

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 12-1254

(Appeal from Circuit Court of Ohio County Case No. 11-C-95 – Judge R.E. Wilson)

JOHANNA DORSEY,

Appellant and Plaintiff hereinbelow,

VS.

PROGRESSIVE CLASSIC INS. CO.

Appellee and Defendant  
/Third-Party Plaintiff hereinbelow,

VS.

LIBERTY MUTUAL INS. CO.

Third-Party Defendant hereinbelow.

**APPEAL BRIEF OF PETITIONER, JOHANNA DORSEY**

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## **I. Assignments of Error**

A. The Circuit Court of Ohio County erred in its August 29, 2012 *Memorandum Order* by misinterpreting the Court's holding in **Loudin v. Nat'l Liab. & Fire Ins. Co., 228 W.Va. 34, 716 S.E.2d 696 (2011)** as excluding individuals who are not premium-paying named insured from the scope of the definition of "first-party insureds."

1. ***Loudin v. Nat'l Liab. & Fire Ins. Co., 228 W.Va. 34, 716 S.E.2d 696 (2011)** does not hold that non-named insureds and non-premium-paying insureds are without a cause of action for first-party bad faith or otherwise fall outside of the definition of "first-party insured."*

2. *The decision in **Loudin v. Nat'l Liab. & Fire Ins. Co., 228 W.Va. 34, 716 S.E.2d 696 (2011)** has not been subsequently construed by this Court as limiting "first-party insured" status to only premium-paying named insureds.*

B. The Circuit Court of Ohio County erred in its August 29, 2012 *Memorandum Order* by holding that Ms. Dorsey was a third-party to the subject Progressive policy and not entitled to maintain statutory and common law bad faith claims against Progressive, as clear, existing legal authorities define Ms. Dorsey as a first-party claimant entitled to maintain suit.

1. *The Circuit Court plainly erred by failing to recognize that Ms. Dorsey was not a "third-party claimant" as defined by **West Virginia Code § 33-11-4a**.*

2. *The Circuit Court erred by failing to recognize that Ms. Dorsey was a "first-party claimant" as defined by the regulations of the West Virginia Insurance Commissioner.*

3. *The Circuit Court's erroneous holding ignored the definitions of first and third-party bad faith supplied by **State ex rel. Allstate Ins. Co. v. Gaughan, 203 W.Va. 358, 508 S.E.2d 75 (1998)** that support a finding that Ms. Dorsey is a "first-party claimant."*

4. *The Circuit Court erred by finding that Ms. Dorsey was a "third-party insured" not entitled to sue for common law bad faith pursuant to **Elmore v. State Farm Mut. Ins. Co., 202 W.Va. 430, 504 S.E.2d 893 (1998)** as Ms. Dorsey is not presenting an adversarial claim against the subject Progressive policy.*

## **II. Statement of the Case**

The instant appeal seeks reversal of the Circuit Court of Ohio County's August 29, 2012 *Memorandum Order* dismissing the Plaintiff's first-party statutory<sup>1</sup> and common law bad faith claims in the instant case. *Appx. pp. 267-269*. Said *Memorandum Order* erroneously granted Progressive's *Motion for Reconsideration Based Upon New Law*, pursuant to **Rule 60(b) of the West Virginia Rules of Civil Procedure**,<sup>2</sup> and which reconsidered Progressive's *Defendant Progressive Classic Insurance Company's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment*, filed pursuant to **Rule 12(b)(6) and Rule 56 of the West Virginia Rules of Civil Procedure**.

On March 25, 2011, the Appellant and Plaintiff hereinbelow, Johanna Dorsey, filed the instant case against Appellee and Defendant hereinbelow, Progressive Classic Insurance Company ("hereinafter sometimes referred to as "Progressive"), in the Circuit Court of Ohio County, West Virginia, alleging claims of first-party insurance bad faith. *Appx. pp. 1-6*. Ms. Dorsey's claims stemmed from Progressive's improper treatment of her in the resolution of a subrogation lien it asserted against her recovery from her successful settlement of a third-party automobile liability claim that had been pending in

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<sup>1</sup> By statutory bad faith, the Appellant means violations of the West Virginia Unfair Trade Practices Act.

<sup>2</sup> Progressive's *Motion for Reconsideration Based Upon New Law* was not styled as a **Rule 60(b)** motion. However, there generally being no such motion as a "motion for reconsideration," and the fact that said motion was filed beyond ten (10) days from the date of the Court's August 29, 2012 *Memorandum Order*, said motion is properly treated under **Rule 60(b)**.

litigation in Jefferson County, Ohio.<sup>3</sup> *Appx. pp. 2-3*. Specifically, Progressive intentionally refused to reduce its subrogation lien for its *pro rata* share of costs pursuant to the dictates of **Syl. Pt. 3 of Federal Kemper Ins. Co. v. Arnold, 183 W.Va. 31, 393 S.E.2d 669 (1990)**. *Appx. p. 75*. During the course of her underlying claims, Progressive provided Ms. Dorsey with Five Thousand Dollars (\$5,000.00) of first-party medical payments coverage benefits under the policy issued to her friend, policyholder, and driver of the vehicle within which Ms. Dorsey was a passenger, Joshua Teacoach.<sup>4</sup> *Appx. pp. 2-3 (paragraphs 7-9), 8 (paragraphs 7-9)*.

Ms. Dorsey successfully prevailed in her third-party liability claim and incurred attorneys fees and costs in the resolution of the same. Despite this fact, Progressive demanded a dollar-for-dollar recovery on its subrogation lien knowing that it was required by law to take a reduction on its lien. *Appx. pp. 88-91*. However, the clear dictates of West Virginia law were not enough to stop Progressive. In fact, in order to circumvent its duties under West Virginia law, it drummed up a plan to obtain the entire Five Thousand Dollar (\$5,000.00) subrogation lien directly from Ms. Dorsey's settlement by demanding that the third-party insurer, Liberty Mutual Insurance Company, pay the total sum directly to it. *Appx. p. 91*.

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<sup>3</sup> The Court should be aware that there is no dispute as to the jurisdiction of the Courts of the State of West Virginia over these claims as being proper or that Ohio County is a proper venue for this action. It is admitted by Progressive that this dispute regards a West Virginia-issued insurance policy issued to a West Virginia resident, Joshua Teacoach. *Appx. pp. 2 (paragraph 8), 8 (paragraph 8)*. Also, the Appellant, Johanna Dorsey, has been at all times relevant a resident of the State of West Virginia. *Appx. pp. 1 (paragraph 1), 7 (paragraph 1)*. Progressive is also an insurance company registered to transact the business of insurance in the State of West Virginia and sells insurance policies in West Virginia to West Virginia residents. *Appx. pp. 1 (paragraph 2), 7 (paragraph 2)*. Thus, there is likewise no dispute that the underlying claims regard the application of a West Virginia automobile insurance policy providing first-party medical payments coverage benefits. *See generally, Appx. 34-70 (Copy of Progressive W.Va. Motor Vehicle Policy)*.

<sup>4</sup> Thus, there is no dispute in this action that Ms. Dorsey is not an insured under the subject policy.

Ms. Dorsey, by and through her counsel rejected the legality of this request and instructed Liberty Mutual not to cut a check directly to Progressive. *Appx. p. 111-144*. Liberty Mutual continually contacted Progressive regarding the medical payments subrogation lien, with no response from Progressive. *Appx pp. 111-112, 149-151*. This resulted in a delay of Ms. Dorsey's third-party liability claim settlement since Liberty Mutual was hesitating to cut a check for the full amount of the settlement due to Progressive's unreasonable demands. *Appx. 116-144*. Ultimately, Ms. Dorsey was required to seek Court intervention to compel the settlement check from Liberty Mutual. *See Id.* Even after the settlement, Progressive continued to maintain its entitlement to repayment of the full Five Thousand Dollar (\$5,000.00) subrogation lien.

As a result of Progressive's intentional violations of law, Ms. Dorsey filed suit against Progressive in the Circuit Court of Ohio County for its wrongful conduct in the course of her underlying claims. After filing its Answer on April 20, 2011, Progressive moved for leave to file a third-party complaint to bring the underlying tortfeasor's carrier, Liberty Mutual Insurance Company, into the case. *Appx. pp. 14-23*. Therein, Progressive alleged that Liberty Mutual Insurance Company was liable to it for the totality of its Five Thousand Dollar (\$5,000.00) subrogation lien. *See Id.* The reason for this move appears to be that Progressive was taking the position in this bad faith litigation (in an attempt to mitigate its liability) that it had "waived any right to reimbursement of medical payments coverage from Plaintiff although it may separately pursue its right to subrogation against the tortfeasor's insurer for failure to honor proper notices of lien." *Appx. pp. 25, 72-73*. Progressive was posturing as if it was only seeking repayment of the subrogation lien directly from Liberty Mutual. However, Progressive knew that the policy proceeds had

been distributed to Ms. Dorsey, knew that Ms. Dorsey has endorsed a settlement agreement with the tortfeasor rendered her responsible for the satisfaction of subrogation liens, and knew that the functional effect of its claim against Liberty Mutual would be to interfere with Ms. Dorsey's recovery since, as a condition of the settlement with the tortfeasor, liens against the settlement would be her responsibility. *Appx. pp. 97-100*. In fact, Progressive's plan came to fruition when it brought Liberty Mutual into the case, as this caused Liberty Mutual to sue Ms. Dorsey by way of a cross-claim (improperly styled as a "counterclaim") for indemnification. *Appx. pp. 157-168*.

On June 29, 2011, Progressive filed *Defendant Progressive Classic Insurance Company's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment*. *Appx. pp. 24-73*. Therein, Progressive alleged that Ms. Dorsey could not maintain her first-party statutory and common law bad faith claims against it since she was a third-party to the policy pursuant to **Elmore v. State Farm Mut. Auto. Ins. Co., 202 W.Va. 430, 504 S.E.2d 893 (1998)** and **West Virginia Code § 33-11-4a** (*Appx. p. 28*); because she was a Class 2 insured (*Appx. pp 28-30*); and because, as a guest passenger, she was allegedly not recognized as a first-party with standing to sue (*Appx. pp. 30-31*).

The aforesaid *Motion* was fully briefed. By Order dated September 12, 2011, the Circuit Court of Ohio County denied *Defendant Progressive Classic Insurance Company's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment*. *Appx. pp. 152-153*. The Circuit Court specifically held that Ms. Dorsey, as a matter of law, had standing to sue Progressive as a first-party insured. *See Id.*

Following this decision, Ms. Dorsey attempted to resolve the alleged subrogation lien of Progressive on behalf of Liberty Mutual. Ms. Dorsey served an *Offer of Judgment*

upon Progressive offering Three Thousand Dollars (\$3,000.00) as full and final satisfaction of its subrogation lien alleged against Liberty Mutual. Ms. Dorsey chose this amount because it represented the amount of the Progressive subrogation lien minus attorney's fee. Progressive did not respond to Ms. Dorsey's offer, let it lapse, and seemingly continued to demand the full sum of its lien from Liberty Mutual knowing that Liberty Mutual would just sue Ms. Dorsey for this sum in the end.

On October 15, 2011, Progressive filed a *Motion for Reconsideration Based Upon New Law* wherein it asserted that this Court's opinion in **Loudin v. Nat'l Liab. & Fire Ins. Co.**, 228 W.Va. 34, 716 S.E.2d 696 (2011) should change the outcome of the Circuit Court's September 12, 2011 Order. *Appx. pp. 169-197*. Specifically, Progressive asserted that **Loudin** stood for the proposition that only *named insureds* and/or *premium-paying insureds* had standing to sue for first-party bad faith. *Appx. p. 171*. Thus, Progressive posited that, even though Ms. Dorsey was provided coverage by the first-party policy, she did not pay the premium and was not the named insured and, accordingly, could not sue Progressive under any theory of bad faith. *See Id.*

The aforesaid *Motion for Reconsideration Based Upon New Law* was fully briefed by the parties. Then, on November 22, 2011, the Court, by and through Law Clerk Heather Wood, advised that the *Motion* had been received and that after review the Court had "three (3) questions: 1) Where in Elmore does it say that a guest passenger is an insured?; 2) What does the insurance policy say about a guest passenger?; 3) Is there any state case that says that a guest passenger is an "insured"?" *Appx. pp. 211-212*. The

parties thereafter filed sur-responses specific to the Circuit Court's inquiries.<sup>5</sup> *Appx. pp. 213-266.*

Then, by *Memorandum Order* dated August 29, 2012, the Circuit Court of Ohio County granted Progressive's *Motion for Reconsideration Based Upon New Law* and dismissed Ms. Dorsey's first-party insurance bad faith claims. *Appx. pp. 267-269.* The Circuit Court erroneously held that, even though Ms. Dorsey was a guest passenger and afforded medical payments coverage under the subject policy, she was not a first-party insured but a third-party. *Appx. pp. 268-269.* In reliance upon **Loudin**, the Circuit Court ruled that only policy purchasers and named insureds could sue for first-party bad faith in West Virginia. *Appx. p. 268.*

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<sup>5</sup> While not reflected in the record of the proceedings, when the *Motion for Reconsideration Based Upon New Law* was orally argued on February 13, 2012, the Court encouraged mediation of this case. The parties were instructed to submit confidential *in camera* settlement positions to the Court. If the parties were very far apart, the Court advised that it would simply rule on the *Motion*. If the parties were close in their positions, the Court advised that it would be amenable to conducting mediation for the parties or permit the parties an opportunity to mediate prior to ruling. It is Ms. Dorsey's understanding that settlement positions were submitted by both parties.

### **III. Summary of Argument**

The crux of the instant appeal regards the application of **Loudin v. Nat'l Liab. & Fire Ins. Co.**, 228 W.Va. 34, 716 S.E.2d 696 (2011) to the first-party statutory and common law bad faith claims of Appellant and Plaintiff hereinbelow, Johanna Dorsey. The Appellant posits that the Circuit Court of Ohio County improperly granted summary judgment against her, upon reconsideration, when it misconstrued the **Loudin** decision to bar Ms. Dorsey's bad faith claims since she was a guest passenger who was entitled to first-party medical payments coverage under the policy and not a premium-paying named insured. Specifically, the Circuit Court incorrectly construed **Loudin** as limiting the causes of action for first-party statutory and common law bad faith to only those individuals who are premium-paying named insureds.

The Circuit Court of Ohio County was correct when it denied *Defendant Progressive Classic Insurance Company's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment* on September 12, 2011. However, by reversing that decision, the Circuit Court ignored ample existing authority that clearly defined Appellant and Plaintiff hereinbelow, Johanna Dorsey, to be a first-party insured entitled to sue for bad faith.

#### **IV. Statement of Oral Argument and Decision**

The undersigned counsel asserts that the instant matter presents clear errors of law by Circuit Court of Ohio County which could easily be addressed by this Court without the need for oral argument. However, that said, the undersigned counsel would respectfully request oral argument to the extent that it may be deemed necessary pursuant to **Rule 20 of the West Virginia Rules of Appellate Procedure** insofar as this matter may raise issues of public importance. Specifically, this appeal primarily regards clarification of the Court's decision in **Loudin v. Nat'l Liab. & Fire Ins. Co., 228 W.Va. 34, 716 S.E.2d 696 (2011)** and whether this Court intended, by its holdings in that case, to exclude Class 2 insureds from the scope of those individuals with standing to sue for statutory and common law first-party bad faith in West Virginia. Thus, to the extent that a ruling by this Court could exclude an entire class of insureds from the scope of those that may sue for first-party bad faith in this State, oral argument may be proper.

Alternatively, oral argument pursuant to **Rule 19 of the West Virginia Rules of Appellate Procedure** may also be warranted to the extent that this appeal presents a rather narrow issue of law regarding the determination of whether the Appellant and Plaintiff hereinbelow, Johanna Dorsey, is a first-party insured with standing to sue Progressive for statutory and common law bad faith under West Virginia law.

Accordingly, the undersigned counsel hereby certifies, under **Rule 18(a) of the West Virginia Rules of Appellate Procedure**, that oral argument has not been waived by all parties and that the instant appeal is not frivolous. Moreover, the Circuit Court's interpretation of **Loudin** has not been authoritatively decided by the Court, and/or alternatively, the Circuit Court is misapplying existing West Virginia authority.

Accordingly, the undersigned counsel reasonably believes that the decisional process would be aided by oral argument. The minimum times afforded under either **Rule 19** or **Rule 20** should be sufficient to address the issues on appeal.

The undersigned counsel also opines that a decision by way of memorandum order is likely improper. The issues presented in the instant case may require the issuance of additional syllabus points of law and/or may require a decision of precedential value.

## **V. Argument**

The Circuit Court erred in holding that “[Ms.] Dorsey is a third-party claimant and therefore cannot bring an action for conduct involving an insurance policy claim on theories of common law bad faith, breach of the insurance contract, breach of the implied duty of good faith and fair dealing, and violations of the West Virginia Unfair Trade Practices Act.” *Appx. p. 268*. By stating such, the Circuit Court incorrectly found that Ms. Dorsey’s claims under the West Virginia Unfair Trade Practices Act were barred by abrogation of third-party bad faith set forth at **West Virginia Code § 33-11-4a**. *Appx. p. 28*. Moreover, the Court further implied by that Ms. Dorsey was a third-party claimant to whom no common law duty of good faith and fair dealing was owed, pursuant to **Elmore v. State Farm Mut. Ins. Co.**, 202 W.Va. 430, 504 S.E.2d 893 (1998). *See Id.*

Both of these conclusions are in error and ignore existing statutory and common law definitions of who is a first-party or third-party claimant and what is a first-party or third-party claim. The Circuit Court once ruled in favor of Ms. Dorsey on these issues and found that she was a first-party insured who may properly assert a first-party bad faith claim. *Appx. pp. 152-153*. However, the Circuit Court thereafter improperly concluded that **Loudin v. Nat’l Liab. & Fire Ins. Co.**, 228 W.Va. 34, 716 S.E.2d 696 (2011) changed Ms. Dorsey’s status as a “first-party claimant” to a “third-party claimant” and misinterpreted the decision to limit the availability of the cause of action for first-party bad faith to only premium-paying named insureds. *Appx. pp. 267-269*.

**A. The Circuit Court of Ohio County erred in its August 29, 2012 Memorandum Order by misinterpreting the Court’s holding in Loudin v. Nat’l Liab. & Fire Ins. Co., 228 W.Va. 34, 716 S.E.2d 696 (2011) as excluding individuals who are not premium-paying named insured from the scope of the definition of “first-party insureds.”**

1. ***Loudin v. Nat'l Liab. & Fire Ins. Co., 228 W.Va. 34, 716 S.E.2d 696 (2011)** does not hold that non-named insureds and non-premium-paying insureds are without a cause of action for first-party bad faith or otherwise fall outside of the definition of "first-party insured."*

The Circuit Court's clearly erred when it held that, based upon **Loudin v. Nat'l Liab. & Fire Ins. Co., 228 W.Va. 34, 716 S.E.2d 696 (2011)**, Ms. Dorsey was not a first-party insured with standing to sue Progressive for statutory and common law bad faith, among other causes of action. *Appx. pp. 267-269.*<sup>6</sup> The Circuit Court's holding misapplies the holding in that case and misconstrues the spirit and intent of that decision. Specifically, the Circuit Court failed to recognize that the **Loudin** decision represented an expansion of the definition of first-party insured, as opposed to a narrowing of that definition. *Appx. pp. 198-200, 220-222.* Similarly, the Circuit Court failed to recognize that the **Loudin** decision has a narrow application and only instructs that a premium-paying named insured may sue as a first-party claimant even where the premium-paying named insured occupies the position of a third-party claimant pursuing a liability claim against his own policy where asserting a claim against the permissive operator of the policyholder's insured vehicle<sup>7</sup>. *See Id.* **Loudin** simply has no application that would lead anyone to believe that Ms. Dorsey, as a guest passenger afforded first-party medical payments coverage, would be barred from filing suit against Progressive.

At **Syllabus Point 3 of Loudin**, this Court held that "[w]hen a named policyholder files a claim with his/her insurer, alleging that a nonnamed insured under the same policy caused him/her injury, the policyholder is a first-party claimant in any

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<sup>6</sup> NOTE: The citation to the Appendix following each allegation of error on the part of the Circuit Court of Ohio County represents at least one location in the record where the issue was raised and/or discussed herein below in accordance with **Rule 10(c)(3) of the West Virginia Rules of Appellate Procedure.**

<sup>7</sup> "Class 2 insured" is defined in **Starr v. State Farm Fire & Cas. Co., 188 W.Va. 313, 423 S.E.2d 922 (1992).**

subsequent bad faith action against the insurer arising from the handling of the policyholder's claim.” In Loudin, this Court was faced with the dilemma of determining whether a named insured who was injured by the negligence of a permissive operator of the named insured’s vehicle was to be classified as a first-party or a third-party to the insurance policy for the purposes of pursuing a bad faith claim against the insurer. The cause of this quandary was the fact that the named insured occupied the position of both a third-party liability claimant and premium-paying first-party policyholder. Id. at \_\_\_, 716 S.E.2d at 701-702. On one hand, the insurer was providing coverage and a defense to the tortfeasor, the permissive operator of the named insured’s vehicle, under the policy’s liability coverage. Id. at \_\_\_, 716 S.E.2d at 698-699. The tortfeasor occupied the traditional position of the first-party insured in the liability claims context. On the other hand, the liability claimant was still the named insured and was the individual who has paid the premiums to purchase the subject policy. Loudin at \_\_\_, 716 S.E.2d at 703. Thus, the question at bar was whether the named insured could also sue the insurance company for first-party bad faith even though he was presenting an adversarial claim against the subject policy. This Court held in Loudin at \_\_\_, 716 S.E.2d at 703 that it would be fundamentally unfair to hold that the named insured under the policy was not owed a first-party duty of good faith and fair dealing by the insurer, especially considering that he had paid the premiums to secure the policy.

Loudin Court did not hold that the permissive operator of the insured vehicle was declassified as a first-party insured. Rather, the Court implicitly adopted an approach that imposed upon an insurer a duty of good faith and fair dealing toward *both* the permissive operator being defended and the named insured presenting the adversarial

claim. See generally, Id. This implicit holding was recognized and criticized by dissenting Justice Benjamin, who asserted that it placed insurers in an “impossible position” to equally adhere to duties of good faith and fair dealing in its dealings between two (2) antagonistic parties in a liability dispute. See Id. at \_\_\_\_, 716 S.E.2d at 706. In fact, Justice Benjamin opined that it was the Class 2 insured – the permissive operator – that should have been treated as the sole entity entitled to a duty of good faith and fair dealing. See Id. at \_\_\_\_, 716 S.E.2d at 707-709.

As this Court is aware, the Loudin decision in no manner foreclosed on the ability of a Class 2 insured to pursue a cause of action for first-party bad faith. To the contrary, it found that *both* a Class 2 insured and a premium-paying named-insured were owed a duty of good faith and fair dealing, even in the liability claims context. Loudin cannot be construed to preclude a guest passenger afforded first-party medical payments coverage, such as Ms. Dorsey, from suing an insurer for either statutory or common law bad faith. Accordingly, the Court erred when it found this Court’s decision in Loudin to be dispositive of Ms. Dorsey’s claims to the extent she was not a named insured or the individual who paid the premiums for the policy. *Appx. pp. 267-269.*

2. *The decision in Loudin v. Nat’l Liab. & Fire Ins. Co., 228 W.Va. 34, 716 S.E.2d 696 (2011) has not been subsequently construed by this Court as limiting “first-party insured” status to only premium-paying named insureds.*

In addition to the fact that the Loudin decision itself does not exclude guest passengers as first-party insureds owed a duty of good faith and fair dealing, a subsequent decision of this Court further evinces that the Loudin holding was never intended to limit the scope of who is “first-party insured.” For example, at **Syllabus Point 3 of Goff v. Penn Mutual Life Ins. Co., 229 W.Va. 568, 729 S.E.2d 890 (2012)**, the Court held that

“[u]pon the death of the insured, a primary beneficiary of a life insurance policy has standing to bring a statutory bad faith claim against the insurer pursuant to West Virginia Code § 33-11-4(9)(2011).” In reaching this holding, the Court reviewed its holding in **Loudin** at \_\_\_\_, 729 S.E.2d at 895 and characterized the same as “elevating” the Court’s definition of “first-party bad faith” in **State ex rel. Allstate Ins. Co. v. Gaughan**, 203 W.Va. 358, 508 S.E.2d 75 (1998). The Court instructed that, in **Loudin**, it had found that the **Gaughan** definition of “first-party bad faith” did not fit squarely with the situation presented therein. **Id.** As such, it expanded the scope of individuals who could sue for “first-party bad faith” to premium-paying named insureds to support the principle that “policyholders deserve to get the benefit of their contractual bargain without having to undergo costly and time-consuming litigation”; to uphold the maxim that “when insurers choose to wrongfully deny coverage or pay benefits to premium-paying insureds, this state has a firm public policy of holding them accountable”; and in recognition of the “unfairness that would result if the named policyholder was determined not to be owed a duty of good faith and fair dealing[.]” **Id. (internal citations omitted)**. As can be seen, the Court in **Goff** confirmed that it did not intend to limit the definition of “first-party bad faith” or “first-party insureds” in West Virginia, *vis-à-vis* **Loudin**, but instead intended to expand that definition to support important public policy concerns.

Furthermore, it should be noted that the holding in **Goff** presents yet another example of this Court expanding the definition of “first-party insured” to include non-premium paying beneficiaries as opposed to restricting it. See **Id.** at \_\_\_\_, 729 S.E.2d at 895-896. It verifies the public policy of this State to include more than just named

insureds or premium-paying insured in the class of “first-party insureds” who may maintain suit against an insurer for violations of the UTPA and/or common law bad faith.

Accordingly, based upon the clear reasoning of this Court in both **Loudin** and **Goff**, it is clear that the Circuit Court erred in holding that “[Ms.] Dorsey is a third-party claimant and therefore cannot bring an action for conduct involving an insurance policy claim on theories of common law bad faith, breach of the insurance contract, breach of the implied duty of good faith and fair dealing, and violations of the West Virginia Unfair Trade Practices Act.” *Appx. pp. 267-269.*

**B. The Circuit Court of Ohio County erred in its August 29, 2012 Memorandum Order by holding that Ms. Dorsey was a third-party to the subject Progressive policy and not entitled to maintain statutory and common law bad faith claims against Progressive, as clear, existing legal authorities define Ms. Dorsey as a first-party claimant entitled to maintain suit.**

The Circuit Court clearly erred when it held that Ms. Dorsey was a third-party and not a first-party to the subject Progressive policy. *Appx. p. 268.* As a guest passenger of the Progressive-insured vehicle entitled to medical payments coverage, Ms. Dorsey was a “first-party insured” under the policy. This is especially so considering that she was presenting a non-adversarial claim against the Progressive policy. **See generally, Elmore v. State Farm Mut. Ins. Co., 202 W.Va. 430, 504 S.E.2d 893 (1998) and W.Va. Code § 33-11-4a(j)(1).** *Appx. p. 213-216.* By holding that Ms. Dorsey was a “third-party insured” under the policy and not permitted to sue for statutory and common law bad faith, the Court improperly ignored existing legal precedent defining the scope of who qualifies as a “first-party insured” in West Virginia to include claimants such as Ms. Dorsey. *See Id.*

*1. The Circuit Court erred by failing to recognize that Ms. Dorsey was not a “third-party claimant” as defined by West Virginia Code § 33-11-4a.*

As this Court is aware, in 2005 the Legislature abrogated third-party causes of action under the West Virginia Unfair Trade Practices Act. See **W.Va. Code § 33-11-4a**. The scope of the abrogation is set forth within the body of the statute and does not incorporate guest passengers presenting medical payments coverage claims a “third party claimants” barred from asserting such claims. Specifically, pursuant to **W.Va. Code § 33-11-4a(j)(1)**, a “[t]hird-party claimant” means any individual, corporation, association, partnership or any other legal entity asserting a claim against any individual, corporation, association, partnership or other legal entity insured under an insurance policy or insurance contract for the claim in question.” Ms. Dorsey does not meet the definition of a “third-party claimant” under **§ 33-11-4a(j)(1)**, the plain terms of which clearly seeks to exclude bad faith claims presented against an insurer by adversaries of the named insureds or other insured persons. Simply put, the insurer cannot be sued for statutory bad faith by a party who sued or presented a liability claim against its insured as a tortfeasor.

Ms. Dorsey’s insurance medical payments claims are not adversarial claims. Similarly, Ms. Dorsey is not provided coverage under the applicable Progressive insurance policy because she is asserting a claim against the named insured, Joshua Teacoach. To the contrary, just like Mr. Teacoach, Ms. Dorsey is a first-party to the policy and entitled to first-party medical payments coverage simply by virtue of her being injured as an occupant of the Mr. Teacoach’s motor vehicle. Accordingly, Ms. Dorsey is not a third-party claimant whose statutory bad faith claims are barred by application of **§**

**33-11-4a**, and the Circuit Court erred by finding that she was a third-party claimant subject to the abrogation.<sup>8</sup>

2. *The Circuit Court erred by failing to recognize that Ms. Dorsey was a “first-party claimant” as defined by the regulations of the West Virginia Insurance Commissioner.*

The Circuit Court erred by failing to recognize that the regulations of the West Virginia Insurance Commissioner clearly define Ms. Dorsey as a first-party claimant under West Virginia law. *Appx. pp. 85, 220-221. West Virginia C.S.R. §114-14-2.3 (2006)* instructs that a “‘First-party claimant’ or ‘Insured’ means an individual, corporation, association, partnership or other legal entity asserting a right to payment under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by such policy.” As can be seen, there is no express limitation for Class 2 insureds in this definition, nor is there an express or implied requirement that the insured individual be a premium-paying named insured. Moreover, the aforesaid regulation appears to utilize the terms “first-party claimant” and “insured” interchangeably, a usage that the Appellant believes is pertinent. Part of the confusion of the Circuit Court in its *Memorandum Order* of August 29, 2012 appears to stem from its reliance upon Progressive’s fallacious supposition that by using the phrase “the insured” in the definition of first-party bad faith at **Syllabus Point 2 of Loudin**, this Court intended to limit the availability of the cause of action to premium-paying policyholders.

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<sup>8</sup> It should be noted that the specific application of **W.Va. Code § 33-11-4a(j)(1)** was not raised in the Circuit Court *sub judice*, but the application of **W.Va. Code § 33-11-4a** was. *Appx. p. 28*. The reason for this was because there was no reason for the Appellant and Plaintiff hereinbelow to have briefed it. Ms. Dorsey initially prevailed on the issue of whether she was a first-party insured who could assert a bad faith claim post-abrogation. *Appx. pp. 152-153*. When the issues developed further on reconsideration, they were limited to the application of the **Loudin** decision (*Appx. pp. 169-197*), and the narrow issues the Circuit Court requested to be briefed in response to its November 22, 2012 correspondence (*Appx. pp. 211-212*). Nevertheless, the issue of the application of **W.Va. Code § 33-11-4a(j)(1)** was subsumed in the Court’s ruling and it was plain error for the Circuit Court to ignore its clear application to this case upon reconsideration.

See *Appx. pp. 170-171*. West Virginia C.S.R. §114-14-2.3 demonstrates that the use of the term “the insured” does not restrict its scope to only policyholders insofar as the term has been found by the Insurance Commissioner to be synonymous with the term “first-party claimant.”

As the Court may see, it was clear error for the Court to ignore the definitions of the West Virginia Insurance Commissioner in holding that Ms. Dorsey was not a “first-party insured” entitled to file suit for first-party statutory and common law bad faith. *Appx. pp. 85, 220-221*. The Insurance Commissioner’s definition of this term clearly includes guest passengers presenting first-party medical payment coverage claims.

3. *The Circuit Court’s erroneous holding ignored the definitions of first and third-party bad faith supplied by State ex rel. Allstate Ins. Co. v. Gaughan, 203 W.Va. 358, 508 S.E.2d 75 (1998) that support a finding that Ms. Dorsey is a “first-party claimant.”*

The Circuit Court erred by failing to acknowledge that Ms. Dorsey’s claims fell within the scope of “first-party bad faith” as defined by the Court in State ex rel. Allstate Ins. Co. v. Gaughan, 203 W.Va. 358, 369, 508 S.E.2d 75, 86 (1998). *Appx. 219-220*.

Therein, this Court suggested that

For definitional purposes, a first-party bad faith action is one wherein the insured sues his/her own insurer for failing to use good faith in settling a claim brought against the insured or a claim filed by the insured. □ A third-party bad faith action is one that is brought against an insurer by a plaintiff who prevailed in a separate action against an insured tortfeasor.<sup>FN15</sup> In the bad faith action against the insurance company the third-party alleges the insurer insurance company engaged in bad faith settlement in the first action against the insured tortfeasor. □

**Id. at 369-370, 508 S.E.2d at 86-87 (internal citations and footnotes omitted).**

Pursuant to Gaughan, the litmus test for determining whether a cause would be defined as “third-party bad faith” is clearly whether the bad faith action was brought by a plaintiff against a tortfeasor’s insurer who had prevailed against tortfeasor. The Loudin

Court did not nullify this distinction between first- and third-party bad faith. In fact, it expressly codified this long-standing definition, and further expanded up it to include policyholders presenting liability claims against the policy. See **Syl. Pts., 2 and 3, Loudin, supra**. Unfortunately, the Circuit Court failed to recognize this fact and instead treated the **Loudin** decision as a narrowing of the scope of the **Gaughan** definition of “first-party bad faith.” *Appx. pp. 268*.

Ms. Dorsey’s claims regarded first-party medical payments claims and were clearly not claims presented against an “insured tortfeasor” or their insurer. Her claims were against the Progressive policy that provided coverage to the vehicle within which she was a passenger. She never asserted a claim against policy-holder, Joshua Teacoach, or otherwise alleged that he was a tortfeasor.

The Circuit Court was seemingly influenced by Progressive’s perversion of the holding **Loudin** wherein it suggested the decision stood for the exclusion of Class 2 insureds from the scope of the definition of “first-party insured.” *Appx. pp. 170-172*. Clearly, this assertion is incorrect, as previous indicated, the holding in **Loudin** represented an expansion of the definition of “first-party insured” not a limitation on its scope. Nevertheless, Progressive inferred that the Court’s pronouncement at **Syllabus Point 2 of Loudin**<sup>9</sup> evinced its intent to limit the cause of action for first-party bad faith to only policy purchasers. Specifically, this Court held that “[A] first-party bad faith action is one wherein the insured sues his/her own insurer for failing to use good faith in

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<sup>9</sup> Citing **State ex rel. Allstate Ins. Co. v. Gaughan**, 203 W.Va. 358, 369, 508 S.E.2d 75, 86 (1998). Accord **Noland v. Virginia Ins. Reciprocal**, 224 W.Va. 372, 384 n. 34, 686 S.E.2d 23, 35 n. 34 (2009); **State of West Virginia ex rel. Allstate Ins. Co. v. Madden**, 215 W.Va. 705, 714 n. 4, 601 S.E.2d 25, 34 n. 4 (2004); **State ex rel. Brison v. Kaufman**, 213 W.Va. 624, 630, 584 S.E.2d 480, 486 (2003); **State ex rel. Med. Assurance of West Virginia, Inc. v. Recht**, 213 W.Va. 457, 471 n. 13, 583 S.E.2d 80, 94 n. 13 (2003).

settling a claim ... filed by the insured.” **Id.** Progressive inferred that the use of the term “the insured” in **Syllabus Point 2** was in indication that the scope of who occupies the position of a first-party insured was narrowed to exclude non-named insureds, and the Circuit Court bit on this construction. Of course, the Circuit Court’s holding ignored the fact that the pronouncement in **Syllabus Point 2 of Loudin** was merely a reiteration of the existing scope of first-party bad faith and formalization of the same in a syllabus point.

4. *The Circuit Court erred by finding that Ms. Dorsey was a “third-party insured” not entitled to sue for common law bad faith pursuant to **Elmore v. State Farm Mut. Ins. Co., 202 W.Va. 430, 504 S.E.2d 893 (1998)** as Ms. Dorsey was not presenting an adversarial claim against the subject Progressive policy.*

The Circuit Court also failed to recognize that Ms. Dorsey was not a “third-party claimant” as defined by **Elmore v. State Farm Mut. Ins. Co., 202 W.Va. 430, 504 S.E.2d 893 (1998)**. *Appx. pp. 213-216, 263-264.* **Elmore** instructs that third parties liability claimants are without a cause of action for common law bad faith against a tortfeasor’s insurer due, in large part, to their adversarial relationship to that insurer. In the sole syllabus point of **Elmore**, the West Virginia Supreme Court of Appeals held that “[a] third party has no cause of action against an insurance carrier for common law breach of the implied covenant of good faith and fair dealing or for common law breach of fiduciary duty.” It reasoned that “the common law duty of good faith and fair dealing in insurance cases under our law runs between insurers and insureds and is based on the existence of a contractual relationship. In the absence of such a relationship there is simply nothing to support a common law duty of good faith and fair dealing on the part of insurance carriers toward third-party claimants.” **Id. at 434, 504 S.E.2d at 897.** The Court declined to hold that third-party liability claimants were owed a common law

fiduciary duty by an insurer and, concomitantly, owed to third-party liability claimants a common law duty of good faith and faith dealing.

The Elmore decision did not expressly include guest passengers within the scope of “third party.” That said, it also did not expressly exclude guest passengers from the scope of “third party” either. However, the reasoning of the Court in Elmore demonstrates that the scope of “third party” is intended to be limited to those individuals who have an adversarial relationship to the first-party insured and insurer. As the Court recognized and discussed throughout the opinion, third-party claimants asserting claims against the tortfeasor insured are adversaries to the tortfeasor’s insurer. See Id. The Elmore Court recognized that a tortfeasor’s insurer’s duty is to protect the tortfeasor (not the claimant) by resolving the claims presented by adversary claimants. Id. at 436-437, 504 S.E.2d at 899-900. Thus, the insurer owes the duty of good faith and fair dealing to the tortfeasor in such a context. See Id. Elmore recognized that a quandary would be created if insurers owed a duty of good faith and fair dealing to both the first-party and third-party in the liability claims process since their interests were in conflict with one another. See Id.; see also Loudin at \_\_\_, 729 S.E.2d at 706 (J. Benjamin dissent). The gravamen of Elmore decision is that the adversarial nature of the relationship between third-party liability claimants and tortfeasors’ insurance companies precludes the imposition of a common duty to act in good faith upon the insurer in its dealings with the liability claimant.

In the instant case, plaintiff, Johanna Dorsey, is not a third-party liability claimant as defined by Elmore. She is a guest passenger who presented first-party medical payments coverage claims and, as such, is a first party to the contract of insurance issued

by defendant Progressive. She is not and has never asserted a cause of action against the Progressive policyholder, Joshua Teacoach. As such, she lacks the requisite “adversarial” relationship with the policyholder and Progressive to warrant excluding her from the scope of claimants who may sue for breach of the common law duty of good faith and fair dealing. Accordingly, pursuant to Elmore, the plaintiff, Johanna Dorsey, is not without a common law bad faith claim against Progressive in this action, and the Circuit Court erred in holding the same.

#### **VI. Conclusion and Relief Requested**

The Circuit Court of Ohio County (J. Wilson) erred when it found that Loudin v. Nat’l Liab. & Fire Ins. Co., 228 W.Va. 34, 716 S.E.2d 696 (2011) classified the Appellant and Plaintiff hereinbelow, Johanna Dorsey, as a “third-party claimant.” Loudin never intended to exclude guest passengers afforded first-party medical payments coverage from the scope of those individuals who may sue for first-party statutory and common law bad faith. Moreover, the Circuit Court of Ohio County ignored ample West Virginia authority that defined Johanna Dorsey as a “first-party claimant” entitled to sue for statutory and common law bad faith in West Virginia.

**WHEREFORE**, the Appellant and Plaintiff hereinbelow, Johanna Dorsey, respectfully requests the following relief:

1.) That this Honorable Court find that Johanna Dorsey is a first-party insured/claimant under the subject Progressive policy who may sue Respondent and Defendant hereinbelow, Progressive Classic Insurance Company, for both common law bad faith and statutory bad faith (e.g., violations of the West Virginia Unfair Trade Practices Act);

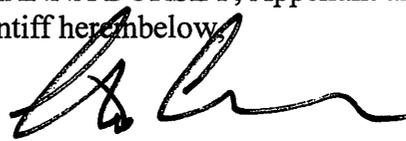
2.) That this Honorable Court issue a Syllabus Point defining Appellant and Plaintiff hereinbelow, Johanna Dorsey, and others similarly situated, as first-party insureds/claimants who may sue for both common law bad faith and statutory bad faith (e.g., violations of the West Virginia Unfair Trade Practices Act);

3.) That this Honorable Court clarify its decision in **Loudin v. Nat'l Liab. & Fire Ins. Co.**, 228 W.Va. 34, 716 S.E.2d 696 (2011) and/or issue a Syllabus Point holding that said decision does not operate to exclude the claims of Appellant and Plaintiff hereinbelow, Johanna Dorsey, and others similarly situated;

4.) That this Honorable Court reverse the August 22, 2012 *Memorandum Order* of the Circuit Court of Ohio County in the instant case, thereby reinstating all first-party insurance claims of the Appellant and Plaintiff hereinbelow, Johanna Dorsey; and

5.) That this Honorable Court remand this case to the Circuit Court of Ohio County for further proceedings.

Respectfully submitted,  
JOHANNA DORSEY, Appellant and  
Plaintiff hereinbelow,



BY:

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**CERTIFICATE OF SERVICE**

Now comes the undersigned counsel and hereby certifies that a true and accurate copy of the instant **APPEAL BRIEF OF PETITIONER, JOHANNA DORSEY** was served upon all parties to this appeal by regular U.S. mail, postage pre-paid on this 31<sup>st</sup> day of December, 2012, as follows:

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