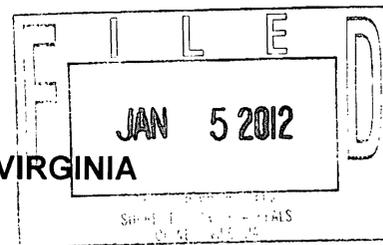


No. 11-1142

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*

REPLY BRIEF

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TABLE OF CONTENTS

I. ARGUMENT1

A. Non-duplication of benefits language is in accord with W.Va. Code §33-6-31(b) and this Court’s consistent interpretation of the statute as well as West Virginia’s public policy against double recovery1

B. Reimbursement language is distinct from non-duplication of benefits language and is likewise proper although not at issue in the present litigation.....6

C. Any argument that payment of medical payments coverage adversely impacted separate health insurance is meritless.....9

D. The doctrine of reasonable expectations is misplaced in this litigation.....9

II. CONCLUSION10

TABLE OF AUTHORITIES

W. VA. CASES:

<i>Bevins v. W.Va. Office of the Ins. Comm'r</i> , 708 S.E.2d 509 (2010).....	4
<i>Cunningham v. Hill</i> , 226 W.Va. 180, 698 S.E.2d 944 (2010).....	5
<i>Federal Kemper v. Arnold</i> , 183 W. Va. 31, 393 S.E.2d 669 (1990).....	7
<i>Ferrell v. Nationwide Mut. Ins. Co.</i> , 217 W.Va. 243, 617 S.E.2d 790 (2005).....	6, 7, 10
<i>Harless v. First Nat'l Bank in Fairmont</i> , 169 W.Va. 673, 289 S.E.2d 692 (1982)...	3
<i>McCormick v. Allstate Ins. Co.</i> , 202 W.Va. 535, 505 S.E.2d 454 (1998).....	4
<i>McDavid v. U.S.</i> , 213 W.Va. 592, 584 S.E.2d 226 (2003).....	3
<i>Meade v. Slonaker</i> , 183 W.Va. 66, 394 S.E.2d 50 (1990).....	4
<i>Mylan Labs. v. Am. Motorists Ins. Co.</i> , 226 W.Va. 307, 700 S.E.2d 518 (2010)...	9
<i>Pennington v. Bluefield Orthopedics, P.C.</i> , 187 W.Va. 344, 419 S.E.2d 9 (1992).	3
<i>Pristavec v. Westfield Ins. Co.</i> , 184 W.Va. 331, 400 S.E.2d 575 (1990).....	3
<i>Richards v. Allstate</i> , 193 W.Va. 244, 455 S.E.2d 803 (1995).....	6
<i>Smithson v. United States Fid. & Guar. Co.</i> , 186 W.Va. 195, 411 S.E.2d 850 (1991).....	4
<i>State Auto v. Youler</i> , 183 W.Va. 556, 396 S.E.2d 737 (1990).....	3, 5
<i>State ex rel. Packard v. Perry</i> , 221 W.Va. 526, 655 S.E.2d 548 (2007).....	3

OUT OF STATE CASES:

<i>Maynard v. State Farm Mut. Auto. Ins. Co.</i> , 902 P.2d 1328, 1334 (Alaska. 1995).....	7
-----------------------------------------------------------------------------------------------	---

FEDERAL CASES:

Cisco v. State Farm Mut. Auto. Ins. Co., Civil Action No. 2:97-0744
(S.D.W.Va.1998).....4

STATUTES AND RULES:

W.Va. Code § 33-6-31(b).....1, 4, 8, 10

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 Respondents’ brief and the *amicus* brief of the West Virginia Association of Justice, (hereinafter “WVAJ”), does state as follows:

ARGUMENT

A. Non-duplication of benefits language is in accord with W.Va. Code §33-6-31(b) and this Court’s consistent interpretation of the statute as well as West Virginia’s public policy against double recovery

Both appellees’ and *amicus* incorrectly assert how State Farm applies non-duplication of benefits provision. Non-duplication of benefits is a mechanism whereby a claimant is reimbursed for medical expenses – once, not twice. There is no reduction of policy limits nor is the provision used in tandem with reimbursement provisions nor is there any method in the State Farm auto policy whereby State Farm recovers twice. (See *amicus*, pp. 18, 19, and 4, respectively). This clear and unambiguous policy language is in harmony with this Court’s holistic interpretation of the UIM statute, W.Va. Code §33-6-31(b), which considers gross damages less liability limits, less medical payments already paid to avoid duplicate recovery for the same damages.

In opposing this provision, Respondents have made a series of arguments in absolute terms which are inaccurate. Respondents assert an insured can never be made whole when receiving a tortfeasor’s liability limits, that settlement with a tortfeasor can never be full indemnification, that a UIM settlement is never proof of full compensation, that a UIM insurer can never prove full indemnification and that a UIM

insurer can never have a right of reimbursement. (See Respondents' brief, pp. 13, 30, and 6, respectively). Such absolutes defy logic and existing West Virginia law.

The very purpose of insurance is to make a claimant whole after a loss. While the goal is to make a claimant whole, there is no right to be made more than whole, thus the necessity of a non-duplication of benefits provision. It stands to reason that, if the insured recovered some or all of his or her medical bills under medical payments coverage, he does not receive those benefits again in the context of a UIM claim. To accept the absolutes advanced by the Respondents would render every tortfeasor underinsured regardless of liability and regardless of damages. Respondents' assertions would also deem every settlement inadequate. Respondents make these arguments so they can reach their ultimate goal of arguing no reimbursement should ever be permitted, thus nearly guaranteeing double recoveries, despite existing West Virginia law permitting reimbursement to prohibit double recoveries.

It is necessary to appreciate the difference between non-duplication and reimbursement and how each is applied. Non-duplication is a policy provision applicable when, for example, medical payments coverage and UIM coverage is available under one State Farm policy. In those situations, the entire value of the claim is paid, subject to policy limits, without overlap. Reimbursement is a provision triggered when the claimant/insured receives monies from a third party and is then contractually obligated to reimburse State Farm for medical payments advanced. While both operate to prevent duplication of medical expenses, they are applied in differing circumstances and not in tandem.

Despite the clear language, which is intended to preclude double recoveries, Respondents go so far as to assert claimants have a statutory right to a double recovery asserting an amendment to the UIM statute “affirmatively displaced the common law with respect to double recoveries.” (See Respondents’ brief, p. 11). That theory is inconsistent with this Court’s interpretation of the UIM statute. Beginning with *State Auto v. Youler*, 183 W.Va. 556, 396 S.E.2d 737 (1990), this Court held:

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), when this Court again applied the formula set forth above so that the amounts of liability and UIM coverage could not preclude the existence of coverage. That formula again was designed to make UIM coverage available, but not to permit a double recovery.

This Court has been unwavering in its position that a double recovery is contrary to West Virginia public policy. 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”). See also, *State ex rel. Packard v. Perry*, 221 W.Va. 526, 655 S.E.2d 548 (2007); *McDavid v. U.S.*, 213 W.Va. 592, 584 S.E.2d 226 (2003); *Pennington v. Bluefield Orthopedics, P.C.*, 187

W.Va. 344, 419 S.E.2d 9 (1992); *McCormick v. Allstate Ins. Co.*, 202 W.Va. 535, 505 S.E.2d 454 (1998); *Smithson v. United States Fid. & Guar. Co.*, 186 W.Va. 195, 411 S.E.2d 850 (1991); *Meade v. Slonaker*, 183 W.Va. 66, 394 S.E.2d 50 (1990); *Bevins v. W.Va. Office of the Ins. Comm'r*, 708 S.E.2d 509 (2010). So too the federal courts have prohibited double recovery. *Cisco v. State Farm Mut. Auto. Ins. Co.*, Civil Action No. 2:97-0744 (S.D.W.Va. 1998). Despite these clear pronouncements, Respondents now seek this Court to overrule this stance and permit a double recovery to UIM claimants.

Respondents and *amicus* also attack non-duplication of benefits language as reducing available UIM coverage and allegedly depriving insureds of benefits, thus precluding a full recovery or the ability to be made whole. Neither assertion is correct. Policy limits for medical payments coverage and UIM remain intact. If after payment of the liability limits, the claim has a value that equals or exceeds the medical payments coverage and the UIM coverage, both are paid in full; thus no reduction in coverage nor deprivation of any benefits. This fosters the goal of full indemnification while also preventing double recovery.

Appellees and *amicus* point to an amendment to W.Va. Code 33-6-31(b) as the source of their opposition to the non-duplication of benefits provision. However, appellees and *amicus* incorrectly interpret the “no sums payable” clause. The pertinent provision of the UIM statute states: “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.” Respondents emphasize the words “no sums” but overlook the key term “payable.” An evaluation of a claim eliminating double recovery provides the “sums payable.” Once the “sums payable” is determined, it is paid without reduction.

Thus, State Farm's policy provision utilized in determining the "sums payable" is appropriate and not in contravention of the UIM statute. It should, therefore, be applied as written.

Respondents further incorrectly assert this Court's ruling in *Cunningham v. Hill*, 226 W.Va. 180, 698 S.E.2d 944 (2010), is dispositive of the issue. The *Cunningham* decision invalidated "other insurance" language because it might arguably deny an insured the full benefit of two UIM policies. No such threat exists here. The present civil action does not involve "other insurance" provisions nor does it involve multiple policies. As written and applied, the non-duplication provision permits the insureds to make one full recovery. Any analogy, therefore to "other insurance" language which might permit a less than full recovery is inapposite to the non-duplication of benefits provision and therefore irrelevant to the present situation.

Respondents clearly seek to multiply their recovery rather than obtain one recovery for a single loss. Any attempt at a multiple recovery is improper. In analyzing a UIM claim, uncompensated damages are considered. See *Youler, supra*. If medical bills have been paid under medical payments coverage, they are no longer uncompensated damages and therefore are not properly considered in the UIM claim. This is the heart of the non-duplication of benefits provision and is wholly consistent with the UIM statute as well as this Court's interpretation of such. Invalidation of this proper policy language by the Circuit Court of Jefferson County must therefore be reversed.

B. Reimbursement language is distinct from non-duplication of benefits language and is likewise proper although not at issue in the present litigation

Respondents also incorrectly co-mingle non-duplication of benefits and reimbursement policy language. The non-duplication of benefits provision states a claimant may not seek recovery twice for damages paid under medical payments coverage and in a UIM claim. Reimbursement language is a right granted to an insurer to recover from an insured monies previously advanced. These provisions are applied in different contexts at different times and are not utilized in tandem.

Moreover, this Court has specifically sanctioned reimbursement language finding it the “best way” to prevent double recoveries. *Richards v. Allstate*, 193 W.Va. 244, 249, 455 S.E.2d 803, 808 (1995):

The best way an insurance carrier can prevent a situation like the present one from arising is to place clear and unambiguous language in its policy providing for the reimbursement of medical payments it may advance to its insured...

.....

... we hold the best way to deal with this problem is not to permit an insurance carrier to assert a right of subrogation against one of its insureds, but rather to have an insurance carrier insert clear and unambiguous language with regard to reimbursement in its policies.

Thereafter, in *Ferrell v. Nationwide Mut. Ins. Co.*, 217 W.Va. 243, 617 S.E.2d 790 (2005), this Court was called upon to review reimbursement language nearly identical to State Farm’s and again upheld the propriety of the reimbursement doctrine. Respondents argue *Ferrell* should be limited to those instances in which the tortfeasor’s

and claimant's insurer is the same. That attempted distinction overlooks this Court's prior decision of *Federal Kemper v. Arnold*, 183 W. Va. 31, 393 S.E.2d 669 (1990), which made reimbursement permissible when the tortfeasor's and claimant's insurers are different entities. The identity of the involved insurers is a distinction without a difference and should not alter the outcome that reimbursement provisions are valid. Although State Farm properly advised its insured of pertinent contract provisions when the claim was opened, it has also repeatedly affirmed it is not and will not seek reimbursement in this case. Nonetheless, the Circuit Court made rulings on issues which were not pled nor at issue. Now, however, Respondents co-mingle the terms in an effort to invalidate both, despite the fact both are proper and used in different contexts.

Respondents also seek to invalidate reimbursement policy provisions arguing such renders medical payments coverage illusory. That argument was specifically rejected in *Ferrell*:

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)).

Rather than accept these clear and valid contractual terms as written, Respondents and WVAJ argue reimbursement language should be stricken from all

auto policies and only subrogation against third party tortfeasors permitted. (See *amicus*, p. 20; Respondents' brief, p. 6). Given this Court has repeatedly upheld the propriety of reimbursement policy language, there is no valid reason to strike it in this or in any other case. This is simply another attempt by the Respondents' to augment their recovery which is inappropriate.

Alternatively, Respondents attempt to impose a duty on UIM insurers to "prove" a claimant has been made whole before reimbursement or non-duplication provisions are activated. (See Respondents' brief, p. 30). The burden of proving damages necessary to trigger a UIM claim, however, lies with the claimant. W.Va. Code §33-6-31(b). Second, reimbursement language, as with non-duplication of benefits provisions, furthers the made whole doctrine. It assures that medical bills, up to medical payments policy limits, have been paid, but not duplicated.

The Circuit Court improperly adopted these arguments in its Orders finding that reimbursement language – which was neither pled nor in any way implicated in the adjustment of the Schatkens' UIM claim – is invalid. Such ruling is directly contrary to the law of this State and must be reversed. Moreover, the specific ruling was that reimbursement language violated W.Va. Code §33-6-31(b). Reimbursement language concerns amounts advanced in medical payments coverage. Medical payments coverage, however, is not governed by W.Va. Code §33-6-31(b). Therefore, any ruling about medical payments reimbursement premised on the UIM statute can not stand and must be reversed.

C. Any argument that payment of medical payments coverage adversely impacted separate health insurance is meritless

Respondents voluntarily purchased medical payments coverage subject to all contract terms. The policy requires State Farm to pay medical bills incurred by an insured as a proximate result of a motor vehicle accident. The Respondents submitted medical bills to State Farm for payment under medical payments coverage; State Farm paid those bills. Now, it is criticized that payment, as directed by the insureds, somehow created debt to the insureds. It is nonsensical to argue that State Farm paid medical bills it was contractually obligated to pay but that said payment "caused" harm to the insureds. (See Respondents' brief, p. 32). Moreover, given that State Farm has not and will not seek reimbursement in this matter, any argument that a demand for reimbursement may also cause harm to the insureds is likewise misplaced and must be overruled.

D. The doctrine of reasonable expectations is misplaced in this litigation

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, this doctrine is inapplicable.

Likewise, to the extent this Court determines the reimbursement policy provision should be considered in this case, State Farm's language is nearly identical to that upheld by this Court in *Ferrell*, again rendering the doctrine of reasonable expectations inapplicable in the case *sub judice*.

CONCLUSION

To accept Respondents' arguments, this Court must abandon its interpretation of W.Va. Code §33-6-31(b) of determining gross damages less prior payments. The Respondents also call upon this Court to reverse its stance of preventing double recoveries and here permit claimants a triple recovery of their medical bills: from medical payments coverage, liability coverage and once again from UIM coverage. The Respondents also call upon this Court to reverse its rulings upholding the propriety of reimbursement language and to wholesale strike its application in first party claims. Finally, Respondents call upon this Court to rule that an insurer which pays medical bills pursuant to contract terms at the request of its insureds somehow also harms the insureds when paying those contractual benefits. These requests are abhorrent to West Virginia public policy and fundamental tenets of insurance and must be rejected. The Petitioner, therefore, respectfully requests this Court affirm its interpretation of the UIM statute, finding that non-duplication of benefits provision is in furtherance of that approach, uphold proper reimbursement language and reject any argument that the payment of medical payments benefits harms insureds.

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,

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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 Brief** upon the following individual by United States Mail, postage prepaid, first class, on this the 4th day of Jan, 2012:

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