IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 11-1059

(Harrison County Docket No. 10-C-164 (J. Matish)

Jeffrey Jenkins and M. Jean McNabb,

Petitioners
And Plaintiffs, hereinbelow,

v.

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

Respondents
And Defendants, hereinbelow,

And

Westfield Insurance Company,

Respondent
And Third-Party Plaintiff, hereinbelow,

v.

AIG Insurance a/k/a National Union Fire Insurance
Company of Pittsburgh, PA,

Respondent
And Third-Party Defendant, hereinbelow,

And

Bombardier Aerospace Corporation,

Respondent
And Third-Party Defendant, hereinbelow.

PETITION FOR APPEAL

JIVIDEN LAW OFFICES, PLLC
Of Counsel

David A. Jividen (WV Bar #1889)
Chad C. Groome (WV Bar #9810)
729 N. Main Street
Wheeling, WV 26003
(304) 232-8888
(304) 232-8555 facsimile
djividen@jividenlaw.com
cgroome@jividenlaw.com

ANGOTTI & STRAFACE, LC
Of Counsel

David J. Straface (WV Bar #3634)
John R. Angotti (WV Bar #5068)
274 Spruce Street
Morgantown, WV 26505
(304) 292-4381
(304) 292-7775 facsimile
djstraface@frontier.com
johnangotti@hotmail.com

TABLE OF CONTENTS

KIND OF PROCEEDING AND NATURE OF RULING.....5

STATEMENT OF FACTS.....7

ASSIGNMENTS OF ERROR.....11

POINTS AND AUTHORITIES RELIED UPON.....12

DISCUSSION OF LAW.....16

I. The Circuit Court of Harrison County erred when it dismissed all claims against the defendants, City of Elkins and Stephen P. Stanton (and their insurer National Union Fire Insurance Company of Pittsburgh, PA), on the basis of statutory immunity under the West Virginia Tort Claims and Insurance Reform Act, W.Va. Code § 29-12A-1, *et seq.*

a. The Circuit Court's finding that the defendants were immune from the plaintiffs' claims by virtue of W.Va. Code § 29-12A-5(a)(11) and O'Dell v. Town of Gauley Bridge, 188 W.Va. 596, 425 S.E.2d 551 (1992) was in error as the O'Dell decision's interpretation of W.Va. Code § 29-12A-5(a)(11) should be revisited and abrogated.....16

b. The Circuit Court's finding that the Petitioners could not maintain their claims against the Respondents despite W.Va. Code § 29-12A-5(a)(11) was in error, as the policy of insurance providing coverage to the City of Elkins and Stephen P. Stanton does not contain sufficient language to preserve the defendants' immunity under W.Va. Code § 29-12A-5(a)(11).....20

II. The Circuit Court of Harrison County erred when it reduced the UM/UIM coverage available to the Petitioners under Bombardier's policy of insurance issued by Greenwich from One Million Dollars ($1,000,000.00) to Twenty Thousand Dollars ($20,000.00) based upon a "governmental vehicle" exclusion contained in the policy, as such an exclusion offends substantial West Virginia public policy and has been found to be void in a majority of jurisdictions that have similarly addressed the issue.....23

III. The Circuit Court of Harrison County erred when it reduced the UM/UIM coverage available to the Petitioners under their personal policy of insurance issued by Westfield from Five Hundred Thousand Dollars ($500,000.00) to Twenty Thousand Dollars ($20,000.00) based upon a "governmental vehicle" exclusion contained in the policy, as such an exclusion offends substantial West Virginia public policy and has been found to be void in a majority of jurisdictions that have similarly addressed the issue.....30

IV. The Circuit Court of Harrison County erred when it found that the Petitioners were not entitled to the proceeds of the medical payments coverage under the Greenwich policy based upon the application of an exclusion for injuries arising out of and in the course of employment.....33

PRAYER FOR RELIEF.....35

KIND OF PROCEEDING AND NATURE OF RULING

The instant appeal arises out of the Circuit Court of Harrison County (Judge Matish) in the case styled *Jeffrey Jenkins and M. Jean McNabb vs. City of Elkins, Stephen P. Stanton, Westfield Insurance Company, National Union Fire Insurance Co. of Pittsburgh, PA, and Bombardier Aerospace Corporation* – Civil Action No. 10-C-164. The instant appeal regards the Circuit Court's June 8, 2011 *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. (J.Appx., p. 549).*

The aforesaid June 8, 2011 *Order*, disposed of Respondents, City of Elkins and Stephen P. Stanton, and National Union Fire Insurance Company of Pittsburgh, PA, as parties to the action, pursuant to **Rule 56 of the West Virginia Rules of Civil Procedure**, on the basis of immunity under **W.Va. Code § 29-12A-5(a)(11)** and its interplay with the City's insurance policy. *(J.Appx., pp. 555-563).* Said June 8, 2011 *Order* further disposed of all remaining insurance issues in the case by finding that only Forty Thousand Dollars ($40,000.00) of the One Million Five Hundred Thousand Dollars ($1,500,000.00) of UM/UIM coverage limits under two (2) UM/UIM policies of insurance (Greenwich and Westfield) were available to the Petitioners. *(J.Appx., pp. 563-573).* The Court held that a "governmental vehicle" exclusion in each UM/UIM policy excluded the plaintiffs' claims from coverage, with the exception of the first $20,000.00 of each UM policy in compliance with West Virginia's mandatory minimum amount of UM coverage, **West Virginia Code § 33-6-31(b)**. *(J.Appx., pp. 570,573).* Lastly, the Court

found that the plaintiffs were not entitled to benefits under the auto medical payments coverage issued to their employer, Bombardier, by Greenwich, citing an exclusion for acts of employees in the scope and course of their employment. *(J.Appx., 570-571).*

The instant matter is ripe for appeal, there being three (3) parties dismissed from the case by the June 8, 2011 *Order*, and there being no remaining triable issues of fact. This instant appeal raises several matters of first impression to this Court including, but not limited to, the issues of what language in an insurance policy, pursuant to **Bender v. Glendenning, 219 W.Va. 174, 632 S.E.2d 330 (2006),** is sufficient to preserve the immunities of a political subdivision; and whether a "government vehicle" exclusion in an UM/UIM insurance policy is void as against public policy in West Virginia as similarly found by a majority of jurisdictions that have addressed the application of such an exclusion.

STATEMENT OF FACTS

Petitioner, and plaintiff hereinbelow, Jeffrey Jenkins, was severely injured as the result of an automobile collision that occurred on October, 27, 2008. *(J.Appx., p. 553).* Specifically, Mr. Jenkins, while driving in the course of his employ with Bombardier Aerospace Corporation, collided with a vehicle owned by the City of Elkins and operated by it employee, Stephen P. Stanton, when Mr. Stanton caused the City's vehicle to dart in front of Mr. Jenkins without the right of way. Liability in this matter is clear and Mr. Stanton admits fault for the accident. *(J.Appx., p. 563).* Mr. Jenkins suffered serious injuries in the accident including, but certainly not limited to, left hip dislocation, left hip fracture, and a left open distal tibia fracture. His injuries required surgical intervention and resulted in total specials of nearly Two Hundred Thousand Dollars ($200,000.00). Mr. Jenkins received workers' compensation coverage, but those benefits have not come close to making him whole for the injuries he sustained in the aforesaid accident. *(J.Appx., p. 564).* Mr. Jenkins's spouse, M. Jena McNabb, was not injured in the accident, but also suffered losses in the way of the care, comfort, and consortium of her husband, Jeffrey Jenkins. *(J.Appx., pp. 7-8).*

When this claim began, Mr. Jenkins was of the reasonable belief that he had Two Million Five Hundred Thousand Dollars ($2,500,000.00) in insurance coverage available to him for this accident. One Million Dollars ($1,000,000.00) in liability coverage was believed to be available through the City of Elkins's insurance policy issued by National Union Fire Insurance Company of Pittsburgh, PA. *(J.Appx., p. 53).* One Million Dollars ($1,000,000.00) in first-party UM or UIM coverage was understood to be available from Mr. Jenkins's employer's policy issued by Greenwich Insurance. *(J.Appx., p. 146).* Finally, Five Hundred Thousand Dollars ($500,000.00) in first-party UM or UIM coverage was understood to be available from Mr. Jenkins's personal

auto policy issued by Westfield Insurance. *(J.Appx., p. 170).* Of note, there were also two (2) small first-party auto medical payments coverages believed to be available to Mr. Jenkins thought the Greenwich and Westfield policies of insurance. *(J.Appx., pp. 142, 170).*

Nevertheless, during litigation, all of the insurers asserted that their policies provided no coverage, or very limited coverage, for the Petitioners' injuries. The City of Elkins, Stephen P. Stanton, and National Union Fire Insurance Company alleged that the immunity provided to the City by **West Virginia Code § 29-12A-5(a)(11)** barred the Petitioners' claims and that the City's policy preserved that statutory immunity. *(J.Appx., 253, 406, 516, 541).* Greenwich argued that its UM, UIM and auto medical payments coverages did not provide coverage to the Petitioners based upon various policy exclusions including, but not limited to, a workers' compensation exclusion and government vehicle exclusion. *(J.Appx., 340, 524).* Westfield also denied UM, UIM and auto medical payments coverage to the Petitioners based upon similar policy provisions. *(J.Appx., 118, 396, 509).*

These allegations eventually led to volumes of motions and cross-motions for summary judgment filed by all parties and insurers in the case. These motions and cross-motion left no insurance coverage issues unaddressed.

The Circuit Court of Harrison County (Judge Matish) ruled upon these motions and cross-motions in a June 8, 2011 omnibus order styled *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. (J.Appx., p. 549). In that Order, the Circuit Court generally ruled as follows:

- The City of Elkins and Stephen P. Stanton were immune from the Petitioners' claims pursuant to **West Virginia Code § 29-12A-5(a)(11)** since the Petitioners' claims were covered in part by workers compensation. *(J.Appx., pp. 553-573).*
- The Petitioners could not maintain their claims against the City's insurance policy, issued by National Union Fire Insurance Company of Pittsburgh, PA, since the policy allegedly preserve the aforesaid immunity. *(Id.).*
- The Petitioners did not have One Millions Dollars ($1,000,000.00) of UM/UIM coverage available to them under the Greenwich policy since the accident involved a government vehicle and the policy contained a government vehicle exclusion. However, the Circuit Court found that Twenty Thousand Dollars ($20,000.00) of UM coverage was available to the Petitioners to comport with West Virginia's mandatory minimum UM requirements. *(J.Appx., pp. 563-573).*
- The Petitioners did not have Five Hundred Thousand Dollars ($500,000.00) of UM/UIM coverage available to them under their own Westfield policy since the accident involved a government vehicle and the policy contained a government vehicle exclusion. However, the Circuit Court found that Twenty Thousand Dollars ($20,000.00) of UM coverage was available to the Petitioners to comport with West Virginia's mandatory minimum UM requirements. *(Id.).*
- The Petitioners were not entitled to coverage under the Greenwich policy's auto medical payments coverage (the policy issued to Petitioners' employer) due to an exclusion for injuries which occur to employees in the course and scope of their

employment. The Order was silent as to the Petitioners' entitlement as to the auto medical payments coverage benefits under the Westfield policy. *(Id.)*.

Accordingly, the Circuit Court found in its June 8, 2011 Order that, of the Two Million Five Hundred Thousand Dollars ($2,500,000.00) coverage limits of the various liability and UM/UIM policies, one Forty Thousand Dollars ($40,000.00) was available to the Petitioners. Obviously, this amount is nowhere close to an amount that would make the Petitioners whole. As the Court may expect, both Greenwich and Westfield immediately tendered their now-modified limits to the Petitioners. These offers left no triable issue of fact in this case and left the Petitioners in a position where they were compelled to either appeal the erroneous rulings of the Circuit Court, or accept the now-modified limits to their detriment.

ASSIGNMENTS OF ERROR AND MANNER IN WHICH CIRCUIT COURT RULED

1. The Circuit Court of Harrison County erred when it dismissed all claims against the defendants, City of Elkins and Stephen P. Stanton (and their insurer National Union Fire Insurance Company of Pittsburgh, PA), on the basis of statutory immunity under the West Virginia Tort Claims and Insurance Reform Act, W.Va. Code § 29-12A-1, *et seq.*, as:
   a. The Circuit Court's finding that the defendants were immune from the plaintiffs' claims by virtue of W.Va. Code § 29-12A-5(a)(11) and O'Dell v. Town of Gauley Bridge, 188 W.Va. 596, 425 S.E.2d 551 (1992) should be found to be in error and the O'Dell decision's interpretation of W.Va. Code § 29-12A-5(a)(11) be revisited and abrogated; and
   b. The Circuit Court erroneously found that immunities were preserved by the he subject policy of insurance.

2. The Circuit Court of Harrison County erred when it reduced the UM coverage (or UIM coverage) available to the plaintiffs under Bombardier's policy of insurance issued by Greenwich from One Million Dollars ($1,000,000.00) to Twenty Thousand Dollars ($20,000.00), based upon a "governmental vehicle" exclusion contained in the policy, as such an exclusion offends substantial West Virginia public policy and has been found to be void in a majority of jurisdictions that have similarly addressed the issue.

3. The Circuit Court of Harrison County erred when it reduced the UM coverage (or UIM coverage) available to the plaintiffs under the plaintiffs personal policy of insurance issued by Westfield from Five Hundred Thousand Dollars ($500,000.00) to Twenty Thousand Dollars ($20,000.00), based upon a "governmental vehicle" exclusion contained in the policy, as such an exclusion offends substantial West Virginia public policy and has been found to be void in a majority of jurisdictions that have similarly addressed the issue.

4. The Circuit Court of Harrison County erred when it found that the plaintiffs' auto medical payments coverage claims were excluded from their employer's policy issued by Greenwich by an exclusion for injuries sustained by employees in the scope and course of their employment.

POINTS AND AUTHORITIES RELIED UPON

West Virginia Statutes, Regulations, and Rules:

W.Va. Code § 23-2-6 19

W.Va. Code § 29-12-5 22

West Virginia Code § 29-12A-1, *et seq* 11,16

W.Va. Code § 29-12A-4(b)(1) 19

W.Va. Code § 29-12A-4(c) 19

W.Va. Code § 29-12A-5 19

West Virginia Code § 29-12A-5(a)(11) 5,8-9,11,16-17,19-20,35

W.Va. Code § 33-6-17 25,31

W.Va.Code § 33-6-31 25,27,30-31,33

West Virginia Code § 33-6-31(b) 5,24,27,31

West Virginia Code § 33-6-31(k) 26,32

Rule 56 of the West Virginia Rules of Civil Procedure 5

West Virginia Caselaw:

Adkins v. Meador, 201 W.Va. 148, 494 S.E.2d 915 (1997) 25-26

Adkins v. St. Francis Hospital of Charleston, 149 W.Va. 705, 143 S.E.2d 154 (1965) 16

American States Ins. Co. v. Tanner, 211 W.Va. 160, 563 S.E.2d 825 (2002) 26

Bell v. State Farm Mut. Auto. Ins. Co., 157 W.Va. 623, 207 S.E.2d 147 (1974) 25

Bender v. Glendenning, 219 W.Va. 174, 632 S.E.2d 330 (2006) 6,20-22

Charter Communications VI, PLLC v. Community Antenna Service, Inc., 211 W.Va. 71, 561 S.E.2d 793 (2002) 18-19

Cunningham v. Hill, 226 W.Va. 180, 698 S.E.2d 944 (2010).....25-26,28,32

D'Annunzio v Security-Connecticut Life Ins. Co., 186 W.Va. 39, 410 S.E.2d 275 (1991).....21

Deel v. Sweeney, 181 W.Va. 460, 383 S.E.2d 92 (1989).....25,31

Expedited Transp. Sys., Inc. v. Vieweg, 207 W.Va. 90, 529 S.E.2d 110 (2000).....19

Findley v. State Farm Mutual Automobile Ins. Co., 213 W.Va. 80, 576 S.E.2d 807 (2002).....26

Gibson v. Northfield Ins. Co., 219 W.Va. 40, 631 S.E.2d 598 (2005).....23,25,31

Henry v. Benyo, 203 W.Va. 172, 506 S.E.2d 615 (1998).....33-34

Hess v. W.Va. Dept. of Corrections, 227 W.Va. 15, 705 S.E.2d 125 (2010).....21-22

Johnson v. Continental Casualty Co., 157 W.Va. 572, 201 S.E.2d 292 (1973).....25

Keefer v. Ferrell, 221 W.Va. 348, 655 S.E.2d 94 (2007).....26

Lovings v. Norfolk & W. Ry Co., 47 W.Va. 582, 35 S.E. 962 (____).....16

Michael v. Marion County Bd. of Educ., 198 W.Va. 523, 482 S.E.2d 140 (1996).....18

Mitchell v. Broadnax, 208 W.Va. 36, 537 S.E.2d 882 (2000).....25-26

National Mutual Ins. Co., v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (1987)...22

O'Dell v. Town of Gauley Bridge, 188 W.Va. 596, 425 S.E.2d 551 (1992).....11,16-20

Parkulo v. W.Va. Bd. of Prob. and Parole, 199 W.Va. 161, 483 S.E.2d 507 (1996).....21

Perkins v. Doe, 177 W.Va. 84, 350 S.E.2d 711 (1986).....25

Randall v. Fairmont City Police Department, 186 W.Va. 336, 412 S.E.2d 737 (1991).....18

Romano v. New England Mut. Life Ins. Co., 178 W.Va. 523, 262 S.E.2d 334 (1987).....22

Simpkins v. White, 27 S.E. 361, 362 (W.Va., 1897).....17

State v. Kerns, 183 W.Va. 130, 135, 394 S.E.2d 532, 537 (1990).....19

State Auto. Mut. Ins. Co. v. Youler, 183 W.Va. 556, 396 S.E.2d 737 (1990).....26

Thomas v. Nationwide Mut. Ins. Co., 188 W.Va. 640, 425 S.E.2d 595 (1992).....26

Universal Underwriters Ins. Co. v. Taylor, 185 W.Va. 606, 408 S.E.2d 358 (1991).....25

Extra-jurisdictional Statutes, Regulations, and Rules:

18 *Del. C.* § 3902.....29

18 *Del. C.* § 3902(a)(3)(a).....29

Extra-jurisdictional Caselaw:

Commercial Union Insurance Co. v. Delaney, 550 S.W.2d 499 (Ky.Supr.,1977).....29

Cropper v. State Farm Mut. Auto. Ins. Co., 671 A.2d 423, 426 -427 (Del.Super.,1995).....29,32

Francis v. International Service Insurance Co., 546 S.W.2d 57 (Tx.Supr.,1976).....29

Franey v. State Farm Mutual Automobile Insurance Co., 5 Ill.App.3d 1040, 285 N.E.2d 151 (Ill., 1972).....29

Higgins v. Nationwide Mutual Insurance Co., 291 Ala. 462, 282 So.2d 301 (Ala.,1973).....29

Hillhouse v. Farmers Insurance Co., 226 Kan. 68, 595 P.2d 1102 (Kan.,1979).....29

Johns v. Liberty Mutual Fire Insurance Co., 337 So.2d 830 (Fla.App., 1976), *cert. denied*, 348 So.2d 949 (Fla.Supr., 1977).....29

Jones v. Southern Farm Bureau Casualty Co., 251 S.C. 446, 163 S.E.2d 306 (S.C.,1968).....29

Martin v. State Farm Mutual Automobile Insurance Co., 755 S.W.2d 638 (Mo.App., 1988).....29

McClellan v. Sentry Indemnity Co., 140 Ariz. 558, 683 P.2d 757 (Az.App.,1984).....29

Powell v. Allstate Insurance Co., 233 So.2d 38 (La.App.,1970).....29

State Farm Automobile Insurance Co. v. Greer, 777 P.2d 941 (Okla.Supr.,1989).....29

State Farm Mutual Automobile Insurance Co. v. Carlson, 130 Ga.App. 27, 202 S.E.2d 213 (Ga.App.,1973).....29

Vaught v. State Farm Fire & Casualty Co., 413 F.2d 539 (8th Cir.,1969).....29

Watters v. Dairyland Insurance Co., 50 Oh.App.2d 106, 361 N.E.2d 1068 (Oh.App.,1976).....29

Young v. Greater Portland Transit District, 535 A.2d 417 (Me.Supr., 1987).....29

Treatises, Law Reviews, and Reporters:

20 Am.Jur., Courts, Section 184.....16

1 A. Widiss, *Uninsured and Underinsured Motorist Insurance* § 8.8 (2nd ed.,1992).....29

DISCUSSION OF LAW

I. **The Circuit Court of Harrison County erred when it dismissed all claims against the defendants, City of Elkins and Stephen P. Stanton (and their insurer National Union Fire Insurance Company of Pittsburgh, PA), on the basis of statutory immunity under the West Virginia Tort Claims and Insurance Reform Act, W.Va. Code § 29-12A-1, *et seq.***

a. **The Circuit Court's finding that the defendants were immune from the plaintiffs' claims by virtue of W.Va. Code § 29-12A-5(a)(11) and O'Dell v. Town of Gauley Bridge, 188 W.Va. 596, 425 S.E.2d 551 (1992) was in error as the O'Dell decision's interpretation of W.Va. Code § 29-12A-5(a)(11) should be revisited and abrogated.**

The Circuit Court's June 8, 2011 Order should be reversed as it applies to the defendants, City of Elkins and Stephen P. Stanton, and their insured, National Union Fire Insurance Company of Pittsburgh, PA, as the Court's holding in **O'Dell v. Town of Gauley Bridge, 188 W.Va. 596, 425 S.E.2d 551 (1992)** creates an unfair and harsh result that is not in accord with current public policies. The Petitioners respectfully request that the Court revisit and modify the broad application of **W.Va. Code § 29-12A-5(a)(11)** that was articulated in the **O'Dell** opinion and its progeny.

"Stare decisis is not a rule of law but is a matter of judicial policy. 20 Am.Jur., Courts, Section 184. It is policy which promotes certainty, stability and uniformity in the law. It should be deviated from only when urgent reason requires deviation. However, stare decisis is not an inflexible policy. In the rare case when it clearly is apparent that an error has been made of that the application of an outmoded rule, due to changing conditions, results in injustice, deviation from that policy is warranted." **Adkins v. St. Francis Hospital of Charleston, 149 W.Va. 705, 718, 143 S.E.2d 154, 162 (1965).** As the Court in **Adkins** reasoned:

> Much has been written and many cliches have been formulated to demonstrate why, in a certain case, stare decisis should not apply. We think that it is sufficient to say that a rule of principle of law should not be adhered to if the only reason therefor is that it has been sanctified by age. As expressed in Lovings v. Norfolk

& W. Ry Co., 47 W.Va. 582, 35 S.E. 962, 'It has been well said that 'it is better to be right than to be consistent with the errors of a hundred years.'

"'. . .[T]he doctrine of stare decisis, like almost every other legal rule, is not without exceptions. It does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason. The authorities are abundant to show that in such cases it is the duty of courts to re-examine the question. . . .'" **Simpkins v. White, 27 S.E. 361, 362 (W.Va., 1897)(internal citation omitted).**

As the Court is well aware, in **Syllabus Point 6, of O'Dell** this Court held that the immunities provided to political subdivisions in **W.Va. Code § 29-12A-5(a)(11),** for "claim[s] covered by any workers compensation law or any employer's liability law", extended to bar personal injury claims by a non-employee of a political subdivision who was in the course of their employment at the time of their injury. The reasoning of the **O'Dell** Court in arriving at this rule was flawed, creates an unjust result, and is unmindful of changed conditions in the workers' compensation landscape. As such, it should be modified and/or abrogated to permit claims by third-party, non-governmental-employees against political subdivisions in West Virginia when those persons are acting in the course of their employ.

The rule in **O'Dell** is unduly harsh and unjust. It bars claims by persons against the political subdivisions of this State simply because they are working at the time of their injury. In the present economy, the citizens of this State are fortunate if they are able to find work, but when they are lucky enough to land a good job they are barred relief if they are maimed by an act of a political subdivision. These people are left to present their claims to workers' compensation, and will receive small fractions of their total losses – all because they had a job in a down economy.

There is no reasonable public policy justification for this rule, and there was no good reason for it at the time the **O'Dell** decision was rendered. In fact, at the time **O'Dell** was decided, West Virginia workers compensation claims were paid from a public fund. The woes of the West Virginia Workers Compensation Fund are well known, and need not be repeated herein. Those problems led to sweeping reforms that essentially privatized workers compensation in this State to promote an efficient, solvent, and affordable system of insurance. The Court in **O'Dell** essentially found it to be better public policy to shift the costs of government negligence to the public workers compensation fund, as opposed to allowing those losses to be shifted to a private insurance policy. Despite the problems we have had in this State with workers compensation, we continue to adhere to a public policy in **O'Dell** and its progeny that continues to shift the burden of government negligence upon our workers compensation programs rather than allowing low-cost, BRIM-secured private insurance policies to absorb those losses. This is a public policy that did not make sense in 1992, and makes even less sense in 2011.

Public policies aside, the **O'Dell** opinion was also based on flawed reasoning. First, The **O'Dell** Court, from the outset, ignored the paramount principle of the construction of governmental immunities – that ambiguous provisions are to be construed in favor of liability, not immunity. As this Court "explained in *Randall v. Fairmont City Police Department,* 186 W.Va. 336, 412 S.E.2d 737 (1991), that 'the general rule of construction ... favor[s] liability, not immunity: *unless the legislature has clearly provided for immunity under the circumstances....*' *Id.* at 347, 412 S.E.2d at 748 (emphasis supplied)." **Michael v. Marion County Bd. of Educ., 198 W.Va. 523, 528, 482 S.E.2d 140, 145 (1996).** The **O'Dell** Court simply came to the sweeping and incorrect conclusion that, by the usage of the term "any", the Legislature meant to exclude all potential claims. "'It is the "duty of this Court to avoid whenever possible a

construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results." *State v. Kerns,* 183 W.Va. 130, 135, 394 S.E.2d 532, 537 (1990)." *Expedited Transp. Sys., Inc. v. Vieweg,* 207 W.Va. 90, 98, 529 S.E.2d 110, 118 (2000).'" **Charter Communications VI, PLLC v. Community Antenna Service, Inc., 211 W.Va. 71, 77, 561 S.E.2d 793, 799 (2002).** By finding that **W.Va. Code § 29-12A-5(a)(11)** barred the claims of persons not employees of the insured-political-subdivision, the **O'Dell** Court ignored this maxim of statutory construction.

The **O'Dell** Court further posited that its ruling was sound to the extent that it believed that the Legislature would not have included **subsection (a)(11)** in the statute had it meant it to duplicate the immunities to employers who subscribe to workers' compensation, as proscribed by **W.Va. Code § 23-2-6**. However, the **O'Dell** Court failed to recognize the nature and effect the **West Virginia Governmental Tort Claims and Insurance Reform Act** had on claims against municipalities. The **Act** immunizes political subdivisions for injury, death or losses caused by their governmental and proprietary functions. **See W.Va. Code § 29-12A-4(b)(1).** After granting blanket statutory immunity to political subdivisions, the **Act** then creates a set of statutory exceptions to the general rule and essentially creates a statutory cause of action against the political subdivision grounded in common law principles. **See W.Va. Code § 29-12A-4(c).** After creating this statutory cause of action, the **Act** goes on to provide further limitations upon the causes of action it creates against political subdivisions. **See W.Va. Code § 29-12A-5.** In light of the foregoing, the inclusion of **W.Va. Code § 29-12A-5(a)(11)** can easily be understood as a reification of the statutory immunity provided to political subdivisions participating in workers' compensation and an effort by the Legislature to avoid any conflict between **W.Va. Code § 23-2-6** and the **Act**. The inclusion of **§ 29-12A-5(a)(11)** simply was an effort to circumvent any perceived limited abrogation of workers' compensation immunity.

In sum, the Petitioners respectfully request that this Court reverse the Circuit Court's June 8, 2011 Order as it applies to the application of immunity under **W.Va. Code § 29-12A-5(a)(11)**, revisit the **O'Dell** decision, and interpret **W.Va. Code § 29-12A-5(a)(11)** so as not to bar claims of third-party non-employees against political subdivisions. The present rule is unduly harsh and unjust.

b. The Circuit Court's finding that the Petitioners could not maintain their claims against the Respondents despite W.Va. Code § 29-12A-5(a)(11) was in error, as the policy of insurance providing coverage to the City of Elkins and Stephen P. Stanton does not contain sufficient language to preserve the defendants' immunity under W.Va. Code § 29-12A-5(a)(11).

The Circuit Court erred in its June 8, 2011 Order when it found that the Petitioners' claims did not fall within the scope of the City's insurance policy, issued by National Union Fire Insurance Company of Pittsburgh, PA. Specifically, the Circuit Court improperly held that the immunity provided by **W.Va. Code § 29-12A-5(a)(11)** was preserved by the subject policy and excluded the Petitioners' claims from coverage.

West Virginia law is clear that when insurance is purchased by a political subdivision, the terms of the subject insurance contract which determine the rights and obligations of the parties. Moreover, the purchase of insurance does not *per se* waive immunity, but the subject policy must contain appropriate language and/or exclusions which specifically preserves the statutory immunity. **See Bender v. Glendenning, 219 W.Va. 174, 632 S.E.2d 330 (2006)**. The Petitioners assert that the City of Elkins's policy of insurance does not contain sufficient language to preserve immunities and bar the Petitioners' claims against the policy. The Circuit Court erred in its interpretation of the policy.

The Circuit Court concluded that the language contained in the "Certificate of Insurance" issued to the City of Elkins, preserved immunities in accordance with **Bender**. The language of

the Certificate is as follows *(J.Appx., p. 559)*:

> THE INSURANCE EVIDENCED BY THIS CERTIFICATE IS SUBJECT TO ALL OF THE TERMS, CONDITIONS, EXCLUSIONS AND DEFINITIONS IN THE POLICIES. 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 Circuit Court further reasoned that a vague endorsement in the National Union policy (Endorsement #10) incorporated the terms of the Certificate into the policy. *(J.Appx., pp. 559-560)*. The Circuit Court further incorrectly held that, per **Hess v. W.Va. Dept. of Corrections, 227 W.Va. 15, 705 S.E.2d 125 (2010)**, the preservation of immunities need not be contained within the body of a policy issued to a governmental entity covered by the **West Virginia Governmental Tort Claims and Insurance Reform Act**. *(Id.)*.

The Petitioners posit that, per **Bender**, the preservation of immunities must be clear, not ambiguous. Moreover, any ambiguities should be construed in favor of liability and against immunity. The aforementioned provisions simply do not rise to the level of clarity required by **Bender** to preserve immunities and bar the Petitioners' claims against the policy.

The language relied upon by the Circuit Court was largely contained only in a "Certificate of Insurance". The putative immunity preservation contained therein does not appear in the policy verbiage. Even giving the Certificate consideration, at best it creates ambiguity and conflict between the Certificate and the Policy. The West Virginia Supreme Court of Appeals has addressed similar issues in the past and resolved them in favor of coverage. Specifically, in **D'Annunzio v Security-Connecticut Life Ins. Co., 186 W.Va. 39, 410 S.E.2d 275 (1991)**, the "Policy Data Page" contained one date of issuance, whereas the policy itself contained another. The difference was whether the insured's suicide fell within, or outside of, the two year exclusionary period. The Court found the conflicting dates between the two

documents to create ambiguity and construed the same in favor of coverage. The Court expanded the principle even further in **Romano v. New England Mut. Life Ins. Co., 178 W.Va. 523, 262 S.E.2d 334 (1987)**, wherein the conflict was between the master group policy which contained an "Actively at Work" requirement, whereas the solicitation brochure provided to the individual insured was silent on that subject.

The Petitioners submit that the issue of what policy language is sufficient to comport with the dictates of **Bender** is a matter of first impression. The **Hess** decision does not address the issue of what language must be contained within a policy of insurance issued to a political subdivision covered by **West Virginia Governmental Tort Claims and Insurance Reform Act**. To the contrary, in **Syllabus Point 4 of Hess,** the Court stated that "'[u]nless the applicable insurance policy otherwise expressly provides, a State agency or instrumentality, as an entity, is immune under common-law principles from tort liability in W. Va.Code § 29–12–5 actions for acts or omissions in the exercise of a legislative or judicial function and for the exercise of an administrative function involving the determination of fundamental governmental policy.' Syl. Pt. 6, *Parkulo v. W.Va. Bd. of Prob. and Parole,* 199 W.Va. 161, 483 S.E.2d 507 (1996)." The decision in **Hess** regarded the interplay between the common law immunity afforded to *the State of West Virginia* and the State's insurance policy. The rule as it applies to the interpretation of the State's insurance policy is the opposite construction employed to the insurance policy of a political subdivision. The State's immunity must be waived expressly in the policy per **Hess**. However, a political subdivision's immunity must be expressly preserved with the policy with clear, plain, and conspicuous language. **See Bender at 181-182, 632 S.E.2d at 337-338 (citing National Mutual Ins. Co., v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (1987))**. The relevant inquiry under **Bender** is the polar opposite of the inquiry in **Hess**.

The Petitioners respectfully request that the Circuit Court's holding in this regard be reversed and that this Court find that the language in the City of Elkins's insurance policy be insufficiently clear, plain, and conspicuous to preserve the City's immunities and bar the Petitioners' claims up to the limits of the subject policy of insurance.

Furthermore, the Petitioners also assert that the Court prematurely dismissed their claims against the National Union policy without permitting a sufficient inquiry into whether any claimed coverage exclusion was of the free will and volition of the City of Elkins. The West Virginia Supreme Court has held that, while a political subdivision can incorporate limiting terms in their insurance policies, the decision to do so must be clearly made by the political subdivision itself, in its sole discretion. **See Gibson v. Northfield Insurance Co., 219 W.Va. 40, 631 S.E.2d 598 (2005).** In the underlying case, there was no evidence in the record indicating that said Certificate was seen by a representative of any entity other than the West Virginia Board of Risk and Insurance Management or, more importantly, that the insured, City of Elkins, was given the opportunity to make any decision to preserve immunities. At the very least, further discovery should have been permitted on this issue prior to issuing a ruling.

Since there is a lack of any evidence that the City of Elkins chose to preserve immunity, and because any such preservation had to be set forth in the policy itself, and finally because the Certificate and Policy conflict thereby creating ambiguity that has to be construed in favor of coverage, granting summary judgment in favor of the City of Elkins, Stephen P. Stanton, and National Union, on the issues of immunity and/or coverage was inappropriate, and the Circuit Court's June 8, 2011 Order should be reversed in this regard.

II. The Circuit Court of Harrison County erred when it reduced the UM/UIM coverage available to the Petitioners under Bombardier's policy of insurance issued by Greenwich from One Million Dollars ($1,000,000.00) to Twenty

Thousand Dollars ($20,000.00) based upon a "governmental vehicle" exclusion contained in the policy, as such an exclusion offends substantial West Virginia public policy and has been found to be void in a majority of jurisdictions that have similarly addressed the issue.

The Circuit Court of Harrison County erred in its June 8, 2011 Order when it held that the full One Million Dollar ($1,000,000.00) policy limits of the Greenwich policy of insurance, issued to the Petitioner's employer, Bombardier, were not available to the Petitioners. The Circuit Court found therein that the Greenwich policy of insurance did not provide coverage to the Petitioners since the policy's UM and UIM coverages contained an exclusionary clause that "[did] not include any vehicle . . . owned by a governmental unit or agency" – otherwise known as a "government vehicle" exclusion.[1] *(J.Appx., p. 566).* Nevertheless, the Circuit Court reasoned that the Greenwich policy was still required to provide the statutory minimum UM coverage of Twenty Thousand Dollars ($20,000.00) to the plaintiffs, pursuant to **W.Va. Code § 33-6-31(b)**. *(J.Appx., pp. 570-571).*

The Circuit Court's finding that a "governmental vehicle" exclusion contained in the UM/UIM policy excluded the Petitioners' claims (with the exception of $20,000 of UM coverage) was in error as said exclusion should have been found to be void as against the substantial public policy of this State. **The propriety of a "governmental vehicle" exclusion contained in a UM/UIM insurance policy is a matter of first impression in this State.** The Petitioners assert that this Court should adopt the position of the vast majority of jurisdictions that have addressed this issue which have found similar "government vehicle" exclusions to be void as against the public policy of their respective states.

[1] The Petitioners do not concede that their claims under the Greenwich policy of insurance issued to Bombardier are UM claims. Rather, the Petitioners contend that they are entitled to UIM coverage if the City's liability policy is found to provide coverage. The Petitioners submit that it does not matter whether the coverage under the Greenwich policy is for UM or UIM as both coverages contain the same exclusion for a "governmental vehicle." As such, the inquiry on appeal would remain the same under each coverage, regardless.

"In construing any insurance policy, it is appropriate to begin by considering whether the policy language is in accord with West Virginia law." **Adkins v. Meador, 201 W.Va. 148, 153, 494 S.E.2d 915, 920 (1997).** "The terms of the policy should be construed in light of the language, purpose and intent of the applicable statute. Provisions in an insurance policy that are more restrictive than statutory requirements are void and ineffective as against public policy. *See* Syllabus Point 2, *Universal Underwriters Ins. Co. v. Taylor,* 185 W.Va. 606, 408 S.E.2d 358 (1991); Syllabus Point 1, *Bell v. State Farm Mut. Auto. Ins. Co.,* 157 W.Va. 623, 207 S.E.2d 147 (1974); Syllabus Point 2, *Johnson v. Continental Casualty Co.,* 157 W.Va. 572, 201 S.E.2d 292 (1973)." **Gibson v. Northfield Ins. Co., 219 W.Va. 40, 46-47, 631 S.E.2d 598, 604 - 605 (2005).** "When the language of an insurance policy is contrary to statute and therefore void, the policy should be reformed and construed to contain the coverage required by West Virginia law." **Id. at 47, 631 S.E.2d at 605 (*citing* W.Va. Code § 33-6-17).**

"Statutory provisions mandated by the Uninsured Motorist Law, *W.Va.Code* § 33-6-31 (1988) may not be altered by insurance policy exclusions." **Syl. Pt. 1, Deel v. Sweeney, 181 W.Va. 460, 460, 383 S.E.2d 92, 92 (1989).** However, "[i]nsurers 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 exclusions do not conflict with the spirit and intent of the uninsured and underinsured motorists statutes." **Syl. Pt. 3, Id.**

In discussing the spirit and intent of the uninsured and underinsured motorists statutes, this Court in **Cunningham v. Hill, 226 W.Va. 180, 185-186, 698 S.E.2d 944, 949 - 950 (2010)** stated that

> This Court has repeatedly recognized that W.Va.Code § 33–6–31, as amended, "is remedial in nature and, therefore, must be construed liberally in order to effect its purpose." Syl. Pt. 7, in part, *Perkins v. Doe,* 177 W.Va. 84, 350 S.E.2d 711 (1986); *Mitchell v. Broadnax,* 208 W.Va. 36, 537 S.E.2d 882 (2000). As we

observed in *State Auto. Mut. Ins. Co. v. Youler,* 183 W.Va. 556, 396 S.E.2d 737 (1990):

> the legislature has articulated a public policy of full indemnification or compensation underlying both uninsured or underinsured motorist coverage in the State of West Virginia. That is, the preeminent public policy of this state in uninsured or underinsured motorist cases is that the injured persons be *fully compensated* for his or her *damages* not compensated by a negligent tortfeasor, up to the limits of the uninsured or underinsured motorist coverage.

183 W.Va. at 564, 396 S.E.2d at 745 (emphasis in original).

The **Cunningham** Court acknowledged that insurers could include reasonable terms, conditions, and exclusions in UM/UIM policies. **See also, W.Va. Code § 33-6-31(k).** However, it "warned that '[t]his Court will be vigilant in holding the insurers' feet to the fire in instances where [terms, conditions and] exclusions or denials of coverage *strike at the heart of the purposes of the uninsured and underinsured motorist statutes* provisions.' *Id.,* at 463, 383 S.E.2d at 95. *Accord,* Syl. Pt. 1, *Thomas v. Nationwide Mut. Ins. Co.,* 188 W.Va. 640, 425 S.E.2d 595 (1992); *Mitchell v. Broadnax,* 208 W.Va. 36, 537 S.E.2d 882 (2000); *American States Ins. Co. v. Tanner,* 211 W.Va. 160, 563 S.E.2d 825 (2002)." **Id. at 186, 698 S.E.2d at 950 (emphasis supplied therein).**[2] "We have repeatedly recognized that 'our most basic and preeminent concern ... is that insurance consumers and insurance purveyors alike receive the benefit of their bargained for exchange when they meet to contract for motor vehicle insurance coverage.' *Findley v. State Farm Mutual Automobile Ins. Co.,* 213 W.Va. 80, 97 n. 28, 576 S.E.2d 807, 824 n. 28 (2002) (*citing Mitchell v. Broadnax,* 208 W.Va. 36, 537 S.E.2d 882 (2000))." **Id. at 185-186, 698 S.E.2d at 949-950.**

[2] "'Under *W. Va.Code,* 33-6-31(c) [1995], insurers must provide uninsured motorist coverage, and make available underinsured motorist coverage, for injuries causally connected to the use of the vehicle, and foreseeably identifiable with the normal use of the vehicle.' Syllabus point 4, *Adkins v. Meador,* 201 W.Va. 148, 494 S.E.2d 915 (1997)." **Keefer v. Ferrell, 221 W.Va. 348, 350, 655 S.E.2d 94, 96 (2007).**

The Petitioners' claims clearly fall within the dictates of the uninsured and underinsured motorists statute, **W.Va. Code § 33-6-31**. Pursuant to **W. Va. Code, § 33-6-31(b)**, an insurance policy in West Virginia shall not be

> . . . . issued or delivered unless it shall contain an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than the requirements of section two, article four, chapter seventeen-d of this code, as amended from time to time: Provided, That such policy or contract shall provide an option to the insured with appropriately adjusted premiums to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle up to an amount of one hundred thousand dollars because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, in the amount of three hundred thousand dollars because of bodily injury to or death of two or more persons in any one accident and in the amount of fifty thousand dollars because of injury to or destruction of property of others in any one accident: Provided, however, That such endorsement or provisions may exclude the first three hundred dollars of property damage resulting from the negligence of an uninsured motorist: Provided further, That such policy or contract shall provide an option to the insured with appropriately adjusted premiums to pay the insured all sums which he shall legally be entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle up to an amount not less than limits of bodily injury liability insurance and property damage liability insurance purchased by the insured without setoff against the insured's policy or any other policy. Regardless of whether motor vehicle coverage is offered and provided to an insured through a multiple vehicle insurance policy or contract, or in separate single vehicle insurance policies or contracts, no insurer or insurance company providing a bargained for discount for multiple motor vehicles with respect to underinsured motor vehicle coverage shall be treated differently from any other insurer or insurance company utilizing a single insurance policy or contract for multiple covered vehicles for purposes of determining the total amount of coverage available to an insured. "Underinsured motor vehicle" means a motor vehicle with respect to the ownership, operation or use of which there is liability insurance applicable at the time of the accident, but the limits of that insurance are either: (i) Less than limits the insured carried for underinsured motorists' coverage; or (ii) has been reduced by payments to others injured in the accident to limits less than limits the insured carried for underinsured motorists' coverage. No sums payable as a result of underinsured motorists' coverage shall be reduced by payments made under the insured's policy or any other policy.

Nothing in the aforementioned statutory provision permits or encourages the exclusion of the acts or omissions of a governmental agency or its employees in the operation of a motor

vehicle from the scope of uninsured or underinsured coverage. The statute does not specifically exclude governmental vehicles from scope of its application either. Moreover, while insurers are permitted to include terms, conditions, and exclusions in UM or UIM policies that are consistent with the premium charged, the same are under no circumstances permitted to "strike at the heart of the purposes of the uninsured and underinsured motorist statutes provisions." **See Cunningham, at 186, 698 S.E.2d at 950 (internal citations omitted); see also, W.Va. Code § 33-6-31(k).**

The spirit and intent of the UM/UIM statute has as its preeminent concern the full compensation of the victim of an uninsured or underinsured motor vehicle. The purchasers of UM and UIM coverages buy those coverages believing that they will have insurance in the event the other driver has none or not enough. It is in direct contravention to the spirit of the UM/UIM statute to permit insurers to exclude from coverage the UM or UIM claims of persons injured and/or damaged by the acts or omissions of a motor vehicle operator simply because the tortfeasor's vehicle is owned by a governmental agency. There is simply no reasonable public policy justification for the blanket exclusion of the class of government-owned vehicles from the scope of UM or UIM coverages. Accordingly, this Court should take up this matter of first impression and hold that government vehicle exclusions in UM and UIM policies are void and unenforceable as against the substantial public policy of this State.

If the Court were told hold that the government vehicle exclusion was void as against public policy, it would be adopting what is clearly the majority rule in the United States. In fact, a vast majority of the courts of other jurisdictions, which have addressed this same issue, have found that the governmental vehicle exclusion is offensive to their jurisdiction's public policy. Recognizing the majority rule and identifying the volume of cases support the same, the

Delaware Superior Court in **Cropper v. State Farm Mut. Auto. Ins. Co., 671 A.2d 423, 426 - 427 (Del.Super.,1995)** stated:

> Insurance policy clauses excluding government-owned vehicles from the definition of uninsured motor vehicles are standard and have been challenged in numerous jurisdictions. *See* 1 A. Widiss, *Uninsured and Underinsured Motorist Insurance* § 8.8 (2nd ed.1992). The majority of jurisdictions that have considered the validity of these clauses have found them void and unenforceable as contrary to their respective uninsured motorist laws. *Compare Higgins v. Nationwide Mutual Insurance Co.,* 291 Ala. 462, 282 So.2d 301 (1973); *McClellan v. Sentry Indemnity Co.,* 140 Ariz. 558, 683 P.2d 757 (App.1984); *Johns v. Liberty Mutual Fire Insurance Co.,* Fla.App., 337 So.2d 830 (1976), *cert. denied,* Fla.Supr., 348 So.2d 949 (1977); *State Farm Mutual Automobile Insurance Co. v. Carlson,* 130 Ga.App. 27, 202 S.E.2d 213 (1973); *Franey v. State Farm Mutual Automobile Insurance Co.,* 5 Ill.App.3d 1040, 285 N.E.2d 151 (1972); *Hillhouse v. Farmers Insurance Co.,* 226 Kan. 68, 595 P.2d 1102 (1979); *Powell v. Allstate Insurance Co.,* La.App., 233 So.2d 38 (1970); *Young v. Greater Portland Transit District,* Me.Supr., 535 A.2d 417 (1987); *Martin v. State Farm Mutual Automobile Insurance Co.,* Mo.App., 755 S.W.2d 638 (1988); *Watters v. Dairyland Insurance Co.,* 50 Oh.App.2d 106, 361 N.E.2d 1068 (1976); *State Farm Automobile Insurance Co. v. Greer,* Okla.Supr., 777 P.2d 941 (1989); *Vaught v. State Farm Fire & Casualty Co.,* 413 F.2d 539 (8th Cir.1969) (holding that policy clause excluding automobiles owned by municipality was invalid under Arkansas Uninsured Motorist Act); *with Commercial Union Insurance Co. v. Delaney,* Ky.Supr., 550 S.W.2d 499 (1977) (holding that policy exclusion of government-owned vehicles is reasonable under statute which defines "uninsured motor vehicle" as subject to the terms and conditions of such coverage); *Jones v. Southern Farm Bureau Casualty Co.,* 251 S.C. 446, 163 S.E.2d 306 (1968) (where uninsured motorist chapter was by statute expressly made inapplicable to vehicles owned by government units); *Francis v. International Service Insurance Co.,* Tx.Supr., 546 S.W.2d 57 (1976) (holding that exclusion by State Board of Insurance of government-owned vehicles from definition of "uninsured automobile" was a rational exercise of Board's delegated authority, consistent with purposes of statute).
>
> Delaware's statutory determination of what is included under the term "uninsured vehicle" does not specifically exclude any class of vehicles. The provision in State Farm's insurance policy impermissibly limits the broad and mandatory coverage of 18 *Del. C.* § 3902. The exclusion is repugnant to the clear public policy of this State in favor of uninsured motorist coverage and against any limitations upon such protection. *See Washington,* 641 A.2d at 453. This Court holds that State Farm's exclusion of government-owned vehicles from its definition of uninsured vehicles limits the scope of uninsured motorist protection to less than that prescribed by statute. The exclusion is invalid as a matter of law because it is contrary to Delaware's uninsured motorist statute, 18 *Del. C.* § 3902(a)(3)(a).

The same result should occur here. This Court should align itself with the majority of courts which have addressed this issue and find that it is offensive to West Virginia public policy to exclude the UM or UIM claims of an injured insured simply because that insured's vehicle was struck by a government-owned vehicle. To hold otherwise would controvert the purpose of the UM/UIM statute, **W.Va. Code § 33-6-31**, of providing full compensation to the victims of un- and under-insured drivers. Government vehicle exclusions in West Virginia should be rendered void and unenforceable, accordingly.

III. The Circuit Court of Harrison County erred when it reduced the UM/UIM coverage available to the Petitioners under their personal policy of insurance issued by Westfield from Five Hundred Thousand Dollars ($500,000.00) to Twenty Thousand Dollars ($20,000.00) based upon a "governmental vehicle" exclusion contained in the policy, as such an exclusion offends substantial West Virginia public policy and has been found to be void in a majority of jurisdictions that have similarly addressed the issue.

The Circuit Court of Harrison County erred in its June 8, 2011 Order when it held that the full Five Hundred Thousand Dollar ($500,000.00) policy limits of the Petitioners' own Westfield policy of insurance were not available to the Petitioners. The issue in regard to the Westfield UM/UIM coverage is identical to that of the Greenwich policy issued to Bombardier. The Circuit Court found that the policy of insurance issued by Westfield to the Petitioners did not provide coverage to the Petitioners since the policy's UM and UIM coverages "[did] not include any vehicle or equipment . . . owned by any governmental unit or agency including, but not limited to . . . the State of West Virginia or any of its political subdivisions or agencies."[3] *(J.Appx., pp. 572-573).* Nevertheless, the Circuit Court found that Westfield was required to

[3] The Petitioners do not concede that their claims under the Westfield policy of insurance issued to are UM claims. Rather, the Petitioners contend that they are entitled to UIM coverage if the City's liability policy is found to provide coverage. The Petitioners submit that it does not matter whether the coverage under the Westfield policy is for UM or UIM as both coverages contain the same exclusion for a "governmental vehicle." As such, the inquiry on appeal would remain the same under each coverage, regardless.

provide UM coverage in the amount of Twenty Thousand Dollars ($20,000.00) - the minimum UM coverage required by **W.Va. Code § 33-6-31(b).**[4] *(J.Appx., p. 573).* The Circuit Court's finding that a "governmental vehicle" exclusion contained in the UM/UIM policy excluded the Petitioners' claims (with the exception of $20,000 of UM coverage) was in error as said exclusion should have been found to be void as against the substantial public policy of this State for those same reasons set forth hereinbefore. **The propriety of a "governmental vehicle" exclusion contained in a UM/UIM insurance policy is a matter of first impression in this State.** The Petitioners assert that this Court should adopt the position of the vast majority of jurisdictions that have addressed this issue which have found that the "governmental vehicle" exclusion to be void as against public policy.

As previously stated, "[w]hen the language of an insurance policy is contrary to statute and therefore void, the policy should be reformed and construed to contain the coverage required by West Virginia law." **Gibson at 47, 631 S.E.2d at 605 (*citing* W.Va. Code § 33-6-17).** "Statutory provisions mandated by the Uninsured Motorist Law, *W.Va.Code* § 33-6-31 (1988) may not be altered by insurance policy exclusions." **Syl. Pt. 1, Deel v. Sweeney, 181 W.Va. 460, 460, 383 S.E.2d 92, 92 (1989).** However, "[i]nsurers 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 exclusions do not conflict with the spirit and intent of the uninsured and underinsured motorists statutes." **Syl. Pt. 3, Id.** That said, nothing in **W.Va. Code § 33-6-31** permits or encourages the exclusion of the acts or omissions of operator of a government-owned motor vehicle from the scope of uninsured or underinsured coverage. The statute also has no express exclusion of governmental vehicles from scope of its application either. Moreover, while insurers are permitted to include terms, conditions, and exclusions in UM or UIM policies

[4] Westfield actually conceded this fact in its various filings. *(J.Appx., p. 573).*

that are consistent with the premium charged, the same under no circumstances are permitted to "strike at the heart of the purposes of the uninsured and underinsured motorist statutes provisions." **See Cunningham, at 186, 698 S.E.2d at 950 (internal citations omitted); see also, W.Va. Code § 33-6-31(k).**

Just like the Greenwich policy, the "government vehicle" exclusion in the Westfield policy strikes directly at the spirit and intent of the UM/UIM statute, which has as its preeminent concern full compensation to the victims of uninsured or underinsured motor vehicles. There is simply no reasonable public policy justification for the blanket exclusion of the class of government-owned vehicles from the scope of UM or UIM coverages. By purchasing a Five Hundred Thousand Dollar ($500,000.00) UM/UIM policy, the Petitioners were being responsible and prudent citizens. The Petitioners paid good money for their UM/UIM coverages and, in their time of need, should have received the benefit of their prudence and good sense. It is simply unfair to exclude the Petitioners' claims from coverage based upon an arbitrary and unconscionable exclusionary clause. Accordingly, this Court should take up this matter of first impression and hold that government vehicle exclusions in UM and UIM policies are void and unenforceable as against the substantial public policy of this State.

If the Court were told hold that government vehicle exclusions in UM/UIM coverages are void as against public policy, it would be adopting what is clearly the majority rule in the United States. In fact, a vast majority of the courts of other jurisdictions which have addressed this same issue have found that the governmental vehicle exclusion is offensive to their jurisdiction's public policy. **See Cropper v. State Farm Mut. Auto. Ins. Co., *supra*. (internal citations omitted).** This Court should align itself with the majority of courts which have addressed this issue and find that it is offensive to West Virginia public policy to exclude the UM or UIM

claims of an injured insured simply because that insured's vehicle was struck by a government-owned vehicle. To hold otherwise would controvert the purpose of the UM/UIM statute, **W.Va. Code § 33-6-31**. Government vehicle exclusions in West Virginia should be rendered void and unenforceable, accordingly.

IV. The Circuit Court of Harrison County erred when it found that the Petitioners were not entitled to the proceeds of the medical payments coverage under the Greenwich policy based upon the application of an exclusion for injuries arising out of and in the course of employment.

The Circuit Court erred by concluding in its June 8, 2011 Order that the plaintiffs were not entitled to the proceeds of the medical payments coverage under the Greenwich policy based upon an exclusionary clause of injuries by employees "arising out of and in the course of employment by [Bombardier]." *(J.Appx., p. 570).* The Petitioners posit that the Circuit Court's reasoning is in contravention to the spirit of this Court's decisions regarding the inapplicability of workers' compensation exclusions to other types of first-party insurance policies. As such, the Petitioners' assert that the Circuit Court's Order in this regard must be reversed.

As this Court stated **Syllabus Point 4 of Henry v. Benyo, 203 W.Va. 172, 506 S.E.2d 615 (1998)**, "[a]n employee who receives workers' compensation benefits for injuries that result from a motor vehicle collision with a third-party which occurs within the course and scope of the employee's employment is entitled to also assert, against his/her employer's motor vehicle insurance carrier, a claim for underinsured motorist benefits, where the employee's employer has in effect motor vehicle insurance providing underinsured motorist coverage and where the employee's recovery against the third-party activates such underinsurance coverage." While the decision in **Henry**, admittedly, did not involve the interpretation of a policy exclusion regarding injuries received in the course of employment, this Court did reason that an employee was entitled to coverage under an employer's policy based upon principles of "equity, fairness, and

justice [that] require that an employee, who is involved in a motor vehicle accident with a third-party during the course and scope of the employee's employment, be permitted to recover, in addition to workers' compensation benefits, underinsured motorist benefits under his/her employer's motor vehicle insurance policy to compensate him/her for those losses that are not covered by workers' compensation (*e.g.*, pain and suffering, loss of enjoyment of life, loss of consortium, etc.)." **Id. at 179, 506 S.E.2d at 622.** The Petitioners assert that the exclusion for injuries received in the course of employment contained within the Greenwich policy's auto medical payments coverage should be held to be void.

The Court should also take note of the fact that the inclusion of these policy terms is rather unconscionable in light of the nature of the subject policy and the entity insured by it. In the instant case, Greenwich issued a policy of insurance to a business, Bombardier, that included coverage for the business's motor vehicles. Included in this policy was an auto medical payments coverage. Obviously, the motor vehicles of Bombardier insured by the Greenwich policy would clearly be used for business pursuits by Bombardier's employees. Despite this obvious fact, the policy contains an exclusion in the auto medical payments coverage for the injuries of employees acting in the scope of their employment. As the Court may see, the aforesaid policy condition serves to virtually negate the auto medical payments coverage sold to the employer for its business vehicles and is clearly unconscionable. What did Greenwich sell Bombardier in the way of auto medical payments coverage if that coverage was never to apply to the employees of Bombardier using the insured motor vehicles in furtherance of business pursuits?

Accordingly, the June 8, 2011 Order of the Circuit Court of Harrison County should be reversed and the auto medical payments coverage under the Greenwich policy should be found

payable to the plaintiffs as the exclusion relied upon by the Circuit Court is not in accord with West Virginia public policy and is unconscionable in its effect.

PRAYER FOR RELIEF

The Petitioners respectfully request that the Court (1) reverse the Circuit Court's June 8, 2011 Order; (2) find that the immunity in **W.Va. Code § 29-12A-5(a)(11)** does not bar the Petitioners' claims, or, alternatively, that the City's policy of insurance does not preserve the immunities as set forth in that statute so as to permit a claim against that policy; (3) find that the "governmental vehicle" exclusions in the Greenwich and Westfield policies are void as against public policy and that the full policy limits of each policy should be made available to the Petitioners; (4) find that the Petitioners are entitled to the proceeds of the auto medical payments coverages of both the Greenwich and Westfield policies; and (5) remand this matter for further proceedings consistent with this Court's holdings.

Respectfully submitted,
JEFFREY JENKINS and M. JEAN MCNABB,
Petitioners, and Plaintiffs, hereinbelow,

BY:

JIVIDEN LAW OFFICES, PLLC
Of Counsel

David A. Jividen (WV Bar #1889)
Chad C. Groome (WV Bar #9810)
729 N. Main Street
Wheeling, WV 26003
(304) 232-8888
(304) 232-8555 facsimile
djividen@jividenlaw.com
cgroome@jividenlaw.com

ANGOTTI & STRAFACE, LC
Of Counsel

David J. Straface (WV Bar #3634)
John R. Angotti (WV Bar #5068)
274 Spruce Street
Morgantown, WV 26505
(304) 292-4381

(304) 292-7775 facsimile
djstraface@frontier.com
johnangotti@hotmail.com

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 2011, true and accurate copies of the foregoing **PETITIONERS', JEFFREY JENKINS AND M. JEAN MCNABB, RESPONSE IN OPPOSITION TO MOTION TO DISMISS APPEAL** were deposited in the U.S. Mail contained in postage-paid envelopes addressed to all other parties to this appeal as follows:

Amy. M. Smith, Esq.
Steptoe & Johnson, PLLC
400 White Oak Blvd.
Bridgeport, WV 26330

Monte L. Williams, Esq.
Carlie M. Parker, Esq.
Steptoe & Johnson, PLC
United Center, Suite 400
1085 Van Voorhis Road
Morgantown, WV 26505

Don C.A. Parker, Esq.
Glen A. Murphy, Esq.
Andrew S. Dornbos, Esq.
P.O. Box 273
Charleston, WV 25321

Michelle L. Gorman, Esq.
Pietragallo, Gordon, Alfano, Bosick & Rarpanti, LLP
100 North Fourth Street, 10th Floor
Steubenville, OH 43952

Susan R. Snowden, Esq.
Martin & Seibert
P.O. Box 1286
Martinsburg, WV 25402

Of Counsel for Petitioners