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No. 11-1142

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston**

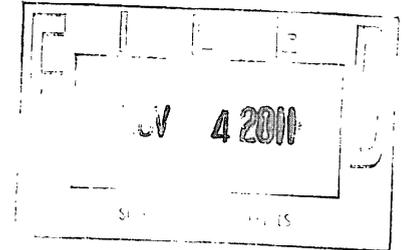
**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,**

Petitioner,

v.

**JILL F. SCHATKEN and
STEVEN N. SCHATKEN,**

Respondents.



*Appeal from the Circuit Court of
Jefferson County, West Virginia
Civil Action No. 10-C-367*

PETITIONER'S BRIEF

E. Kay Fuller
(WV State Bar No. 5594)
Counsel of Record
ekfuller@martinandseibert.com
Michael M. Stevens
(WV State Bar No. 9258)
MARTIN & SEIBERT, L.C.
P.O. Box 1286
Martinsburg, WV 25405
(304) 262-3209
Counsel for Petitioner

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COMES NOW the Petitioner, State Farm Mutual Automobile Insurance Company (hereinafter "State Farm"), by and through its counsel, E. Kay Fuller, Michael M. Stevens, and Martin & Seibert, L.C., pursuant to Rule 10 of the West Virginia Revised Rules of Appellate Procedure and presents its brief respectfully requesting the February 3, 2011 and July 7, 2011 Orders of the Circuit Court of Jefferson County be reversed.

I. ASSIGNMENTS OF ERROR

The Circuit Court of Jefferson County has committed a series of errors in two Orders regarding clear and unambiguous policy language in a State Farm auto policy which was then exacerbated by making rulings on other provisions of the policy not at issue in the present civil action.

Specifically, the Circuit Court erred in its February 3, 2011 Order Granting Partial Summary Judgment when it refused to uphold as proper non-duplication of benefits language. In so doing, the Circuit Court would permit a result which would violate West Virginia public policy prohibiting double recoveries. In so doing, the trial court erred in its interpretation of W. Va. Code § 33-6-31(b) when it found the language was an incorrect reduction of benefits and that such "reduction" violated West Virginia public policy. (App. 1-10.)

The Circuit Court further erred in its February 3, 2011 Order when it improperly relied upon case law concerning "other insurance" provisions which is distinct from non-duplication of benefits language at issue herein. (App. 8-9.)

Thereafter, the Circuit Court erred in its July 7, 2011 Amended Order Granting Plaintiffs' Second Motion for Summary Judgment concerning reimbursement language in the policy. (App. 11-18.) Reimbursement is not an issue in the present civil action

and there was no controversy before the Court upon which to issue this ruling. It is therefore extraneous to the matters in controversy thus rendering the Amended Order an impermissible and unconstitutional advisory opinion.

As to the merits of the ruling, the Circuit Court erred when it concluded reimbursement language “indirectly reduce[s] the amount of UIM coverage paid to the Plaintiffs.” The Circuit Court further erred in its analysis and conclusion that reimbursement language reduces UIM benefits and therefore is contrary to the meaning and purpose of the UM/UIM statute and when it reached its decision by an analysis under W. Va. Code § 33-6-31(b) which is inapplicable to medical payments reimbursement issues. (App. 18-24.) Furthermore, the Circuit Court erred when it found that State Farm is ignoring the “made whole” rule and refusing to pay a share of fees and costs when no such argument was ever advanced by State Farm. (App. 21.)

To the extent the extraneous ruling also found a double recovery is permissible under West Virginia law and does not offend public policy, such finding is clearly flawed and constitutes reversible error. (App. 24.) Likewise, the Circuit Court’s ruling that medical payments reimbursement language should be limited to those instances when the tortfeasor’s insurer is the same as the insured’s is an incorrect application of existing law. (App. 23.)

The Circuit Court further erred in its analysis concerning the application of the doctrine of reasonable expectations to the present litigation and when it concluded that reimbursement language in the State Farm auto policy is ambiguous and/or “inherently misleading.” (App. 24-26.)

Finally, the Circuit Court's additional analysis and ruling as to whether medical payments coverage has any impact on health insurance or "medical debt obligation" is outside the bounds of the pleadings in this matter and also an incorrect finding. (App. 26-27.)

II. STATEMENT OF THE CASE

The present civil action is an underinsured motorist (hereinafter "UIM") claim that also includes, *inter alia*, a count for declaratory judgment. The case arises from a two-vehicle collision which occurred December 19, 2008, in Jefferson County, West Virginia. A vehicle driven by Ida Trayter, insured by Nationwide, struck a vehicle in which Jill Schatken was a passenger. The Schatken vehicle was insured by State Farm. Mrs. Schatken incurred medical expenses of \$29,368.47. Mrs. Schatken carried medical payments coverage on her auto policy with State Farm in the amount of \$5,000.00. State Farm paid 100% of the medical payments coverage toward Mrs. Schatken's hospital bill as the policy provides. Nationwide, on behalf of Ms. Trayter, tendered liability limits of \$25,000.00 to which State Farm consented and waived subrogation. State Farm also agreed not to seek reimbursement of any of the medical payments it made to or on behalf of Mrs. Schatken.

Mrs. Schatken carried \$250,000.00 in underinsured motorist (hereinafter "UIM") coverage on her State Farm policy. After receiving liability limits, Mrs. Schatken pursued a UIM claim, that claim is pending in the Circuit Court of Jefferson County.

In her Complaint, Mrs. Schatken also alleged a count for declaratory judgment count and sought – ahead of any judgment that may call for its application - a judicial

declaration concerning non-duplication of benefits language in the State Farm auto policy. Language at issue clearly and unambiguously states:

The Underinsured Motor Vehicle Coverage limits for **bodily injury** are shown on the Declarations Page under “Underinsured Motor Vehicle Coverage – Bodily Injury Limits – Each Person, Each Accident.”

The most **we** will pay for all damages resulting from **bodily injury** to any one **insured** injured in any one accident, including all damages sustained by other **insureds** as a result of that **bodily injury** is the lesser of

1. the limit shown under “each Person”; or
2. the amount of all damages resulting from that bodily injury, reduced by:

* * *

c. any damages that have already been paid or that are payable as expenses under Medical Payments Coverage of this policy, the medical payments coverage of any other policy, or other similar vehicle insurance.

(App. 101)(emphasis added.)

The Circuit Court granted Respondents’ motion for partial summary judgment on this issue on February 3, 2011 finding, *inter alia*, that the language violated West Virginia Code and public policy. (App. 1-10.) Although not pled or otherwise in controversy, the Circuit Court then entered an Agreed Order on February 28, 2011 permitting additional briefing on medical payments reimbursement language indicating when it ruled on this additional issue, all Orders would then become final and appealable. (App. 369-373.)

On July 7, 2011, the Circuit Court entered an Amended Order granting Respondents’ Second Motion for Summary Judgment, wherein the Circuit Court

concluded reimbursement language in the State Farm policy is void as a matter of law. (App. 11-28.)

In both Orders, the Circuit Court made other extraneous findings and conclusions as to the impact of applicable policy language, the purpose and intent of the UIM statute, the doctrine of reasonable expectations, upheld the availability of a double recovery, and commented upon medical payments coverage *vis a vis* health insurance.

III. SUMMARY OF ARGUMENT

The Circuit Court of Jefferson County erred in invalidating non-duplication of benefits language which is in accord with West Virginia law and public policy.

The Circuit Court also erred in granting summary judgment on issues beyond the pleadings, *i.e.*, medical payments reimbursement language and how medical payments coverage may impact health insurance.

Each of these incorrect rulings must therefore be reversed by this Court.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate in this matter. This case is also appropriate for Rule 20 disposition because it (a) involves a case of first impression; (b) involves issues of fundamental public importance since non-duplication of benefits language is common in auto policies and therefore impacts a multitude of claims; and (c) will resolve an ongoing issue in lower courts as well as federal courts which have reached inconsistent findings.

V. ARGUMENT

A. Motions for summary judgment are reviewed *de novo*.

“The interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination which, like the court’s summary judgment, is reviewed *de novo* on appeal.” *Dairyland Ins. Co. v. Fox*, 209 W.Va. 598, 601, 550 S.E.2d 388, 391 (2001), (quoting *Payne v. Weston*, 195 W.Va. 502, 506-07, 466 S.E.2d 161, 165-66 (1995)). Likewise, the standard of review concerning a Summary Judgment Order is *de novo*. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

B. Insurance policies are contracts which must be enforced as written.

An insurance policy is a contract. It is therefore entitled to the same principles governing interpretation and application of language as any other contract. The Legislature made this clear in W.Va. Code § 33-1-16, defining an insurance policy as “the *contract* effecting insurance...and includes all clauses, riders, endorsements and papers attached thereto and a part thereof.” (emphasis added.) See *Horace Mann Ins. Co. v. Shaw*, 175 W.Va. 671, 676 fn. 5, 337 S.E.2d 908, 913 fn. 5 (1985). “This Court has consistently held that the language of an insurance policy contract, like any other contract, must be accorded its plain meaning, and, where plain, the language must be given full effect, no construction or interpretation being permissible.” *White v. Washington Nat’l Ins. Co.*, 162 W.Va. 829, 831, 253 S.E.2d 144, 146 (1979); *Stone v. Nat’l Surety Corp.*, 147 W.Va. 83, 85, 125 S.E.2d 618, 619 (1962).

Insurance policy contracts are enforceable and the provisions will be applied and not construed unless they are contrary to a statute, regulation, or public policy. Syl. Pt.

2, *Shamblin v. Nationwide Mut. Ins. Co.*, 175 W.Va. 337, 332 S.E.2d 639 (1985). See also *Deel v. Sweeney*, 181 W.Va. 460, 462, 383 S.E.2d 92, 94 (1989) (citing *Bell v. State Farm Mut. Auto. Ins. Co.*, 157 W.Va. 623, 627, 207 S.E.2d 147, 150 (1974)).

Non-duplication of benefits language in State Farm's contract is clear and unambiguous, is consistent with West Virginia public policy and law and must therefore be enforced as written.

1. Application of non-duplication of benefits advances West Virginia public policy.

It is undisputed that West Virginia adheres to the principle of full compensation of an injured claimant. That principle, however, does not include a profit or windfall to the claimant. Full compensation is abhorrent to double recovery. State Farm's policy language, in accord with this principle, operates simply to avoid duplicate payment of medical expenses. The non-duplication provision does not alter or reduce the UIM coverage available; it simply prohibits recovering twice, under both medical payments coverage and UIM coverage, for the same damages. If damages warrant, full UIM coverage limits are available.

With respect to automobile insurance, the West Virginia Legislature and this Court have held the purpose of UIM coverage is to provide full indemnification for damages not compensated by the tortfeasor's liability coverage – up to the limits of the UIM policy. *State Auto. Mut. Ins. Co. v. Youler*, 183 W.Va. 556, 396 S.E.2d 737 (1990). While West Virginia law clearly endorses full compensation for an insured up to policy limits, it is equally clear that an injured party is not entitled to a double recovery of damages. Syl. Pt. 7, *Harless v. First Nat'l Bank in Fairmont*, 169 W.Va. 673, 289 S.E.2d 692 (1982) ("It is generally recognized that there can be only one recovery of damages

for one wrong or injury. Double recovery of damages is not permitted; the law does not permit a double satisfaction for a single injury.

This Court has specifically pronounced this prohibition on double recovery concerning recovery of medical expenses such as presented in the case *sub judice*. Syl. Pt. 4, *State ex rel. Packard v. Perry*, 221 W.Va. 526, 655 S.E.2d 548 (2007) (The right to maintain an action to recover pre-majority medical expenses incurred as a result of a minor's personal injuries belongs to both the minor and the minor's parents, but under no circumstances will double recovery be allowed)(emphasis added).

In a variety of circumstances, this Court has stated a plaintiff may not recover damages twice for the same injury. See *McDavid v. U.S.*, 213 W.Va. 592, 584 S.E.2d 226 (2003) (axiomatic that only one recovery permitted for each loss); *Pennington v. Bluefield Orthopedics, P.C.*, 187 W.Va. 344, 419 S.E.2d 9 (1992) (there can be only one recovery of damages); *McCormick v. Allstate Ins. Co.*, 202 W.Va. 535, 505 S.E.2d 454 (1998)(A plaintiff may not recover damages twice for the same injury simply because he has two legal theories); *Smithson v. United States Fid. & Guar. Co.*, 186 W.Va. 195, 411 S.E.2d 850 (1991) (insured not permitted to recover damages for destroyed property under insurance policy and recover the same damages in a separate action against the insurer); *Meade v. Slonaker*, 183 W.Va. 66, 394 S.E.2d 50 (1990) (Plaintiff is only entitled to one recovery and cannot recover same damages from more than one defendant); Syl Pt. 8, *Bevins v. W.Va. Office of the Ins. Comm'r*, 708 S.E.2d 509 (2010) (extrinsic statutes can be utilized to prevent an impermissible double recovery when a claimant simultaneously receives temporary total disability workers' compensation benefits while also receiving Social Security disability benefits for the same

compensable injury). This principle applies with equal force regardless of the type of damages sought.¹

State Farm's policy language likewise permits full compensation while also precluding a double recovery. Respondents' UIM policy limits are \$250,000.00 per person. The non-duplication of benefits language does not, in any manner, reduce or otherwise alter Respondents' UIM policy limits. Rather, the clear non-duplication of benefits language simply precludes the Respondent from recovering twice for the bill paid under medical payments coverage. Should Respondents' general damages, for example, exceed that which she has already received from the tortfeasor, she will receive those additional damages - up to policy limits - from her UIM coverage. She will not, however, be able to duplicate the \$5,000.00 payment of medical bills in her UIM claim.

This holistic approach was first introduced by this Court in *Youler, supra*. State Farm's language is in accord with this principle. As such, the Circuit Court's ruling that the non-duplication of benefits clause is inconsistent with West Virginia's public policy of full compensation is incorrect. Mrs. Schatken has not been deprived of the ability to

¹ This Court has precluded double recovery of punitive damages. *Dzingski v. Weirton Steel Corp.*, 191 W.Va. 278, 288, 445 S.E.2d 219, 229 (1994), *modified on other grounds, Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, 209 W.Va. 318, 547 S.E.2d 256 (2001). Likewise, this Court has precluded double recovery in certain cases seeking damages for intentional infliction of emotional distress and punitive damages. *Perrine v. E. I. du Pont Nemours & Co.*, 225 W.Va. 482, 694 S.E.2d 815 (2010). The *Perrine* Court also discussed the potential that a claimant who receives a double recovery may have to remit a second punitive damages award to prevent an impermissible double recovery. See also *Tudor v. Charleston Area Med. Ctr.*, 203 W.Va. 111, 506 S.E.2d 554 (1997). In the employment law arena, plaintiffs may not recover back-pay when they are pursuing a full-time education as this is a double recovery. *Rodriguez v. Consolidation Coal Co.*, 206 W.Va. 317, 524 S.E.2d 674 (1999). This Court has also precluded double recovery of attorney's fees. *Heldreth v. Rahimian*, 219 W.Va. 462, 637 S.E.2d 359 (2006).

receive full compensation for damages up to UIM limits. Should damages warrant payment above liability limits and the medical bill already paid by State Farm, Mrs. Schatken may trigger her UIM coverage up to policy limits. Thus, to the extent the non-duplication provision only prohibits a double recovery, it is fully consistent with West Virginia public policy and should be applied as written.

Other jurisdictions are in accord. For example, in *Mid-Century Ins. Co. of Texas v. Kidd*, 997 S.W.2d 265, 271 (Tex. 1999), the Supreme Court of Texas held that insurers could enforce policy provisions which prevented an insured from recovering both personal injury protection coverage (“PIP”) benefits and UM coverage benefits for the same damages. The Court found that such policy language did not violate Texas’ UM coverage statute which, like West Virginia’s, states that UM coverage provides benefits for persons “who are legally entitled to recover damages from owners or operators of uninsured or underinsured motor vehicles....” *Id.* at 268. The Court concluded that the policy language simply barred a double recovery and explained the insured was not prevented from recovering “all sums” which he or she would be legally entitled to recover from the negligent motorist. Looking at the insurance policy as a whole, instead of in discrete subsections, the insured recovers everything contemplated by the UM statute. The PIP provision simply prevents the insured from aggregating those subsections to recover in excess of actual damages. *Id.* at 272.

The Fourth Circuit, interpreting South Carolina’s UIM statute which also provides for full compensation up to policy limits, held in *Rowzie v. Allstate Ins. Co.*, 556 F.3d 165 (4th Cir. 2009), that “[a]llowing Plaintiffs to recover UIM benefits totaling the entire amount left uncompensated by the at-fault motorist, without any deduction of

PIP/MedPay benefits already paid, would require Allstate to doubly compensate their insureds for medical damages sustained in accidents with underinsured motorist and would, in effect, give a 'windfall recovery' to Plaintiffs." *Id.* at 170-171.

In *Ellison v. California State Auto. Ass'n*, 106 Nev. 601, 797 P.2d 975 (1990), the Court upheld policy language which prevented double recovery of same damages under both UM and medical payments coverage. The *Ellison* Court observed "a recovery in excess of one hundred percent of damages is a windfall which this court will not countenance absent a clear agreement providing for such coverage."²

Safeco Ins. Co. v. Woodley, 102 Wash. App. 384, 8 P.3d 304 (2000) (policy provision prohibiting payment under UIM coverage for same damages paid under PIP coverage does not violate Washington's UIM statute so long as the insured is fully compensated); *Johnson v. State Farm Mut. Auto. Ins. Co.*, 323 Ill. App. 3d 376, 752 N.E.2d 449 (2001) (State Farm is entitled as a matter of law to deduct from an arbitration award the amount it previously paid plaintiff pursuant to medical payments coverage).

Likewise, in *Welborn v. State Farm Mut. Auto. Ins. Co.*, 480 F.3d 685 (5th Cir. 2007), the United States Court of Appeals for the Fifth Circuit found such a provision did not decrease the insured's UM coverage limits or reduce the amount of coverage available to her. Rather, the policy language permitted plaintiff to recover full policy limits if damages warranted. "This clause would not operate to deny Welborn the limits

² As the Court of Appeals of Georgia held in *Ga. Farm Bureau Mut. Ins. Co. v. Harper*, 272 Ga. App. 536, 612 S.E.2d 861 (2005), "as the parties unambiguously contracted against double recovery, we see no reason for failing to enforce the agreement as written." *Id.*, 612 S.E.2d at 863.

of her UM policy if her damages had been high enough; instead, it only operates to prevent a double payment for exactly the same damages.” *Id.* at 688.

Similarly, the Court in *Fickbohm v. St. Paul Ins. Co.*, 133 N.M. 414, 63 P.3d 517 (N.M.Ct.App. 2002), found policy language which prevented double recovery of medical payments coverage and UM or UIM coverage did not violate New Mexico’s UM/UIM statutory scheme nor public policy because the insureds were fully compensated for their damages. The *Fickbohm* Court noted that under New Mexico law, just as in West Virginia, the statutory conditions for receipt of UM or UIM coverage benefits were that (1) the insured be legally entitled to recover damages, and (2) the negligent driver be uninsured or underinsured. *Id.* at 521. Further, like West Virginia, New Mexico’s public policy favors “full compensation of injured parties.” *Id.* at 522. See also *Schultz v. Farmers Ins. Group of Cos.*, 167 Ariz. 148, 805 P.2d 381 (1991) (endorsement preventing non-duplication of UM and MPC)³; *Standard Mut. Ins. Co. v. Pleasants*, 627 N.E.2d 1327 (Ind. 1994) (policy provision precluding recovery of UM and medical payments coverage from the same policy prohibited double recovery of damages; Plaintiff could still recover entire UM and medical payments coverage limits if damages warranted); *Ostransky v. State Farm Ins. Co.*, 252 Neb. 833, 566 N.W.2d 399 (1997) (Plaintiff received full compensation for his damages and allowing him to recover amount of medical payments under the UIM coverage “would allow him to be compensated twice for medical payments”); *Kessler v. Shimp*, 181 N.C. App. 753, 640

³ The *Schultz* Court also noted that under Arizona law, exclusions prohibiting an insured from recovering liability coverage and UIM coverage under the same policy for the conduct of a single tortfeasor were valid and demonstrated “that Arizona public policy permits an insurer to preclude double recovery on multiple coverages.” *Id.* at 382. The same applies in West Virginia. See *Thomas v. Nationwide Mut. Ins. Co.*, 188 W.Va. 640, 425 S.E.2d 595 (1992) (precluding recovery of UIM and liability coverage from the same policy).

S.E.2d 822 (2007) (Where the express language in the plaintiff's insurance policy stated that UM coverage was 'in excess of and shall not duplicate payments made under the medical payment coverage,' the defendant was entitled to a credit and setoff for the \$1,000 it previously paid the plaintiff in medical expenses)(internal citations omitted)

The method of calculation adopted by the *Youler* Court has been applied in other jurisdictions as well. See *Sunderland v. Allstate Ins. Co.*, 717 A.2d 53 (R.I. 1998) ("However, were we to accept Sunderland's argument, we would be endorsing a method of calculation that encourages double-recovery, which is contrary to our previous opinions and contrary to the purpose of the underinsured-motorist statute")(internal citations omitted); *Wilson v. Farm Bureau Mut. Ins.Co.*, 770 N.W.2d 324 (Iowa 2009)(Iowa statute permits offsets and other limitations for the purpose of avoiding duplication of coverage); *Diggs v. State Farm Mut. Auto. Ins. Co.*, 985 So.2d 767 (La. App. 2008)(Where a plaintiff's total damages do not exceed the UM policy limits and the language of the policy so provides, the UM carrier is entitled to a credit for any amount which it has paid to the plaintiff under the medical payments coverage).

The common thread among these decisions is the balance achieved between two equally important public policies, *i.e.*, the insured's right of full recovery and the prohibition against a double recovery. West Virginia adheres to these same public policies. Accordingly, the plain language of the non-duplication of benefits clause, which guarantees Mrs. Schatken full recovery for her damages, up to UIM policy limits, but which prevents her from recovering twice for the same damages, is consistent with West Virginia public policy and should be applied as written. Therefore, the Circuit Court's February 3, 2011 Order holdings to the contrary should be reversed.

2. State Farm's non-duplication of benefits policy language comports with W. Va. Code § 33-6-31(b).

W.Va. Code §33-6-31(b) states in pertinent part:

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 or underinsured motor vehicle up to an amount not less than limits of bodily injury liability and property damage liability insurance purchased by the insured without set off against the insureds policy or other policy.... No sums payable as a result of underinsured motorist coverage shall be reduced by payments made under the insured's policy or any policy.

In explaining how the statute is to be applied, this Court in *Youler* created a formulaic approach that again advances public policy of full compensation up to policy limits while precluding a double recovery. The *Youler* Court held:

As stated previously, the "all sums...as damages" language of the statute evinces a public policy of full indemnification or compensation for damages uncompensated by the negligent tortfeasor. Thus, the statute requires the following computation of underinsured motorist coverage: the total amount of damages, reduced by the liability insurance coverage actually available to the injured person in question; the insurer providing underinsured motorist coverage is liable for the excess or uncompensated damages up to the underinsured motorist coverage limits. This approach furthers the goal of full compensation, without duplicating benefits.

Id., 396 S.E.2d at 748-49 (emphasis added). See also *Pristavec v. Westfield Ins. Co.*, 184 W.Va. 331, 400 S.E.2d 575 (1990), holding that UIM coverage is activated "when the amount of such tortfeasor's motor vehicle liability insurance actually available to the injured person in question is less than the total amount of damages sustained by the

injured person, regardless of the comparison between such liability insurance limits actually available and the underinsured motorist coverage limits.” *Id.*, Syl. Pt. 5.

This approach has been consistently applied by this Court and should not now be abandoned. In *Henry v. Benyo*, 203 W.Va. 172, 506 S.E.2d 615 (1998), this Court considered whether an injured employee could obtain workers’ compensation benefits and also pursue a claim against his employer’s UIM coverage for the work-related injury.⁴ This Court permitted the Plaintiff to pursue multiple avenues of recovery, but continued in its persistence that the Plaintiff would not be entitled to a double recovery. The *Henry* Court held equity, fairness and justice require that an employee, involved in a motor vehicle accident with a third-party during the course and scope of his employment, is permitted to recover UIM benefits in addition to workers’ compensation, but only for those losses not covered by workers’ compensation. *Id.*, 203 W.Va. at 179, 506 S.E.2d at 622 (emphasis added). This grant of recovery from multiple sources reinforces the purpose of UIM coverage which is to provide another avenue to full compensation. It does not, however, allow for duplicative recovery.

Federal courts in West Virginia have also considered this issue also finding that double recovery is impermissible. In *Cisco v. State Farm Mut. Auto. Ins. Co.*, Civil Action No. 2:97-0744 (S.D.W.Va. 1998), an action for UIM coverage, the jury awarded \$67,015.42 in total damages. The Court then deducted the \$20,000.00 Plaintiff had received from the tortfeasor’s liability insurer and \$4,713.68 previously paid by State Farm in medical payment coverage to reach the amount then due under UIM coverage. In doing so, the Court explained:

⁴ See also *Miralles v. Snoderly*, 216 W.Va. 91, 602 S.E.2d 534 (2004).

Defendant is not attempting to set off one award due Plaintiff with another award due Plaintiff. Defendant has paid Plaintiff \$4,713.68 in medical expenses. The jury has found that Plaintiff's total medical expenses associated with the underlying action total \$7,015.42. Defendant is merely requesting a credit equal to monies previously paid Plaintiff by Defendant for the specific purpose of compensating him for his damages related to past medical expenses. Such a credit averts a windfall recovery by Plaintiff, and serves to ensure that Plaintiff is made whole; no more, no less.

Id., slip op. at 5 (emphasis added).

Applying the rationale of the *Cisco* holding to the present case, the companion objectives of full compensation and single recovery are met. As in *Cisco*, there is no reduction of contractual benefits available to the insured. Likewise, there is no windfall recovery by the insured. The insured receives the benefit she bargained for and the damages she establishes, up to policy limits.

Despite this clear pronouncement of how to calculate UIM benefits due, the Circuit Court erroneously found non-duplication of benefits language conflicts with W. Va. Code § 33-6-31(b). To adopt the Circuit Court's position would mean the amount of UIM coverage paid could never reflect any form of damages credit. That is directly contrary to each of this Court's prior holdings on the calculation of UIM benefits due. UIM coverage has been defined in West Virginia as excess coverage. See Syl. Pt. 4, *State ex rel. Allstate Ins. Co. v. Karl*, 190 W.Va. 176, 437 S.E.2d 749 (1993). UIM coverage provides an additional pool of funds, exceeding the tortfeasor's liability limits, available to compensate the claimant. *Pristavec, supra; Brown v. Crum*, 184 W.Va. 352, 400 S.E.2d 596 (1990).⁵

⁵ The United States District Court for the Northern District of West Virginia appeared conflicted in acknowledging that West Virginia law and public policy prohibits double recovery, but nonetheless stated that reducing UIM payments by the amount previously paid under medical payments coverage violates

In *Pristavec*, this Court found that the UIM statute is “*internally inconsistent* in that the statutory *definition* of an ‘underinsured motor vehicle’ compares the ~~amount~~ amount of the tortfeasor’s *liability* insurance with the *underinsured* motorist coverage limits (the former ostensibly must be *less than* the latter), while the *extent* of underinsured motorist coverage (subject to the policy limits) is calculated under the statute by comparing the amount of the tortfeasor’s *liability* insurance with the amount of *damages*, rather than with the underinsured motorist coverage limits....” 184 W.Va. at 334-35, 400 S.E.2d at 578-79 (emphasis in original). This Court held it would not ascribe to the legislature an intent to “shortchange” the public by an overly restrictive definition of an “underinsured motor vehicle” and therefore handed down the formula for the calculation of when UIM benefits are due beginning with gross damages and making appropriate deductions therefrom.

UIM coverage, which is not mandatory, permits insurers to offer or limit the coverage, incorporating such terms and conditions consistent with premiums charged. W.Va. Code §33-6-31(k). Furthermore, insurance contracts shall be construed according to the entirety of its terms and conditions as set forth in the policy. W.Va. Code §33-6-30(a). Moreover, West Virginia public policy is to make insurance as affordable as possible. W.Va. Code §33-20-1. One way in which this public policy goal is accomplished is enforcement of clear and unambiguous non-duplication of benefits policy language. Application of State Farm’s language as written follows this Court’s precedent and should therefore be applied as written.

W.Va. Code § 33-6-31(b). *Kemp v. State Farm Mut. Auto. Ins. Co., et al.* (Civil Action No. 1:08CV137 (J. Keeley), September 27, 2010).

To the extent Respondents will argue they paid separate premiums for separate lines of coverage, such argument must likewise be rejected. Only one policy is involved in this matter. One premium was paid for the coverages defined in the policy. (App. 78-118.) That premium is calculated in part upon inclusion of non-duplication of benefits language. It is contrary to West Virginia law to require line item premium discounts or rate adjustments corresponding to any term in a policy which is inherently what the Plaintiff seek. W.Va. Code §33-6-30(c); *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002). Therefore, the one policy at issue in this case subject to all its terms and conditions must be enforced as written and priced.⁶

3. Non-duplication of benefits language is distinct from “other insurance” provisions.

In its February 3, 2011 Order, the Circuit Court improperly relied upon case law concerning “other insurance” provisions. (App. 8-9.) Such language, however, is distinct from non-duplication of benefits language at issue in the present case. The Circuit Court attempted to apply *Cunningham v. Hill*, 226 W.Va. 180, 698 S.E.2d 944 (2010), a case where this Court invalidated “other insurance” provisions. The Circuit Court attempted to expand the reach of *Cunningham* to non-duplication of benefits language.

However, the facts in *Cunningham* are inapposite to the present action in that two different insurers with two different policies covering different vehicles were involved. Moreover, *Cunningham* interpreted vastly different language. While the *Cunningham* decision invalidated “other insurance” provisions, it did so because the

⁶ To the extent Respondents pursue this argument, challenges to premiums charged implicate the filed rate doctrine must be addressed by the Insurance Commissioner, not the Circuit Courts of this State. *State ex rel. Citifinancial, Inc. v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008).

operation of the clauses in two different insurers' contracts would arguably deny the insured the full benefit of both policies and might thwart the public policy of full indemnification. In contrast, the present case involves one policy and one insurer with a non-duplication of benefits clause which promotes full indemnification without an impermissible double recovery. While language at issue in *Cunningham* was deemed to limit UIM recovery to the highest amount under all available policies, non-duplication of benefits language has no such effect. The non-duplication provision permits the insured to recover the full amount of UIM coverage, if damages warrant; the insured merely cannot recover twice for the same damages.

State Farm's non-duplication of benefits language will not operate to deprive Ms. Schatken of any insurance policy she purchased. It simply prohibits her from profiting from a loss. It is critical to note that non-duplication of benefits language only applies to medical bills. It does not apply to any general damages such as pain and suffering. It therefore stands to reason that liquidated damages in the form of bills need only be paid once.

C. The Circuit Court's consideration of the medical payments reimbursement language in State Farm's policy constitutes an impermissible advisory opinion.

Despite the fact medical payments reimbursement was never sought by State Farm, nor pled by Respondents, the Circuit Court permitted Respondents to expand their quest for summary judgment and permitted a second round of briefing. State Farm affirmatively advised the Circuit Court it had not nor would it in this case pursue medical payments reimbursement. (App. 235-242.) Nonetheless, the Circuit Court considered language which is not applicable to the present civil action and issued a second Order

on July 7, 2011 which invalidated reimbursement language. Moreover, it invalidated the language on wholly inapplicable grounds.

In its July 7, 2011 Order, the Circuit Court held: “[t]here is little doubt that a controversy presently exists concerning the meaning of State Farm’s ‘reimbursement’ policy language.” (App. 17 (emphasis added)).⁷ Yet, on the very same page, the Circuit Court noted that “...State Farm intended to exercise its ‘right’ of ‘reimbursement.’” *Id.* This was mere conjecture since State Farm had advised the Court in its pleadings it was not seeking reimbursement in this case. (App. 238-242.) Because the Circuit Court’s ruling was based purely on speculation, and contrary to the affirmations in the pleadings, this issue was not ripe for adjudication.

It is axiomatic that jurisdiction is not conferred upon a circuit court unless there is an actual case or controversy before it. *In re Dailey*, 195 W.Va. 330, 340, 465 S.E.2d 601, 611 (1995); *Harshbarger v. Gainer*, 184 W.Va. 656, 659, 463 S.E.2d 399, 402 (1991). West Virginia law disfavors the adjudication of contingencies which are not yet justiciable:

“[C]ourts will not...adjudicate rights which are merely contingent or dependent upon contingent events, as distinguished from actual controversies.” Likewise, “courts will not resolve mere academic disputes or moot questions or render mere advisory opinions which are unrelated to actual controversies. Indeed, a matter must be ripe for consideration before the court may review it. Courts must be cautious not to issue advisory opinions. In this case, the circuit court’s abstract review of and decision to alter the Mutual’s hearing procedures prior to the non-renewal hearing taking place violates this Court’s long-standing

⁷ On or about January 7, 2011, in response to Respondents’ attempt to expand their Motion for Partial Summary Judgment to encompass the MPC reimbursement language, which had not been applied in the instant case, State Farm filed a Motion to Strike premised on the grounds that consideration of this clause would constitute an impermissible advisory opinion. The Circuit Court denied State Farm’s Motion on or about February 3, 2011. (App. 325.)

principles of ripeness and the requirement that an actual case in controversy exist before a matter can be reviewed. In other words, the circuit court put the cart before the horse.

Zaleski v. W. Va. Mut. Ins. Co., 224 W.Va. 544, 552, 687 S.E.2d 123, 131 (2009) (internal citations omitted).

Rather, “[c]ourts are not constituted for the purpose of making advisory decrees or resolving academic disputes. The pleadings and evidence must present a claim or legal right asserted by one party and denied by the other before jurisdiction of a suit may be taken.” *Harshbarger, supra* (emphasis added); *South Charleston v. Board of Educ.*, 132 W.Va. 77, 83 (1948); *Mainella v. Board of Trustees of Policemen’s Pension or Relief Fund of City of Fairmont*, 126 W.Va. 183, 185-86, 27 S.E.2d 486, 487-88 (1943).

Given State Farm’s affirmation it is not seeking reimbursement, the premise of the July 7, 2011 Order is misplaced thereby warranting its reversal.

D. Medical payments reimbursement has been endorsed by this Court.

To the extent, however, this Court may nonetheless consider the propriety of medical payments reimbursement language in the State Farm policy, it too advances West Virginia public policy against duplicative recovery and has been specifically endorsed by this Court.

In Syl. Pt. 1, *Richards v. Allstate Ins. Co.*, 193 W.Va. 244, 455 S.E.2d 803 (1995), this Court upheld subrogation of medical payments paid to or on behalf of an insured except where the insurer for the tortfeasor is the same insurer. The *Richards* Court conceded the potential for double recovery that could result from its holding, and

concluded by providing that an insurer could address this potential inequity through the insertion of clear and unambiguous reimbursement language. *Id.*, 455 S.E.2d at 808.

Thereafter, the Court considered directly and endorsed the application of medical payments reimbursement language in *Ferrell v. Nationwide Mut. Ins. Co.*, 217 W.Va. 243, 617 S.E.2d 790 (2005). The *Ferrell* Court upheld reimbursement language which (a) allows an insurance company to seek reimbursement of medical expense payment to an insured out of any recovery obtained by the insured from a third party; (b) the insured obtains a recovery from a third party that duplicates the insurance company's medical expense payments to the insured; and (c) the insurance company is also the liability insurer of the third party. *Id.*, at Syl. Pt. 3. Contrary to the Circuit Court's ruling, however, this Court did not limit reimbursement only to instances where the insurance company is the same for the insured and the tortfeasor. *Federal Kemper v. Arnold*, 183 W. Va. 31, 393 S.E.2d 669 (1990), makes clear that reimbursement is permissible when the tortfeasor is insured by an insurer other than plaintiff's insurer. The presence of two insurers rather than one does not alter the analysis that reimbursement provisions are valid. There is no legal distinction between seeking reimbursement when the tortfeasor is insured by the same or a different insurer.

Moreover, this Court addressed the argument of plaintiffs that permitting reimbursement renders medical payments coverage illusory.

Allowing an insurer to seek reimbursement for medical payments from an insured does not, as the plaintiffs argue, make medical payments coverage illusory. The coverage permits the insured to gain speedy reimbursement for medical expenses incurred as a result of a collision without regard to the insured's fault. It also assures coverage when the insured is involved in an accident with an uninsured or underinsured driver. And in situations where both parties to

an accident are insured by the same insurer, it sometimes eliminates the need for costly litigation to determine fault.

Id., 217 W.Va. at 249, 617 S.E.2d at 796 (citing *Maynard v. State Farm Mut. Auto. Ins. Co.*, 902 P.2d 1328, 1334 (Alaska. 1995)).

The *Ferrell* Court reasoned that “[a]ttempts to invalidate contractual reimbursement rights on the ground that they violated the principles embodied in the antisubrogation rule prohibiting recovery under the theory by an insurer against its own insured have not been successful.” *Id.* at 249 (quoting Lee R. Russ, 16 *Couch on Insurance* §226:25 (3rd ed.)). In so doing, the *Ferrell* Court endorsed the concept of reimbursement as a mechanism to eliminate a duplicative recovery. Despite this clear pronouncement, the Circuit Court adopted the same illusory coverage argument by the *Schatkens* as the basis to invalidate State Farm’s reimbursement language.

State Farm’s policy language states:

12 b. Reimbursement

If we make payment under this policy and the *person* to or for whom we make payment recovers or has recovered from another party, then that *person* must

...

(2) reimburse *us* to the extent of *our* payment.

It is this type of clear and unambiguous language which this Court endorsed in *Ferrell*. Although the facts are different than those of *Richards* and *Ferrell*, the underlying principle remains the same. The reimbursement language supports the full recovery of damages while precluding an impermissible windfall. Moreover, to the extent Respondents will argue that *Ferrell* should be limited to only those cases in which the insurer is the same for tortfeasor and claimant, such a result is inconsistent with public policy and West Virginia law. Limiting the propriety of reimbursement language to

a unique set of circumstances is of no benefit to the insurance-consuming public. It would be impossible to rate for such a limited contingency and would result in disparate treatment of claimants depending upon the identity of the tortfeasor's liability insurer. All claimants must be treated the same. Due process demands such. All claimants must be precluded from a double recovery, not just those who are involved in motor vehicle accidents with tortfeasors who have the same insurer as the claimant.

Additionally, the Circuit Court found that reimbursement language – and the non-duplication of benefits provision – violates the “made whole” rule finding State Farm is refusing to share its share of fees and costs in recovering the underlying settlement from the tortfeasor. (App. 21). This holding misconstrues the “made whole” rule and its purpose. The purpose of the “made whole” rule is to restore a claimant to pre-injury status before an insurer may subrogate. *Provident Life & Accident Ins. Co. v. Bennett*, 199 W.Va. 236, 483 S.E.2d 819 (1997). There is no subrogation sought in the present civil action and therefore this doctrine does not apply. Therefore, any finding State Farm is “ignoring” the doctrine is again misplaced and constitutes reversible error.

Because State Farm's reimbursement language is in accord with language previously approved and because it furthers the same goal of full recovery without duplicative recovery, it should be enforced – when sought - as written.

E. The Circuit Court erred in finding that reimbursement language conflicts with W. Va. Code § 33-6-31(b).

In addition to ignoring precedent of this Court, the Circuit Court also attempted to analyze reimbursement language under W. Va. Code §33-6-31(b) finding such language violates the UIM statute. The Circuit Court also erroneously held that the provisions in State Farm's policy “are more restrictive than statutory requirements,” and

must be found “void and ineffective as against public policy.” (App. 20.) Further, the Circuit Court incorrectly held that “As the law currently stands, any direct or indirect reduction of UIM benefits by prior payments made under the insured’s policy, or any other policy, is forbidden.” (App. 24.)

The Circuit Court erred in relying on W. Va. Code §33-6-31(b). State Farm’s right of reimbursement arises not from the plaintiff’s UIM coverage, but from plaintiff’s liability settlement with the tortfeasor. The policy clearly states the right of reimbursement arises from the policyholder’s recovery “from another party.” Accordingly, W.Va. Code §33-6-31(b) plays no part in analysis of State Farm’s right of reimbursement.

Additionally, neither W.Va. Code §33-6-31(b), nor any other statute, governs optional medical payments coverage. *Keiper v. State Farm Mut. Auto. Ins. Co.*, 189 W. Va. 179, 429 S.E.2d 66 (1993). Reimbursement language does not implicate and therefore can not violate W.Va. Code §33-6-31(b). W.Va. Code §33-6-31(b) governs uninsured and underinsured motorist claims only. It is liability payments which give rise to reimbursement claims – when they are pursued – not uninsured or underinsured motorist claims. Thus, the UIM statute is irrelevant to a medical payments reimbursement claim and the plain and unambiguous language of the policy must be applied as written. *Payne, supra* (Unambiguous policy provisions are to be applied, not interpreted, and the policy is not to be rewritten by the Court).

F. Any application of the doctrine of reasonable expectations is misplaced in the case *sub judice*.

When the language of an insurance contract is at issue, it should be given its plain ordinary meaning. Syl. Pt. 1, *Mylan Labs. v. Am. Motorists Ins. Co.*, 226 W.Va. 307, 700 S.E.2d 518 (2010). “Where the provisions of an insurance policy contract are

clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." *Id.* at Syl. Pt. 2. Here, notwithstanding the clear and unambiguous nature of the policy provision at issue, the Circuit Court erroneously applied the doctrine of reasonable expectations.

The doctrine of "reasonable expectations" is a judicially-created remedy that is "limited to those instances...in which the policy language is ambiguous." *Boggs v. Camden-Clark Mem. Hosp. Corp.*, 225 W. Va. 300, 310, 693 S.E.2d 53, 63 (2010) (quoting *National Mut. Ins. Co. v. McMahon & Sons, Inc.* 177 W. Va. 734, 356 S.E.2d 488 (1987), *abrogated on other grounds by Potesta v. United States Fid. & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998)). Moreover, this Court has affirmed that the term "ambiguity" constitutes language "reasonably susceptible of two different meanings" or language "of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning." *Blake v. State Farm Mut. Auto. Ins. Co.*, 224 W. Va. 317, 323, 685 S.E.2d 895, 901 (2009). This is simply not the case in the present matter.

The Circuit Court held that because the policy's Declarations Page does not reference reimbursement language, an inherent ambiguity exists. (App. 25-26.) There is no policy language on any declarations page. Policy contracts contain policy language. Policy declarations pages identified parties insured and a listing of the coverages purchased. The location of language can not therefore alter the meaning of the language contained therein.

"The mere fact that parties do not agree to the construction of a contract does not render it ambiguous." Syl. Pt. 6, *Certain Underwriters at Lloyd's, London v. Pinnoak*

Resources, LLC, 223 W.Va. 336, 674 S.E.2d 197 (2008). Therefore, to the extent the Court premised its ruling on the location of reimbursement language, the Order must be reversed.

The Circuit Court also concluded that reimbursement language is ambiguous and “inherently misleading.” The State Farm language is largely analogous to the language of the Nationwide policy considered by the *Ferrell* Court. Having passed judicial scrutiny, the language can not now be termed ambiguous such as to invoke the doctrine of reasonable expectations. Accordingly, the July 7, 2011 Order should be reversed.

G. Medical payments coverage has no impact on health insurance or “medical debt obligations” nor was such pled by the Respondents.

The Circuit Court’s ruling that medical payments coverage is an “additional layer of protection” over and above Respondents’ health insurance, is irrelevant. Moreover, this too was not before the Court when it issued its July 17, 2011 Order. Medical payments coverage, just like UIM coverage, is optional coverage. Here, the Schatkens purchased medical payments coverage on their auto policy, subject to the terms and conditions of the policy language. The Schatkens invoked the privileges of the coverage and State Farm complied with policy terms paying policy limits to a health care provider on behalf of Mrs. Schatken. Now, the Schatkens – or the Circuit Court – criticize State Farm for meeting its contractual obligations in paying bills presented to it under medical payments coverage. State Farm paid as it was obligated to do. The Circuit Court, with no record, however, found that payment by State Farm under medical payments coverage might have been at a higher rate than the health care provider may have been paid by private health insurance. What private health insurers pays under the terms and conditions of another policy that does not include State Farm is irrelevant.

Again with no basis for its findings in the record, the Circuit Court found that State Farm's payment of bills under medical payments coverage may have created a "debt obligation" to the insureds. How payment of bills creates a "debt obligation" is not explained by the Circuit Court in its ruling.

These nonsensical rulings, particularly when made in the absence of any evidence in the record, must be reversed.

VI. CONCLUSION

The Circuit Court of Jefferson County made a number of errors in its February 3, 2011 and July 7, 2011 Orders concerning non-duplication of benefits and medical payments reimbursement language in State Farm's policy. Application of the non-duplication of benefits language furthers the ability of a claimant to make a full but not excess recovery of damages. That provision is consistent with public policy and W. Va. Code § 33-6-31(b).

Thereafter, the Circuit Court's consideration of medical payments reimbursement language not at issue herein was an impermissible advisory opinion. To the extent, however, the ruling is considered, it is inconsistent with governing case law upholding the propriety of reimbursement language and any attempt to tie medical payments reimbursement to the inapplicable UIM statute is clearly incorrect.

The language of both clauses of State Farm's policy is clear and unambiguous. Accordingly, full effect must be given to the plain meaning intended and both Orders of the Circuit Court must be reversed.

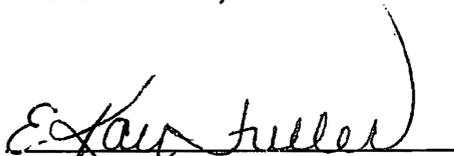
WHEREFORE, the Petitioner, State Farm Mutual Automobile Insurance Company, respectfully requests this Court reverse the February 3, 2011 and July 7, 2011 Orders of the Circuit Court of Jefferson County.

Respectfully submitted,

**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY**
By Counsel

MARTIN & SEIBERT, L.C.

BY:



E. Kay Fuller
(WV State Bar No. 5594)
1453 Winchester Avenue
P.O. Box 1286
Martinsburg, WV 25405
(304) 262-3209

CERTIFICATE OF SERVICE

I, E. Kay Fuller, Counsel for the Petitioner, State Farm Mutual Automobile Insurance Company, hereby certify that I served a true copy of the foregoing *Petitioner's Brief* upon the following individual by United States Mail, postage prepaid, first class, on this the 3rd day of November, 2011:

Laura C. Davis, Esquire
SKINNER LAW FIRM
P.O. Box 487
Charles Town, WV 25414



E. Kay Fuller