

No. 11-1142

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

JILL F. SCHATKEN and
STEVEN N. SCHATKEN,

Respondents,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Petitioner.

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

REPLY TO REVISED *AMICUS* BRIEF

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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., and in reply to the revised *amicus* brief of the West Virginia Association of Justice, (hereinafter “WVAJ”), does state as follows:

ARGUMENT

A. Non-duplication of benefits language advances sound public policy

Non-duplication of benefits language has but one purpose: to prevent double recovery of damages, a principle long adhered to in West Virginia.

WVAJ incorrectly characterizes this policy provision as depriving insureds of full compensation. There is nothing in the provision which deprives an insured of full compensation, it simply limits recovery to one – but only one – recovery. The prohibition on double recovery is long standing. See. 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).

WVAJ also incorrectly asserts the provision reduces available benefits and posits no UIM claimant can ever make a full recovery. (See revised brief, pp. 13, 17). If damages so warrant, a claimant may recover limits of UIM and MPC coverages.¹ Limits remain intact and there is nothing in the provision to demonstrate otherwise. The non-duplication of benefits provision therefore advances West Virginia public policy of permitting a full recovery while concomitantly prohibiting a windfall recovery. Moreover,

¹ UIM is the acronym for underinsured motorist coverage. MPC is the acronym for medical payments coverage.

the provision complies with the made-whole doctrine. Non-duplication permits a claimant to be made whole but prevents a claimant from being made more than whole.

B. Reimbursement language is appropriate and again advances public policy

WVAJ advocates for the elimination of reimbursement provisions in auto insurance policies. (See revised brief, p. 16). To do so would bring about unjust results and ignores the fact that reimbursement provisions have been approved by this Court. See *Ferrell v. Nationwide Mut. Ins. Co.*, 217 W.Va. 243, 617 S.E.2d 790 (2005); *Federal Kemper v. Arnold*, 183 W. Va. 31, 393 S.E.2d 669 (1990).

First, there is no justiciable controversy in the present civil action concerning reimbursement language. Reimbursement was not sought by State Farm in the adjustment of the Schatken claim nor did the plaintiffs below challenge this provision in their pleadings. Nonetheless, the Circuit Court issued a ruling on an issue not before it.

Reimbursement is a recovery method permitted by case law. Reimbursement, per applicable policy language, applies after an insured makes a recovery from another party. Reimbursement, therefore, is not sought from UIM coverage, nor under policy language could it be. This recovery method is in accord with *Ferrell, supra*. Eliminating the right of reimbursement would result in recovery in some, but not all claims, thus creating an inequitable result. Without reimbursement provisions, some claimants would receive a 100% recovery while others may receive more.

Amicus overlooks this clear dichotomy advancing a position that is neither fair nor proper. *Amicus* further attempts to compound the issue by asserting State Farm might apply reimbursement and non-duplication of benefits in tandem. That can not occur. Reimbursement occurs after the insured makes a recovery from a third party and

the insured reimburses his or her insurer for amounts advanced under MPC whereas non-duplication of benefits is a policy provision applied to determine the amount payable in a UIM claim. The non-duplication of benefits provision can also be applied post-verdict – both achieving the same goal of preventing a double recovery. The application of non-duplication of benefits whereby gross damages are calculated and then liability settlements and medical payments are accounted for is in compliance with the settlement formula created by this Court in calculating the amount payable in a UIM claim as W.Va. Code §33-6-31(b) requires. See *Youler v. State Auto. Ins. Co.*, 183 W.Va. 556, 396 S.E.2d 737 (1990).

To the extent *amicus* also argues reimbursement language renders medical payments coverage illusory, said argument has been specifically rejected by this Court.

The *Ferrell* Court held:

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)).

As reimbursement language is appropriate, its inclusion in auto policies should be upheld.

C. The collateral source rule is inapplicable here

Amicus also incorrectly argues the non-duplication of benefits provision and/or reimbursement language violates the collateral source rule. *Amicus* fails to appreciate there is no collateral source involved. The collateral source rule generally applies with respect to health insurance or other outside sources of recovery. There is one policy at issue with clear language governing when and where payments are made and recovered and under what circumstances. There is no outside – or collateral – source making payment for the same damage. Thus, any argument concerning the collateral source rule is misplaced and should be disregarded.

D. The doctrine of reasonable expectations is likewise inapplicable here

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, a judicially-created doctrine limited to cases involving ambiguous policy language. There is no ambiguity in the non-duplication of benefits provision. Thus, the doctrine of reasonable expectations is inapplicable. Likewise, to the extent this Court determines reimbursement language should be considered, State Farm's language is nearly identical to that affirmed by this Court in *Ferrell*, again rendering the doctrine of reasonable expectations inapplicable.

E. Reliance on cases that are based on other principles should be disregarded

Amicus relies upon *Cunningham v. Hill*, 226 W.Va. 180, 698 S.E.2d 944 (2010), and a case pending before the U.S. District Court for the Northern District of West Virginia, *Nickerson v. State Farm*, Civil Action No. 5:10-cv-105. Neither case answers the question presented herein. *Cunningham* did not in any way address the non-duplication of benefits provision nor speak to reimbursement language in an auto policy. Rather, *Cunningham* involved “other insurance” clauses contained in two separate policies issued by two insurers. There is one policy in the case *sub judice*. *Cunningham* involved a unique situation of an insured who had the benefit of two UIM policies and an issue arose whether the two policies could be pro-rated. There is no concern about pro-rating policies or coverages herein. Because the reimbursement provision does not apply to UIM coverage, but only to payments received from a third-party, reimbursement has no impact whatsoever upon the UIM coverage limits and full UIM coverage is available to the insured. Moreover, the non-duplication provision does not reduce the amount of UIM coverage available to an insured nor does it preclude payment of full UIM coverage limits when the insured’s damages warrant. Thus, there is nothing instructive in *Cunningham* with respect to non-duplication of benefits provisions or reimbursement.

Likewise, *Nickerson* was an uninsured motorist case. Uninsured motorist cases are governed by a different subsection of the omnibus statute. State Farm acknowledges an incorrect Motion *in limine* was filed with a characterization it was an underinsured motorist claim. It has sought the District Court to clarify the record to avoid any further misuse or confusion of the issue. However, to the extent the District Court

considered the non-duplication of benefits provision violative of W.Va. Code §33-6-31(b), and relied upon the Circuit Court of Jefferson County's reasoning, it must be corrected. The non-duplication of benefits provision simply extends the process this Court has adopted as the proper method of calculating the amount payable in an underinsured motorist claim. That method comports with the statute and advances sound public policy. It should not now be abandoned.

CONCLUSION

The non-duplication of benefits provision advances sound public policy of prohibiting double recovery. Reimbursement addresses the same goal. These policy provisions are applied in differing circumstances thus requiring both be included in an auto policy. Neither is used to the detriment of insureds nor does either provision deprive insureds of full recovery. Moreover, neither provision reduces available limits of coverage. Neither, therefore, requires elimination or invalidation and any ruling of the Circuit Court which tampered with these policy provisions 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

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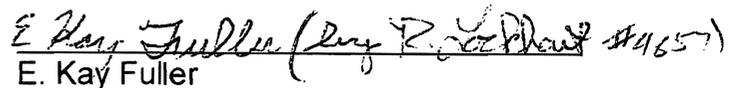
CERTIFICATE OF SERVICE

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 **Reply to Revised Amicus Brief** upon the following individuals by United States Mail, postage prepaid, first class, on this the 21st day of February, 2012:

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