Pursuant to W. Va. Const. Art. VI, § 35, the State's immunity is absolute and cannot be waived by the legislature or any other instrumentality of the State. Nevertheless, the West Virginia Supreme Court of Appeals has recognized that sovereign immunity may be waived when an individual does not seek recovery from State funds; however, the recovery sought must be less than or equal to the maximum of the State's liability insurance coverage. See Pittsburgh Elevator Co. v. West Virginia Bd. of Regents, 172 W. Va. 743, 310 S.E.2d 675 (1983).

In 1974, the West Virginia Supreme Court of Appeals held in Syllabus Point 4 of Higginbotham v. City of Charleston, 157 W. Va 724, 204 S.E.2d 1 (1974), sovereign immunity pursuant to W. Va. Const. Art. VI, § 35 was inapplicable to municipalities, and in 1975, the Court abolished the common law rule of municipal government immunity, Syl. Pt. 10, Long v. City of Weirton, 158 W. Va. 741, 214 S.E.2d 832 (1975). Nevertheless, the West Virginia Legislature, in 1986, enacted the Government Tort Claims and Insurance Reform, W. Va. Code § 29-12A-1 *et seq.*, which reestablished immunities for municipalities and political subdivision; however, it excluded the State.

Although the West Virginia Supreme Court of Appeals has held that insurance coverage may waive the State's sovereign immunity up to the limits of insurance coverage, the Tort Reform Act expressly and unequivocally provides that the "purchase of liability insurance . . . by a political subdivision does not

constitute a waiver of any immunity it may have pursuant to this article.” W. Va. Code § 29-12A-16(a) (2008).² Accordingly, while insurance coverage can amount to an automatic waiver of constitutional immunity by the State, such coverage cannot amount to a waiver of statutory immunity by a political subdivision.

The West Virginia Supreme Court of Appeals has held that when an insurance policy provides coverage for a political subdivision, the terms of the insurance contract may determine the rights of the insurer and insured, despite the political subdivision’s immunity. Bender v. Glendenning, 219 W. Va. 174, 179, 632 S.E.2d 330, 335 (2006). Nevertheless, the Court added, “The existence of an insurance policy does not per se eliminate the grants of immunity provided by the Act unless the policy fails to include appropriate language and/or exclusions which specifically preserve the Act’s immunity provisions.” Id. at 180, 632 S.E.2d at 336.

Here, the National Union policy contained a Certificate of Liability Insurance that clearly states, “IT IS A CONDITION PRECEDENT OF COVERAGE UNDER THE POLICIES THAT THE ADDITIONAL INSURED DOES NOT WAIVE ANY STATUTORY OR COMMON LAW IMMUNITY CONFERRED UPON IT.” The Plaintiffs argue the City’s insurance policy did not contain appropriate language and/or exclusion which specifically preserved its statutory immunity. The West Virginia Supreme Court of Appeals has recently recognized that it is irrelevant that the above language appears in the Certificate

² Moreover, in other contexts, such as workers’ compensation, the West Virginia Supreme Court of Appeals has likewise held that immunity from tort liability is not waived to the extent that liability insurance coverage is available. Syl. Pt. 4, Deller v. Naymick, 342 S.E.2d 73 (W. Va. 1985).

of Liability Insurance, as opposed to the body of the insurance policy. See Hess v. W. Va. Dept. of Corrections, 227 W. Va. 15, 705 S.E.2d 125 (2010).³

Furthermore, an endorsement is present within the National Union policy that incorporates the Certificate of Liability Insurance into the original policy, thereby confirming that the immunities under the Act were preserved. On July 1, 2008, Endorsement No. 10 of the National Union policy became effective and formed a part of Policy No. RMCA 160-76-18. This endorsement explicitly modified the original policy,

It is agreed that the insurance afforded by this insurance to each West Virginia Political Subdivision, charitable or public service organization or emergency services agency covered by Certificates of Liability Insurance on file with the company, applies subject to the following provisions: . . . 2. It is agreed that provisions of the Certificate of Liability Insurance issued to each West Virginia Political Subdivision, charitable or public service organization, or emergency services agency are incorporated into this policy.

Based on this amendment, the language contained within the Certificate of Liability Insurance was irrevocably incorporated into the policy as if it has existed at the date of the policy's inception. Therefore, this Court is of the opinion that this clause "is sufficiently 'conspicuous, plain, and clear' so as to clearly identify

³ In Hess, the West Virginia Supreme Court of Appeals stated,

In analyzing whether qualified immunity bars the instant negligence complaint, the first determination that must be made is whether the relevant insurance policy waives the defense of qualified immunity. . . . In the instant case, the insurance policy at issue . . . does not waive the Appellant's qualified immunity. Rather, the Certificate of Liability Insurance to the policy expressly provides that the additional insured [Division of Corrections] does not waive any statutory or common law immunities conferred upon it.

227 W. Va. at 5, 705 S.E.2d at 130. Moreover, the West Virginia Supreme Court of Appeals has noted that "[a]s a general rule, legally valid principles of law set out in an opinion as dicta of the Supreme Court should not be disregarded by a trial court without a compelling reason." West Virginia Dept. of Transp. v. Parkersburg Inn, Inc., 671 S.E.2d 693 (W. Va. 2008).

the precise limitation of liability it is intended to impart.” Id. at 182, 632 S.E.2d at 338 (quoting Syl. Pt. 10, in part, National Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W. Va. 734 (1987)).

Nevertheless, the Plaintiffs argue that the West Virginia Supreme Court has held, “[A]n insurance company may incorporate limiting terms and conditions that violate W. Va. Code § 33-6-31 (2006) into a governmental entity’s insurance policy. However, to be permissible under W. Va. Code § 29-12A-16(a) (2003), the limiting terms and conditions in the insurance policy must be ‘determined by the political subdivision in its discretion.’” Gibson v. Northfield Insurance Co., 219 W. Va. 40, 631 S.E.2d 598 (2005). They contend no evidence is present that the Certificate was seen by a representative of any entity other than the BRIM, or, more importantly, the insured, the City of Elkins, was given the opportunity to make any decision to preserve immunity rather than insure its liability under the coverage purchased.

In this case, the City of Elkins chose to purchase an insurance policy through BRIM that included the preservation of any and all immunities provided by law. Notably, the City argued, in its Motion to Dismiss, that the City did not waive its statutory immunity. The Gibson case cited by the Plaintiffs was decided on a unique set of facts. Notably, the Gibson case dealt with the inclusion of limiting language that allowed an insurance company to reduce the available limits by the cost of investigating and defending the claim, which the West Virginia Supreme Court held to be contrary to public policy. Hence, this Court is of the opinion that the Plaintiffs argument under Gibson was misplaced.

This Court is of the opinion that immunity extends to damages not covered by workers' compensation. The West Virginia Supreme Court of Appeals has held that the Tort Reform Act "provides immunity to a political subdivision for all damages arising from a tortuous injury, not merely for those compensated by workers' compensation." O'Dell, 188 W. Va. at 610, 425 S.E.2d at 565 (emphasis added). Accordingly, Defendant Stanton's and the City's immunity applies to all damages claimed by Plaintiff Jenkins. The Court has also noted that "derivative claims for loss of love, society, comfort, companionship, and services stand or fall with [the directly injured plaintiff's] claims." Marlin v. Bill Rich Const., Inc., 198 W. Va. 635, 656, 482 S.E.2d 620, 641 (1996). Therefore, because Defendant Stanton and the City are immune from Plaintiff Jenkins's direct claims, they are also immune from Plaintiff McNabb's derivative claims, specifically her claim of loss of consortium.

Because Defendant Stanton and the City of Elkins are immune from liability, this Court is of the opinion that National Union is not required to pay for the Plaintiffs claims. Nevertheless, Westfield argues that the City of Elkins is responsible for meeting West Virginia's minimum financial responsibility requirements under W. Va. Code § 17D-4-12(b)(2) (2009). As explained above, this Court is of the opinion that the City of Elkins is immune from liability in this particular case, and the amount of liability limits within its insurance policy is simply a moot point.

Furthermore, if the Court were to accept Westfield's argument, the concept of immunity in W. Va. Code § 29-12A-5(a)(11) would be undermined. In

support of this contention, W. Va. Code § 17D-4-12 was originally enacted in 1951 and amended in 1959, 1979, and 1991. Notably, the 1991 and 1979 versions contain the same language under the latest version of § 17D-4-12(b)(2). In contrast, the Tort Reform Act was legislatively enacted in 1986. At that time, the West Virginia Legislature was aware of W. Va. Code § 17D-4-12(b)(2); however, it did not create an exception for § 17D-4-12(b)(2).

Moreover, according to W. Va. Code § 29-12A-2 (2008), the purpose of the Tort Reform Act was to establish certain immunities and limitations to assist municipalities in procuring adequate liability insurance coverage at a reasonable cost. If the City in this particular situation was required to satisfy W. Va. Code § 17-D-4-12(b)(2), the purpose of the Tort Reform Act would be frustrated. By forcing National Union to compensate the Plaintiffs, the current premiums charged, which were established with an expectation that no judgments or settlement would be paid in this type of case, will increase, possibly making it unaffordable for municipalities to purchase.⁴ Therefore, this Court is of the opinion that because the Legislature did not draft an exception in § 29-12A-5(a)(11) and the purpose of the Tort Reform Act was to assist municipalities in procuring adequate liability insurance coverage at a reasonable cost, National Union does not have to compensate the Plaintiffs up to the limits of the policy or meet the minimum requirements of W. Va. Code § 17D-4-12(b)(2).

B. Greenwich Policy (Bombardier/Gallagher Bassett) and Westfield Policy

Generally, a tort-feasor's liability carrier has primary coverage and

⁴ The Court recognizes that the outcome may have been drastically different if it were presented with a different set of facts.

accordingly, controls litigation on behalf of the tort-feasor insured; however, because this Court finds that the National Union policy is inapplicable on governmental immunity grounds, the analysis narrows between the respective policies of Bombardier and Westfield. See State ex rel. State Auto Mut. Ins. Co. v. Steptoe, 190 W. Va. 262, 438 S.E.2d 54 (1993).

As noted above, the vehicle driven by Plaintiff Jenkins was owned by Bombardier and covered by two insurance policies: the Greenwich policy, purchased by Bombardier, and the Westfield policy, purchased by Plaintiff Jenkins. According to the West Virginia Supreme Court of Appeals,

If the non-ownership coverage offered by one of the policies involved is “excess insurance” the conclusion is generally reached that the policy issued to the owner of the vehicle is the ‘primary’ policy and the company issuing it is liable up to the limits of the policy without apportionment, although the policy contains a “pro-rata” clause. Thus, the general statement of insurance law – “that insurance follows the automobile, rather than the driver.”

Allstate Ins. Co. V. State Auto. Mut. Ins. Co., 178 W. Va. 704, 706-07, 364 S.E.2d 30, 32-33 (1987) (internal citations omitted). This Court is of the opinion that Westfield’s coverage is secondary to Bombardier’s Greenwich coverage.

Moreover, because the Court has denied the Plaintiff’s motion regarding National Union policy, Defendant Stanton falls within the definition of uninsured motorist as defined by W. Va. Code § 33-6-31(c). According to § 33-6-31(c), “the term ‘uninsured motor vehicle’ shall mean a motor vehicle as to which there is no: Bodily injury liability insurance and property damage liability insurance both in the amounts specified by section two, article four, chapter seventeen-d of this code, as amended from time to time[.]”

Bombardier and Gallagher Bassett contend that Plaintiff Jenkins is not entitled to coverage under the Greenwich policy. Specifically, they argue that two exclusions apply. The relevant clause of the Greenwich policy states,

We will pay all sums that the “insured” is legally entitled to recover as compensatory damages from the owner or driver of an “uninsured” or “underinsured motor vehicle.” The damages must result from “bodily injury” sustained by the “insured,” or “property damage” caused by an “accident.” The owner’s or driver’s liability for these damages must result from the ownership, maintenance or use of the “uninsured” or “underinsured” motor vehicle.

They argue that the policy contains the following exclusion: “This insurance does not apply to any of the following: . . . The direct or indirect benefit of any insurer or self-insurer under any workers’ compensation, disability benefits or similar law.” Accordingly, Bombardier and Gallagher Bassett contend that because Plaintiff Jenkins received a direct benefit under workers’ compensation, his claims are excluded under the Greenwich policy.

Moreover, they contend that the policy contains a second exclusion in the definitions of “uninsured and “underinsured” vehicles. The policy defines “Uninsured motor vehicle” as “a land motor vehicle or ‘trailer’: . . . [f]or which no liability bond or policy at the time of an ‘accident’ provides at least the amounts required by the West Virginia Motor Vehicle Safety Responsibility Law” In addition, the policy defines “Underinsured motor vehicle” as “a land motor vehicle or ‘trailer’ to which a liability bond or policy applies at the time of the ‘accident’ but the amount paid for ‘bodily injury’ or ‘property damage’ to an insured under that bond or policy is not enough to pay the full amount the ‘insured’ is legally entitled to recover as damages.” Both definitions have the same exception: “However,

“uninsured motor vehicle” and “underinsured motor vehicle” “does not include any vehicle . . . owned by a governmental unit or agency.” They contend that the vehicle driven by Stanton at the time of the accident was owned by the City of Elkins and accordingly, it falls outside the definition of an uninsured and underinsured motor vehicle.

Furthermore, Bombardier and Gallagher Bassett contend that the auto medical payments benefits afforded by the Greenwich policy contains the following exclusion: “This insurance does not apply to any of the following: . . . ‘Bodily injury’ to you or your ‘employee’ arising out of and in the course of employment by you.” They argue that Plaintiff Jenkins was an employee of Bombardier and that, at the time of the accident, Jenkins was acting within the course and scope of his employment for Bombardier. Accordingly, no coverage should be afforded because of the exclusion for injuries sustained by Bombardier employees in the course of their employment.

In contrast, Third-Party Defendant Westfield contends that the Plaintiffs are entitled to benefits under the plain language of the Greenwich policy. Furthermore, the Plaintiffs argue that workers’ compensation exclusions and governmental vehicle exclusions are not valid under West Virginia law when considering the issue of a third-party’s liability. See Henry v. Benyo, 203 W. Va. 172, 506 S.E.2d 615 (1998). The Plaintiffs also contend that Bombardier and Gallagher Bassett’s argument that because of the exclusion for injuries sustained by Bombardier employees in the course of their employment, no coverage should be afforded is inapplicable according to West Virginia Supreme Court precedent.

See Wisman v. Rhodes, 191 W. Va. 542, 447 S.E.2d 5 (1994).

Regarding the workers' compensation exclusion, this Court is of the opinion that the Greenwich workers' compensation exclusion does not apply in this case. As explained above, the Plaintiffs argue that Henry v. Benyo dictates the outcome of this case. They contend a workers' compensation exclusion is not valid under West Virginia law when considering the issue of a third-party's liability. At first glance, Henry v. Benyo appears controlling; however, the West Virginia Supreme Court of Appeals explicitly noted the following in Footnote 9 of the case:

We do not, by our decision today, consider whether the same result would obtain where the employer's motor vehicle insurance policy, in whole or in part, specifically precludes recovery of underinsured motorist benefit by the injured employee if he/she has received workers' compensation benefits for injuries resulting from the same accident. As the circuit court has not consider this issue in its decision of this case and as the parties have not raised this matter on appeal, we need not address further this hypothetical situation.

203 W. Va. at 181, 506 S.E.2d at 624. Therefore, because this policy specifically precludes recovery of uninsured and underinsured motorist benefit by the injured employee if he has received workers' compensation benefits, this Court is hesitant to adopt the Plaintiffs' reasoning.

However, as Westfield explains in its response to Bombardier's and Gallagher Bassett's Motion for Summary Judgment, the West Virginia Supreme Court of Appeals has recently addressed the issue of whether a workers' compensation exclusion in an employer's policy can exclude an employee from receiving uninsured or underinsured benefits. Miralles, 216 W. Va. at 98, 602 S.E.2d at 541. In Miralles, an employee was attempting to recovering

underinsured benefits from his employer's policy after he was severely injured in an automobile accident with a third-party. Notably, the Plaintiff had already received workers' compensation benefits, and the employer argued that a workers' compensation exclusion precluded the employee from receiving any benefit. The employer contended that "uninsured and underinsured motorist coverage does not apply to '[a]ny obligation for which the 'insured' may be held liable under any workers' compensation, disability benefits or unemployment compensation law or any similar law.'" Id. at 93-96, 602 S.E.2d at 536-39 (citations omitted).

The West Virginia Supreme Court of Appeals reexamined the Court's holding in Henry v. Benyo,

"Where, however, an employee's work-related injuries are caused by a third party . . . W. Va. Code § 33-6-31(h) does not apply because the employer is not liable for the accident. In this scenario, it is the third party who is technically 'at fault' for the collision and resulting damages. Therefore, while the employee may recover workers' compensation benefits for his/her injuries resulting from the accident which occurred in the course and scope of his/her employment, he/she is not statutorily barred from also pursuing his/her claims against the third party as this individual does not enjoy the immunity afforded by the workers' compensation statute."

Id. at 97, 602 S.E.2d at 540 (citations omitted). The Court then reasoned,

[The employee's] work-related injuries were caused by a third party; consequently, [his employer] was not "liable," or otherwise "at fault," for the subject accident or for the resultant injuries. Therefore, because [the employee] was injured by a third-party tortfeasor and [his employer] was not "liable" for the subject accident and injuries under any workers' compensation law, the workers' compensation exclusion does not apply.

Id. at 97-98, 602 S.E.2d at 540-41. Therefore, the Court held the circuit court

committed error in granting summary judgment in favor of the employer. Id. at 98, 602 S.E.2d at 541.

This Court is of the opinion that the Greenwich workers' compensation exclusion does not apply in this case. Here, the Plaintiff's work-related injuries were caused by Defendant Stanton, a third-party. Accordingly, Bombardier was not "liable" or "at fault" for the Plaintiffs injuries, and therefore, its workers' compensation exclusion does not apply. Bombardier cannot hide behind the immunities created by the workers' compensation statute. Nevertheless, this holding does not end the Court's analysis.

The most problematic issue before this Court is the policy's governmental vehicle exclusion in the definitions of uninsured and underinsured vehicles. As the Plaintiffs note, this definitional exclusion is a newer exclusion in the State of West Virginia. According to the West Virginia Supreme Court of Appeals, "Insurers may incorporate such terms, conditions and exclusions in an automobile insurance policy as may be consistent with the premium charged, so long as any such exclusion does not conflict with the spirit and intent of the uninsured and underinsured motorist statutes." Syl. Pt. 3, Deel v. Sweeney, 181 W. Va. 460, 383 S.E.2d 92 (1989).⁵

The Uninsured Motorist Law, W. Va. Code § 33-6-31, requires an owner or operator of a motor vehicle to possess insurance in a minimum amount of "twenty thousand dollars because of bodily injury to or death of one person in any

⁵ The Court recognizes that uninsured motorist coverage is required by state law, whereas underinsured motorist coverage is optional and not legally required. Because of the Court's holding regarding the liability of Defendant City of Elkins and Stanton, this Court is analyzing only the issue of uninsured motorist coverage.

one accident” This Court recognizes that this provision may not be altered by an insurance policy exclusion. Therefore, this Court is of the opinion that the governmental vehicle exclusion is valid and enforceable above the mandatory limits of uninsured motorist coverage required by W. Va. Code § 33-6-31. To the extent that a governmental vehicle exclusion attempts to preclude recovery of statutorily mandated minimum limits of uninsured motorist coverage, such exclusion is void and ineffective.⁶

Finally, this Court is of the opinion that the auto medical payments benefits exclusion is applicable. According to the West Virginia Supreme Court of Appeals, “Where provisions in an insurance policy are plain and unambiguous and where the provisions are not contrary to statute, regulation, or public policy, the provisions will be applied and not construed.” Syl. Pt. 1, Keiper v. State Farm Mut. Auto. Ins. Co., 189 W. Va. 179, 180, 429 S.E.2d 66, 67 (1993) (citations omitted). Here, Plaintiff Jenkins was an employee of Bombardier and that, at the time of the accident, Jenkins was acting within the course and scope of his employment for Bombardier. Accordingly, this Court is of the opinion that no coverage should be afforded because of the exclusion for injuries sustained by Bombardier employees in the course of their employment.

In sum, although the workers’ compensation exclusion is inapplicable, the governmental vehicle exclusion is applicable above the mandatory limits of the uninsured motorist statute, and the auto medical payments benefits exclusion is also applicable, this Court FINDS that Bombardier may be responsible up to the

⁶ See Universal Underwriters Ins. Co. v. Taylor, 185 W. Va. 606, 408 S.E.2d 358 (1991) (holding “provisions in an insurance policy that are more restrictive than statutory requirements are void and ineffective as against public policy”).

minimum amount of uninsured coverage required by statute (\$20,000.00).

In brief, Westfield contends that Plaintiff Jenkins is not entitled to coverage under the Westfield policy. Specifically, Westfield argues that the Auto Medical Payments coverage is modified by C(3) of "Section IV – Exclusions." It states, "We do not provide Auto Medical Payments Coverage for **bodily injury**: . . . Occurring during the course of employment if workers' compensation benefits are required or available for the **bodily injury**."

According to the West Virginia Supreme Court, "Where provisions in an insurance policy are plain and unambiguous and where the provisions are not contrary to statute, regulation, or public policy, the provisions will be applied and not construed." Id. at 180, 429 S.E.2d at 67. This Court is of the opinion that this provision is not contrary to statute, regulation, or public policy, and as a result, the Plaintiffs are not entitled to recover under Westfield's auto medical payments coverage.

Moreover, Westfield contends the Plaintiffs are not entitled to Underinsured Motorist Coverage under the Westfield policy. It argues that although Westfield's policy contains an Underinsured Motorist Coverage provision, the vehicle driven by Defendant Stanton does not qualify as an underinsured motor vehicle for purposes of coverage. Specifically, the endorsement entitled "UNDERINSURED MOTORIST COVERAGE – WEST VIRGINIA" provides, in pertinent part, "Underinsured motor vehicle' means a "land motor vehicle or trailer or any type to which a liability bond or policy applies at the time of the accident but the amount paid for *bodily injury* or *property*

damage to an *insured* under that bond or policy is not enough to pay the full amount the insured is legally entitled to recover as damages.”

However, the policy conspicuously and unambiguously explains that “underinsured motor vehicle” does not include any vehicle or equipment “that is an uninsured motor vehicle.” The policy defines an “uninsured vehicle” as “a land motor vehicle or trailer of any type [t]o which neither a liability bond or policy nor case or securities on file with the West Virginia State Treasurer applies at the time of the accident.” Because of this Court’s holding regarding the immunity of Defendant Stanton and the City of Elkins, this Court is of the opinion that Westfield’s underinsurance motorist coverage is inapplicable.

Nevertheless, Westfield contends that the Plaintiffs may be entitled to limited Uninsured Motorist Coverage under its policy. Westfield’s Policy’s “UNINSURED MOTORIST COVERAGE – WEST VIRGINIA” endorsement provides that “[Westfield] will pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** where such coverage is indicated as applicable in the Declarations because of: 1. **Bodily injury** sustained by an **insured** and caused by an accident; and 2. **Property damage** caused by an accident.” As noted above, the policy defines an “uninsured vehicle” as “a land motor vehicle or trailer of any type [t]o which neither a liability bond or policy nor case or securities on file with the West Virginia State Treasurer applies at the time of the accident.”

The endorsement continues, “However, ‘**uninsured motor vehicle**’ does not include any vehicle or equipment . . . [o]wned by any governmental unit or

agency including, but not limited to . . . the State of West Virginia or any of its political subdivisions or agencies.” Westfield’s uninsured coverage requirements also have a preclusive effect, “[Westfield does] not provided Underinsured Motorist Coverage to the extent benefits apply, either directly or indirectly by: . . . [a]ny works’ compensation or disability benefits insurance company.” Nevertheless, Westfield contends it may be responsible for the mandatory minimum underinsured coverage as statutorily required under W. Va. Code § 17D-4-12.

Based on the Court’s reasoning when discussing Bombardier’s coverage, this Court is of the opinion that the governmental vehicle exclusion is valid and enforceable above the mandatory limits of uninsured motorist coverage required by W. Va. Code § 33-6-31. To the extent that a governmental vehicle exclusion attempts to preclude recovery of statutorily mandated minimum limits of uninsured motorist coverage, such exclusion is void and ineffective. Therefore, Westfield may be responsible for up to \$20,000.00.

ORDER

This Court **ORDERS** that Defendants City of Elkins and Stephen P. Stanton’s and Third-Party Defendant National Union Fire Insurance Company of Pittsburgh, PA’s, motions for summary judgment are **GRANTED**.

This Court **FURTHER ORDERS** that Plaintiffs Jeffery Jenkins and M. Jean McNabb’s, Third-Party Defendant Bombardier Aerospace Corporation’s, and Third-Party Plaintiff Westfield Insurance Company’s motions for summary judgment are **GRANTED IN PART** and **DENIED IN PART**.

This Court **FURTHER ORDERS** the Clerk to send certified copies of this

Order to the following:

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Entered: June 8, 2011



STATE OF WEST VIRGINIA
COUNTY OF HARRISON, TO-WIT:

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18th
Family Court Circuit of Harrison County, West Virginia, hereby certify the
foregoing to be a true copy of the ORDER entered in the above styled action
on the 8th day of June, 2011.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix

Seal of the Court this 9th day of June, 2011.

Donald L. Kopp II
Fifteenth Judicial Circuit & 18th Family Court
Circuit Clerk
Harrison County, West Virginia