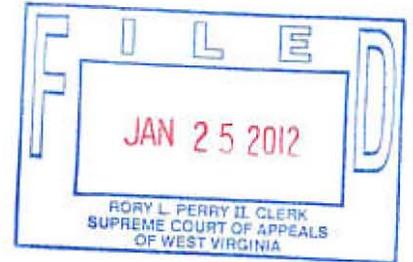


No. 11-1059

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
At Charleston



JEFFREY JENKINS and M. JEAN MCNABB,

*Petitioners,*

v.

CITY OF ELKINS, a Municipal Corporation,  
STEPHEN P. STANTON, WESTFIELD INSURANCE  
COMPANY, NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA, and  
BOMBARDIER AEROSPACE CORPORATION,

*Respondents.*

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*Appeal from the Circuit Court of  
Jefferson County, West Virginia  
Civil Action No. 10-C-164*

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**WESTFIELD INSURANCE COMPANY'S REPLY TO RESPONSE ON BEHALF OF  
RESPONDENT CITY OF ELKINS, A MUNICIPAL CORPORATION,  
STEPHEN P. STANTON, AND NATIONAL UNION FIRE INSURANCE COMPANY**

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**COMES NOW** the Respondent, Westfield Insurance Company (hereinafter “Westfield”), by and through its counsel, Susan R. Snowden and Martin & Seibert, L.C., and submits the following in Reply To Response on Behalf of Respondents City of Elkins, a Municipal Corporation, Stephan P. Stanton, and National Union Fire Insurance Company To Cross Assignment of Error in Brief of Westfield Insurance Company:

**I. SUMMARY OF ARGUMENT**

As previously articulated in Westfield’s Response to Petitioner’s Jeffrey Jenkins and M. Jean McNabb, the Circuit Court of Harrison County, West Virginia was correct in ruling that the uninsured motorist coverage under the Westfield policy of insurance issued to the Petitioners herein, did not afford coverage to the Petitioners’ claims based upon the “governmental vehicle exclusions” contained therein (*J. Appx., pp. 566, 608*). Therefore, the coverage available to the Petitioners was the uninsured motorist statutory minimum of \$20,000.00. Further, the Circuit Court of Harrison County’s refusal to find that the National Union Coverage applied to the incident up to its limits, or at a minimum, the financial minimum requirement of West Virginia law was in error. Westfield does not lack standing to raise this issue on appeal as the Circuit Court ruling with respect to the applicability of W.Va. Code §17D-4-12(b)(2) with regard to The City, prejudiced Westfield when it triggered limited uninsured motorist coverage which otherwise would have been The City’s responsibility under its liability policy.

National Union, carrier for City of Elkins and Stanton may not eviscerate or obfuscate the West Virginia minimum financial responsibility requirements solely because its insured is a governmental entity. The City of Elkins position that they the have complete immunity and said immunity would be frustrated by holding their insurance company to the statutory

mandatory minimum prescribed in W.Va. Code §17D-4-12(b)(2) is not ~~legally sound~~ because it ostensibly puts a tenuous cost savings justification over the health and safety of West Virginia citizens.

There is no evidence in the record to suggest that West Virginia governmental entities would not be able to procure adequate liability insurance premiums at a reasonable rate simply because a carrier must pay the policy minimums as set forth in W.Va. Code §17-D-4-12(b)(2). Contrary to Respondents' position, this does not undermine governmental immunity. Respondents can not cite to any West Virginia case that permits governmental vehicles to operate in the state of West Virginia without the benefit of insurance. Further, to embrace Respondents' faulty logic can only lead to the inescapable conclusion that governmental vehicles in West Virginia need not and should not obtain an automobile insurance policy. If the government is completely immune and, therefore, their insurance carrier retains that immunity then obtaining an automobile insurance policy by a government – in this case a City – in West Virginia is nothing but wasted time, effort and money out of public coffers. The coverage is illusionary.

The language at issue in W.Va Code §17D-4-12(b)(2) “liability imposed by law” is ambiguous and it is not clear as argued by Respondents. Even if The City of Elkins governmental immunity was absolute, adopting such a narrow interpretation and application of the West Virginia Motor Vehicle Safety Responsibility Law would contravene the public policy of West Virginia, insuring *only* to the benefit of the insurance carrier issuing policies to West Virginia governmental entities.

## II. ARGUMENT

The City of Elkins insurance carrier is responsible for meeting West Virginia's minimum financial responsibility requirements such that the National Union coverage must apply up to the minimum statutory requirement prescribed in W.Va. Code §17D-4-12(b)(2). It is undisputed that Defendant Stanton was driving a vehicle owned by the City of Elkins when the accident at issue occurred. It is also undisputed that National Union Fire Insurance Company issued a policy of insurance to the City of Elkins that was in force on the subject vehicle.

As this Court is aware, W.Va. Code §17D-4-12(b)(2) provides that an automobile owner's liability insurance policy:

Shall insure the person named therein and any other person, as insured, using any such vehicle or vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, operation, maintenance or use of such vehicle or vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each such vehicle, as follows: Twenty thousand dollars because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, forty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and ten thousand dollars because of injury to or destruction of property of others in any one accident.

W.Va. Code §17D-4-2 operates to require mandatory minimum coverage to protect the citizens of West Virginia. Therefore, a policy insuring a motor vehicle must contain minimums of \$20,000 for bodily injury or death of one person and \$40,000 for two or more persons injured or killed in any one accident. *Id.*; *Miller v. Lambert*, 195 W.Va. 63, 66-7, 464 S.E.2d 582, 585-6 (1995). This requirement effectuates one of the central purposes of the Motor Vehicle Safety Responsibility Law in providing a minimum level of financial security

to third-parties who might suffer bodily injury or property damage from negligent drivers. *Blake v. State Farm Mut. Auto. Ins. Co.*, 224 W.Va. 317, 322, 685 S.E.2d 895, 900 (2009).

While Respondents contend that W.Va. Code §17D-4-2 does not apply to them under the rubric of sovereign immunity, they fail to cite unambiguous language to conclusively establish this point. While Respondents make much of the language “liability imposed by law”, this language itself is ambiguous and lends itself to multiple interpretations. Moreover, the Petitioner is not seeking some amorphous “liability imposed by law” but is instead seeking to receive the benefit of the City’s insurance coverage to compensate for legal detriment caused by the City’s employee under the insurance policy, not from the city. The right of such benefit sounds in contract, not tort liability.

The cases cited by Westfield are not inapposite and have important bearing on the issues involved in this instant appeal. The Circuit Court agreed with the City of Elkins and National Union’s position that the Defendants City of Elkins and Stanton were immune from the Plaintiffs’ claims due to the applicability of W.Va. Code §29-12A-5(a)(11). Westfield argued below and in their Brief before this Court that such an application of the law, as articulated in the case of *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 the current public policy of this State. *See* Respondent Westfield Insurance Company’s Response Brief, November 16, 2011, at p. 16.

This Court most recently addressed the issue of whether qualified immunity would bar a negligence complaint in *Hess v. W.Va. Dept. of Corrections*, 705 S.E.2d 125 (W. Va.

2010). In *Hess*, this Court noted that the pertinent issue to consider is whether the policy of insurance waived the defense of the qualified immunity as set forth in *Parkulo v. W.Va. Bd. of Probation and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996). *Hess*, 705 S.E.2d at 130. The *Hess* Court went on to hold that the insurance policy did not waive the defense of qualified immunity, as the policy and its associated documents expressly reserved that defense. Specifically, the certificate of liability in question stated, “the additional insured (Division of Corrections) does not waive any statutory or common law immunities conferred upon it,” and the Court found that this statement was sufficient to preserve the defense of sovereign immunity. *Id.*

In the instant case, the Circuit Court found that the language contained in the “certificate of insurance” issued to the City of Elkins was indeed a preservation of the immunities in accordance with *Bender v. Glendenning*, 219 W.Va. 174, 632 S.E.2d 330 (2006), (*J. Appx.*, pp. 559, 601). The certificate of insurance provided in pertinent part that “it is a condition precedent of coverage under the policy that the additional insured does not waive any statutory or common law immunity conferred upon it.” *Id.* The Circuit Court then extrapolated the endorsement to be incorporated into the terms of the policy of insurance, and applying the *Hess* case, found that the immunity had been preserved and, therefore, the policy of insurance was not applicable to the instant case. *Id.* It is important to note that Westfield is correct in its statement that the “immunity preservation does not appear in the policy of insurance issued by National Union herein.” See Respondent Westfield Insurance Company’s Response Brief, November 16, 2011, at p. 21. Instead of expressly and patently providing that the sovereign immunity was preserved under *Bender*, the policy issued stated

simply on the certificate that sovereign immunity was not waived. Such a “reservation” should not contravene the intent of W.Va. Code §17D-4-2.

As this Court noted in *Bender*, the purchase of insurance does not *per se* waive immunity, and the subject policy must contain appropriate language and/or exclusions to specifically preserve the statutory immunity. It is Westfield’s position that the Circuit Court was presented with a conflict of interpretation of the policy and that the language in the certificate of insurance is not part of the contract of insurance. Westfield also assert that the Circuit Court erred by not applying the National Union insurance policy to the instant case.

The City of Elkins and National Union proffer that governmental immunity and policy exclusions bar all claims against them. This position is inapposite with West Virginia law, which makes clear that exclusions cannot override the mandatory limits imposed under the State’s financial responsibility law. *Jones v. Motorists Mutual Insurance Co.*, 177 W.Va. 763, 356 S.E.2d 634 (1987) (holding that "'named driver exclusion' endorsement in motor vehicle liability insurance policy was of no force or effect up to the limits of financial responsibility required by W.Va. Code §17D-4-2 but that exclusion was valid above those mandatory limits). In other words, “provisions in an insurance policy that are more restrictive than statutory requirements are void and ineffective as against public policy.” *Adkins v. Meador*, 201 W.Va. 148, 153, 494 S.E.2d 915, 920 (1997), citing Syl. Pt. 2; *Universal Underwriters Ins. Co. v. Taylor*, 185 W.Va. 606, 408 S.E.2d 358 (1991). Where a vehicle registered in this State has limits of insurance which are less than those required by West Virginia law, its limits will be enhanced to meet this state's minimum financial responsibility requirements. *Miller v. Lambert*, 195 W.Va. at 67, 464 S.E.2d at 586. Therefore, the National Union policy *must* provide liability limits which at a minimum meet

this State's legal requirements. Where a vehicle registered in a State whose minimum financial responsibility limits are less than those of West Virginia is operated in this State, the financial responsibility limits will be deemed to be enhanced to meet this state's minimum financial responsibility requirements. *Id.* Further illustrating this procedure is W.Va. Code §33-6-17 which directs how an unduly restrictive provision is to be reconciled with respect to the offending policy as a whole:

[a]ny insurance policy, rider, or endorsement hereafter issued and otherwise valid which contains any condition or provision not in compliance with the requirements of this chapter, shall not be thereby rendered invalid but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider, or endorsement been in full compliance with this chapter.

Had the Legislature intended for the governmental entities in the State of West Virginia to be excluded from the minimum financial responsibility requirements set forth in W.Va. Code §17D-4-2, or the mandatory policy reformation requirements of W.Va. Code §33-6-17, it would have stated so specifically in the statutes. Further, there is no case that the City of Elkins or National Union have cited for the proposition that the City of Elkins' vehicles should be allowed to operate in the state uninsured and in contravention of the intent of the legislature. As such, at the minimum, National Union's policy applies as required by W.Va. Code §17D-4-2.

Respondents' citations to *Dotts v. Taressa J.A.*, 182 W.Va. 586, 390 S.E.2d 568 (1990), and *Kucera v. City of Wheeling*, 153 W. Va. 531, 170 S.E. 2d 217 (1969), are misguided. The City of Elkins legal status as a "political subdivision" is not in dispute. What is truly at issue is whether W.Va Code §29-12A-2 and §29-12A-5 preclude the applicability

of a political subdivision to W. Va. Code §17D-4-12(b)(2). In reality, it is not immunity of a political subdivision which is at issue, but rather the applicability of an insurance policy.

Because National Union's coverage should be applicable, Petitioners should not be entitled to any coverage under the Westfield policy. The Westfield policy of insurance issued to the Plaintiffs in this matter contains an underinsured motorist coverage endorsement which provides in pertinent part:

D. "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, "*underinsured motor vehicle*" does not include any vehicle or equipment:

1. Owned or operated by a self-insurer under any applicable motor vehicle law.

\*\*\*

3. Owned by any governmental unit or agency including, but not limited to:

a. the United States of America or any of its agencies; or

b. the State of West Virginia or any of its political subdivisions or agencies.

\*\*\*

8. That is an *uninsured motor vehicle*.

(*J. Appx., p. 232*).

In the event that this court rules that the National Union policy is subject to providing twenty thousand dollars (\$20,000.00) in coverage pursuant to W.Va. Code §17D-4-12(b)(2) then the Underinsured exclusion in the Westfield policy, as stated above, would be

applicable. This court should apply the exclusion, based upon the same reasoning as that in the Circuit court's prior order given that the Uninsured and Underinsured exclusions are the same. However, there is no requirement in West Virginia that a carrier enhance coverage under a minimum financial responsibility statute for underinsured coverage. Therefore, applicability of the policy language would act to preclude any recovery by Petitioners under the Westfield policy.

### III. CONCLUSION

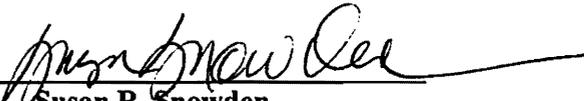
For all of the following reasons and for the reasons set forth in the Brief of Respondent Westfield, and its reply to City of Elkins, Stanton's and National Union's Response, this Court should find as follows:

1. That the National Union policy applies due to a failure to properly preserve the government immunity afforded by W.Va. Code §29-12A-5(a)(11) up to the limits of liability; or, in the alternative,
2. To find that the Circuit Court erred in failing to require the City of Elkins' insurance carrier, National Union, to provide the minimum financial responsibility requirement and uphold the governmental vehicle exclusion for underinsured coverage in the Westfield policy.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

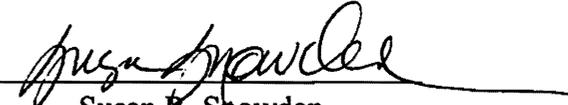
I, Susan R. Snowden, counsel for Respondent, Westfield Insurance Company, do hereby certify that I served the foregoing **Westfield Insurance Company's Reply To Response On Behalf Of Respondent City Of Elkins, A Municipal Corporation, Stephen P. Stanton, And National Union Fire Insurance Company**, upon the following counsel, by first class mail, postage pre-paid, on this the **24th** day of **January, 2012**.

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