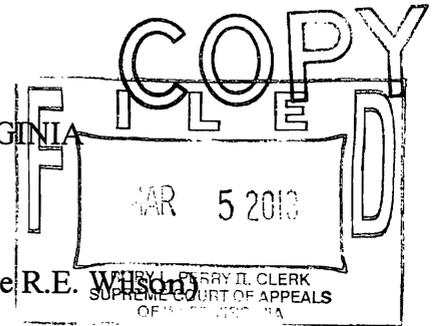


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

**REPLY BRIEF OF PETITIONER, JOHANNA DORSEY**

JIVIDEN LAW OFFICES, PLLC  
*Of Counsel for Appellant*

David A. Jividen (WV Bar #1889)  
Chad C. Groome (WV Bar #9810)  
729 N. Main Street  
Wheeling, WV 26003  
(304) 232-8888  
(304) 232-8555 facsimile  
[djividen@jividenlaw.com](mailto:djividen@jividenlaw.com)  
[cgroome@jividenlaw.com](mailto:cgroome@jividenlaw.com)

Table of Contents

Table of Authorities.....iv-v

**I. Statement of Oral Argument and Decision**.....1

**II. Argument**.....3

**A. The Respondent, Progressive Classic Insurance Company, misconstrues the standard of review to be applied to the instant appeal as that of an abuse of discretion.**.....3

**B. The Respondent, Progressive Classic Insurance Company, is incorrect in its conclusion that *Loudin v. Nat'l Liab. & Fire Ins. Co.*, 228 W.Va. 34, 716 S.E.2d 696 (2011) reiterated a pre-existing proposition that non-premium-paying insureds were third-party claimants, as pre-existing legal authority supports the Petitioner's definition of "first-party claimant."**.....4

**C. The Respondent, Progressive Classic Insurance Company, incorrectly suggests that the proper inquiry for deciding who is a first-party claimant is the "status" of the claimant, not the coverage sought. This is incorrect as the litmus test for determining who is a first- and third-party insured in West Virginia is whether the claimant is presenting her claim against either an insurance company or a person or entity.**.....9

**D. While the Petitioner agrees that the Court has provided special protection to premium-paying insureds in the past, that special protection is not mutually-exclusive of other first-party insureds' ability to present statutory and common law bad faith claims.**.....10

**E. The Petitioner's status as a Class Two insured does not foreclose on her ability to pursue a cause of action for statutory or common law bad faith.**.....12

**F. Respondent Progressive Classic Insurance Company's criticisms regarding the Petitioner's reliance upon *Goff v. Penn Mut. Life Ins. Co.*, 229 W.Va. 568, 729 S.E.2d 890 (2012) actually support the Petitioner's contentions as to why non-premium-paying insureds should always be considered first-party insureds.**.....14

---

<sup>1</sup> Pursuant to **Rule 10(g) of the West Virginia Rules of Appellate Procedure**, a summary of argument has not been included since the Petitioner's arguments are appropriately divided into topical headings. Also, pursuant to **Rule 10(d) of the West Virginia Rules of Appellate Procedure**, as cross-referenced by **Rule 10(g)**, no statement of the case is necessary since the outcome is not fact dependent and the assignments of error are not reiterated herein to the extent that the same are not required to be set forth in a respondent's brief and are adequately set forth in the appeal brief.

**G. The Respondent is incorrect in its contention that it is “admitted” that the Petitioner is not an “insured” under the policy. Footnote 4 of page 3 of the Petitioner’s Appeal Brief is an obvious misnomer insofar as it contradicts the Petitioner’s arguments stated throughout the brief, the Respondent’s admissions hereinbelow, and the August 29, 2012 Memorandum Order of the Circuit Court of Ohio County.....15**

**III. Conclusion and Relief Requested.....16**

**Table of Authorities**

**A. West Virginia Statutes, Regulations, and Rules of Procedure**

West Virginia Code § 33-11-4a(j)(1).....7,10

West Virginia C.S.R. §114-14-2.3 (2006).....6-7,10

West Virginia C.S.R. §114-14-2.8 (2006).....6-7,10

Rule 10(d) of the West Virginia Rules of Appellate Procedure.....1

Rule 10(g) of the West Virginia Rules of Appellate Procedure.....1

Rule 18(a) of the West Virginia Rules of Appellate Procedure.....1

Rule 19 of the West Virginia Rules of Appellate Procedure.....1-2

Rule 20 of the West Virginia Rules of Appellate Procedure.....1-2

Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.....4

Rule 56 of the West Virginia Rules of Civil Procedure.....4

Rule 60(b) of the West Virginia Rules of Civil Procedure.....3-4

**B. West Virginia Caselaw**

Bowyer by Bowyer v. Thomas, 188 W.Va. 297, 423 S.E.2d 906 (1992).....12

Burks v. McNeel, 164 W.Va. 654, 264 S.E.2d 651 (1980).....3

Charles v. State Farm Mut. Auto Ins. Co., 192 W.Va. 293, 298, 452 S.E.2d 384, 389 (1994).....11-12

Coffman v. W.Va. Div. of Motor Vehicles, 209 W.Va. 736, 551 S.E.2d 658 (2001).....3

Elmore v. State Farm Mut. Ins. Co., 202 W.Va. 430, 504 S.E.2d 893 (1998).....5-7,10

Fernandez v. Fernandez, 218 W.Va. 340, 624 S.E.2d 777 (2005).....3

Goff v. Penn Mutual Life Ins. Co., 229 W.Va. 568, 729 S.E.2d 890 (2012).....10, 14-15

<u>Hayseeds, Inc. v. State Farm Fire and Cas. Co.</u> , 177 W.Va. 323, 352 S.E.2d 73 (1986).....	11-12
<u>Jenkins v. J.C. Penney Cas. Ins. Co.</u> , 167 W.Va. 597, 280 S.E.2d 252 (1981).....	11
<u>Jividen v. Jividen</u> , 212 W.Va. 478, 575 S.E.2d 88 (2002).....	3
<u>Jordache Enterprises, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA</u> , 204 W.Va. 465, 513 S.E.2d 692 (1998).....	3
<u>Loudin v. Nat'l Liab. &amp; Fire Ins. Co.</u> , 228 W.Va. 34, 716 S.E.2d 696 (2011).....	1-2, 4-10, 12, 14-17
<u>McCormick v. Allstate Ins. Co.</u> , 197 W.Va. 415, 475 S.E.2d 507 (1996).....	11
<u>Miller v. Fluharty</u> , 201 W.Va. 685, 500 S.E.2d 310 (1997).....	11-12
<u>Shamblin v. Nationwide Mut. Ins. Co.</u> , 183 W.Va. 585, 396 S.E.2d 766 (1990).....	11-12
<u>Slider v. State Farm Mut. Auto Ins. Co.</u> , 210 W.Va. 476, 557 S.E.2d 883 (2001).....	11
<u>Starr v. State Farm Fire &amp; Cas. Co.</u> , 188 W.Va. 313, 423 S.E.2d 922 (1992).....	12-13
<u>State ex rel. Allstate Ins. Co. v. Gaughan</u> , 203 W.Va. 358, 508 S.E.2d 75 (1998).....	6,10
<u>Toler v. Shelton</u> , 157 W.Va. 778, 204 S.E.2d 85 (1974).....	3

**B. Extra-Jurisdictional Caselaw**

<u>Linscott v. State Farm Mutual Auto. Ins. Co.</u> , 368 A.2d 1161, 1163-64 (Me.1977).....	5
<u>Long v. McAllister</u> , 319 N.W.2d 256, 262 (Iowa 1982).....	5

## **I. Statement of Oral Argument and Decision**<sup>1</sup>

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

---

<sup>1</sup> Pursuant to **Rule 10(g) of the West Virginia Rules of Appellate Procedure**, a summary of argument has not been included since the Petitioner's arguments are appropriately divided into topical headings. Also, pursuant to **Rule 10(d) of the West Virginia Rules of Appellate Procedure**, as cross-referenced by **Rule 10(g)**, no statement of the case is necessary since the outcome is not fact dependent and the assignments of error are not reiterated herein to the extent that the same are not required to be set forth in a respondent's brief and are adequately set forth in the appeal brief.

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.

## II. ARGUMENT

### A. The Respondent, Progressive Classic Insurance Company, misconstrues the standard of review to be applied to the instant appeal as that of an abuse of discretion.

The standard of review applicable to the instant appeal is not an abuse of discretion standard, as the Respondent suggests. Fernandez v. Fernandez, 218 W.Va. 340, 624 S.E.2d 777 (2005), Jividen v. Jividen, 212 W.Va. 478, 575 S.E.2d 88 (2002), and Jordache Enterprises, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA, 204 W.Va. 465, 513 S.E.2d 692 (1998) each involve review of a circuit court's denial of **Rule 60(b)** relief. As such, the defendant's reliance upon those cases is misplaced. *See Respondent's Brief*, p. 5.

The West Virginia Supreme Court of Appeals in Coffman v. W.Va. Div. of Motor Vehicles, 209 W.Va. 736, 551 S.E.2d 658 (2001), suggests that a different standard of review is employed in case where **Rule 60(b)** relief is granted at the circuit court level. As this Court stated in Coffman at 739-740, 551 S.E.2d at 661 - 662, "...we typically defer to a circuit court's discretion with respect to rulings concerning Rule 60(b) motions: '[a] motion to vacate a judgment made pursuant to *Rule 60(b)*, W.Va. R.C.P., is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion.' Syl. pt. 5, *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974).<sup>1</sup> Nevertheless, '[i]n reviewing the judgment of a lower court this Court does not accord special weight to the lower court's conclusions of law, and will reverse the judgment below when it is based on an incorrect conclusion of law.' Syl. pt. 1, *Burks v. McNeel*, 164 W.Va. 654, 264 S.E.2d 651 (1980)...." The Coffman decision clearly sets forth a modified standard of for appeals following **Rule 60(b)** motions that result in a vacation of a prior decision.

The instant appeal regards a grant of **Rule 60(b)** relief that ultimately resulted in the Circuit Court of Ohio County dismissing the Petitioner's claim pursuant to either **Rule 12(b)(6)** or **Rule 56 of the West Virginia Rules of Civil Procedure**. The nature and effect of the Circuit Court's decision was essentially to grant summary judgment or dismissal as requested by the Respondent in its prior motion(s). For this reason, a standard of review similar to that of a grant of summary judgment or request for dismissal should be employed. It would make no sense to apply an abuse of discretion standard to the instant appeal where the error of Circuit Court of Ohio County is a legal one regarding its interpretation of this Court's decision in **Loudin v. Nat'l Liab. & Fire Ins. Co.**, 228 W.Va. 34, 716 S.E.2d 696 (2011). To do so would for this Court to cede its superiority over the circuit courts when it comes to interpreting and/or expanding the law of this State.

**B. The Respondent, Progressive Classic Insurance Company, is incorrect in its conclusion that Loudin v. Nat'l Liab. & Fire Ins. Co., 228 W.Va. 34, 716 S.E.2d 696 (2011) reiterated a pre-existing proposition that non-premium-paying insureds were third-party claimants, as pre-existing legal authority supports the Petitioner's definition of "first-party claimant."**

In support of its contentions, the Respondent makes the sweeping assertion that the Court in **Loudin v. Nat'l Liab. & Fire Ins. Co.**, 228 W.Va. 34, 716 S.E.2d 696 (2011), upheld longstanding case law supporting the conclusion non-premium-paying insureds are third-party claimants. *See Respondent's Brief, p. 6*. In positing the same, the Respondent makes several incorrect assumptions about both **Loudin** and pre-existing jurisprudence.

As the Court may see, the Respondent's conclusion avoids a meaningful review of pre-existing case law in this regard. The Respondent, instead, seeks to make quick work of those decisions electing only to cite to selectively fleeting references from those decision. However, a

meaningful review of each authority demonstrates that, pre-Loudin, the Petitioner qualified as a first-party claimant.

**Elmore v. State Farm Mut. Ins. Co., 202 W.Va. 430, 434, 504 S.E.2d 893, 897 (1998)** found 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.” Nowhere in this definition is it suggested that the payment of a premium is the acid test for occupying “insured” status. However, when one delves into the reasoning of Elmore, it is quickly discovered that the Court’s definition of “third-party claimant” was premised upon the adversarial position those claimants occupied against the insurer. As stated in Elmore at 436, 504 S.E.2d at 899, “. . . the relationship between an insurer and a third-party claimant in a settlement process is adversarial. ‘[T]hat the insurer is the representative of the insured logically imports that the third-party tort claimant’s status as the adversary of the insured renders him, ipso facto, the adversary of the insured’s agent.’ *Linscott v. State Farm Mutual Auto. Ins. Co.*, 368 A.2d 1161, 1163-64 (Me.1977). ‘[T]he insurer stands in the shoes of the insured in dealing with the victim.’ *Long v. McAllister*, 319 N.W.2d 256, 262 (Iowa 1982). Because the insurer is an adversary of a third-party claimant in the settlement process, the law cannot expect the insurer to subordinate its interests to those of the third party.”

The Respondent seemingly suggests that the Elmore Court’s use of the terms “insurers” and “insureds” insinuates a limitation of first-party insureds to policyowners. *See Respondent’s Brief, p. 6*. However, this express limitation is absent from Elmore, and to suggest the same is to ignore the decision’s focus on the adversarial relationship as distinguishing between first- and

third-party status. See Elmore at 436, 504 S.E.2d at 899. Elmore never held that non-premium-paying insureds were third-parties in the bad faith claims context, and it in no manner foreclosed on the ability of non-premium-paying insureds to institute first- or third-party UTPA claims.

Similarly, the Court in State ex rel. Allstate Ins. Co. v. Gaughan, 203 W.Va. 358, 508 S.E.2d 75 (1998) did not exclude the claims of non-premium-paying first party insureds from the definition of first party bad faith. To the contrary, the Court in Gaughan at 369-370, 508 S.E.2d at 86-87 (internal citations and footnotes omitted)(emphasis added) held that “[f]or 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. □ 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. □ “ Again, Gaughan clearly instructs that the Petitioner’s status is one of first-party claimant, not third-party. However, the Respondent ignores the clear dictates of Gaughan to focus instead upon a passing reference to a first-party claimant being one who sues “his/her own insurer.” See *Respondent’s Brief*, pp. 6-7. To construe Gaughan as restricting bad faith claims to only premium-paying insureds by using this phrase requires one to ignore the clear definition it provided for a third-party bad faith action.

The Respondent’s argument that the Loudin Court found the of the definitions of first- and third party claimants, as provided by the regulations of the West Virginia Insurance Commissioner, West Virginia C.S.R. §§114-14-2.3, 2.8 (2006), to be unambiguous is correct, but its interpretation that it focused on the policyholder is misplaced. See *Respondent’s Brief*,

pp. 7-8. The **Loudin** Court did not construe the definitions of first- and third-party claimants set forth by the Insurance Commissioner to unambiguously focus on the premium-paying status of an insureds, as the Respondent suggests. *See Id.* **Loudin** found that the circuit court erred in its interpretation of the regulations of the Insurance Commissioner to the extent that it concluded that a premium-paying insured presenting a liability claim against his own policy was not a “first-party claimant.” The Court in **Loudin** at \_\_\_, 716 S.E.2d at 701-702, found that a premium-paying claimant asserting a liability claim against his own policy met the unambiguous definitions of *both* “first-party claimant” and “third-party claimant” as set forth by the Insurance Commissioner.

Moreover, the definition of “first-party claimant” in the context of the regulations of the Insurance Commissioner focuses on whether the claimant is asserting a claim against a policy of insurance. *See West Virginia C.S.R. §§114-14-2.3*. On the other hand, the definition of the Insurance Commissioner for “third-party claimants” focuses on whether the claimant is asserting a claim against an insured tortfeasor. *See West Virginia C.S.R. §§114-14-2.8*. Similar to **Elmore**, the regulations of the insurance commissioner focus on who the individual is making the claim against, not who purchased the policy or their “status” as a Class One, Two, or Three insured in relation to the policy. Is the claim being made against an insurance company due to coverage being triggered against the policy? If so, it is a first-party claim. Is the claim being made against an individual or entity who is covered by insurance? If so, the claim is a third-party claim.

Note also, the Respondent did not address the Petitioner’s reliance upon **W.Va. Code § 33-11-4a(j)(1)**, which dictates that, for the purposes of the statutory abrogation of third-party UTPA claims, 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.” The Legislature has unambiguously spoken to the issue of who is a “third-party claimant” for the purposes of a UTPA claim and it is, thus, beyond the authority of the Circuit Court or this Court to recraft that statutory definition to exclude the Petitioner’s claims from the UTPA.

Simply put, prior to Loudin, West Virginia law was always clear that all claimants asserting a claim against a policy, as opposed to an insured person or entity, are first-party insureds. **Syl. Pt. 3 of Loudin** did not depart from those definitions, but merely held that since a premium-paying policyholder asserting a liability claim against his own policy meets both definitions, the policyholder will be treated as a first-party for the purposes of a statutory or common law bad faith claim.

In addition to assuming the existing jurisprudence supports its proposed scope of the definition of “first-party insured”, the Respondent’s argument infers two (2) additional assumptions about Loudin that are incorrect: (1) that it simply upheld the *status quo*; and (2) that the decision to treat premium-paying insureds as first-party claimant necessarily results in the exclusion of non-premium-paying first-party insureds from the definition. *See generally, Respondent’s Brief.* Both of these assumptions are fallacious. The Loudin decision unquestionably expanded the definition of first-party claimant to include premium-paying insureds who are presenting what would be otherwise be considered third-party claims. This is a departure from the *status quo*. Moreover, **nothing** in Loudin suggests that the inclusion of premium-paying insureds into the definition is necessarily mutually exclusive of non-premium-

paying insureds from the scope of that definition. Rather, both premium-paying liability claimants *and* non-premium paying insureds occupy first-party claimant status after Loudin.

The Petitioner's contention are not only supported by the plain language of the Loudin decision, but also the dissent of Justice Benjamin therein. Justice Benjamin characterized the Court's holding as "a radical departure from our jurisprudence and wholly without support from other courts" and criticized it to the extent that it "places insurance companies in the impossible position of owing a duty of good faith and fair dealing to two potentially antagonistic parties at the same time." Loudin, \_\_\_ W.Va. \_\_\_, 716 S.E.2d 696, 706 (2011). Neither of the Respondent's assumptions could be correct based upon Justice Benjamin's criticism of Loudin. First, a decision that merely upholds the *status quo* would never be characterized as a "radical departure." The fact of the matter is that Loudin changed something. The Petitioner submits that this change was expansive and inclusive of individuals who were previously not thought to be first-party insureds. Second, Loudin cannot be construed to be exclusive of the claims of non-premium-paying insureds if Justice Benjamin is correct in his observation that insurers are now placed in a position of potentially owing a dual duty of good faith and fair dealing in factual patterns similar to Loudin. By inference, Justice Benjamin suggests that the Petitioner's interpretation that Loudin is not exclusive of the claims of non-premium-paying insureds from the definition of first-party claimant is the correct one.

**C. The Respondent, Progressive Classic Insurance Company, incorrectly suggests that the proper inquiry for deciding who is a first-party claimant is the "status" of the claimant, not the coverage sought. This is incorrect as the litmus test for determining who is a first- and third-party insured in West Virginia is whether the claimant is presenting her claim against either an insurance company or a person or entity.**

The correct inquiry for determining whether a claimant is a first- or third-party is well established. The inquiry focuses on whether the claimant is presenting a claim against an insurance policy or presenting a claim against an insured person or entity. See **W.Va. Code § 33-11-4a(j)(1)**; **West Virginia C.S.R. §§114-14-2.3, 2.8 (2006)**; **Elmore v. State Farm Mut. Ins. Co., supra**; and **State ex rel. Allstate Ins. Co. v. Gaughan, supra**. The former is a first-party claimant, while the latter is a third-party claimant. **Loudin** merely expanded the definition of first-party claimant to also include third-party claimants who are presenting liability claims against their own policy. The reason for this expansion was because the premium-paying insured met the definition of first-party claimant as well as third. **Loudin** at \_\_\_, 716 S.E.2d at 701-702. The Court simply gave the benefit of that quandary to the premium-paying insured and treated him as a first-party claimant. In fact, in **Goff v. Penn Mut. Life Ins. Co., 229 W.Va. 568, \_\_\_, 729 S.E.2d 890, 895 (2012)(citing Loudin, supra.)** the Court clarified its holding in **Loudin** as defining third-party bad faith as follows: “We affirmed the accepted definition of a third-party action as one brought against an insurer by a plaintiff who has already prevailed in a separate action against an insured tortfeasor. *Id.* at 38, 716 S.E.2d at 700.” The definition is clear, and it is equally clear that the Petitioner cannot be classified as a third-party claimant where she is a non-premium-paying insured asserting a claim against an insurer who provided her with first-party medical payments coverage.

**D. While the Petitioner agrees that the Court has provided special protection to premium-paying insureds in the past, that special protection is not mutually-exclusive of other first-party insureds’ ability to present statutory and common law bad faith claims.**

As the Court reasoned, “[t]he observations expressed in *Miller* and *Hayseeds* echo a firm public policy of this State to hold insurers accountable in a court of law when they wrongfully deny coverage to premium-paying insureds.” **Loudin v. National Liability & Fire Ins. Co. 716**

S.E.2d 696, 703 (2011)(citing Miller v. Fluharty, 201 W.Va. 685, 500 S.E.2d 310 (1997) and Hayseeds, Inc. v. State Farm Fire and Cas. Co., 177 W.Va. 323, 352 S.E.2d 73 (1986)). The Petitioner does not dispute this. However, neither Miller nor Hayseeds suggest that non-premium paying first-party insureds are third-party claimants for the purposes of a statutory or common law bad faith suit or are otherwise afforded lesser rights in bad faith litigation.<sup>2</sup> While not determinative of the issues at bar, it should be further noted that neither Hayseeds, Miller, nor their progeny foreclose on the possibility of other types of first-party insureds from recovering Hayseeds-style damages from an insurer despite the use of the term “policyholder” in the scope of the Hayseeds doctrine. In fact, refusing to extend Hayseeds-style doctrines to non-premium-paying insureds would be foolish public policy and serve only to incentivize insurers to deny the claims of non-premium-paying insureds and force those claims into litigation. The public policy justifications are the same whether the first-party insured is a premium-payer or not, as the premium-paying insured paid good money for coverages to be extended to individuals other than herself, such as her passengers. Why should the premium-paying insured not get the full benefit of her bargain to protect others under the policy?

Moreover, the doctrine in Shamblin v. Nationwide Mut. Ins. Co., 183 W.Va. 585, 396 S.E.2d 766 (1990) is not a good example of the Courts providing premium-paying policyholders with rights greater than non-premium-paying insureds. In fact, Shamblin has historically been applied to non-premium paying insureds. For example, in Charles v. State Farm Mut. Auto Ins. Co., 192 W.Va. 293, 298, 452 S.E.2d 384, 389 (1994), a decision cited by the Respondent (*see Respondent’s Brief, p. 10*), the Court stated that the “it is beyond cavil that the original

---

<sup>2</sup> See generally, Slider v. State Farm Mut. Auto Ins. Co., 210 W.Va. 476, 557 S.E.2d 883 (2001)(citing Jenkins v. J.C. Penney Cas. Ins. Co., 167 W.Va. 597, 280 S.E.2d 252 (1981) and McCormick v. Allstate Ins. Co., 197 W.Va. 415, 475 S.E.2d 507 (1996))(discussing the express distinction of Hayseeds style claims from UPTA claims).

*Shamblin* doctrine was created to protect policyholders who purchase insurance to safeguard their hard-won personal estates and then find these estates needlessly at risk because of the intransigence of an insurance carrier.” However, **in the very next sentence of Charles at 298, 452 S.E.2d at 389**, the Court held that “[a]lthough Mr. Bowen was not the original purchaser of the insurance, he was nonetheless an ‘insured’ under the policy and is, therefore, entitled to the protections of the *Shamblin* doctrine to the extent that as an ‘insured’ he has not forfeited his rights under *Bowyer by Bowyer v. Thomas*, 188 W.Va. 297, 423 S.E.2d 906 (1992).” Thus, **Charles** unmistakably applied **Shamblin** principles to non-premium-paying insureds. Furthermore, at **Footnote 1 of Charles at 298, 452 S.E.2d at 389**, the Court asserted that one of the public policy justifications for this expansion was lowering policy premiums for West Virginia insureds by avoiding costly litigation. In that same footnote, it further suggested that **Hayseeds** and **Miller** were premised upon a similar public policy of lower insurance premiums, thereby inferring their potential for expansion toward other type of claimants in furtherance of this policy. **See Id.**

Therefore, based upon the foregoing, the Respondent’s argument the public policy of providing protection to premium-paying-insureds does not support the proposition that non-premium-paying insureds are without a cause of action for statutory or common law first-party bad faith.

**E. The Petitioner’s status as a Class Two insured does not foreclose on her ability to pursue a cause of action for statutory or common law bad faith.**

The Respondent’s assertion that the Petitioner’s status as a Class Two insured means she is with lesser rights in regard to pursuing an action for bad faith is a fiction. *See Respondent’s Brief, pp. 10-13*. The decision in **Starr v. State Farm Fire and Cas. Co., 188 W.Va. 313, 423 S.E.2d 922 (1992)** was not mentioned by the **Loudin** Court in its reasoning and does not support

the Respondent's argument. At **Syl. Pt. 1 of Starr**, the Court held that “[u]ninsured or underinsured motorist provisions of an automobile insurance policy which separately define coverage for the owner, spouse, and any relative living in the owner's household as one group, and for other persons while occupying the covered vehicle with the consent of the owner or his or her spouse as another group, create two distinct classes of covered individuals. The first class includes the named insured, his or her spouse, and their resident relatives. The second class consists of the permissive users of the named insured's vehicle.” At **Syl. Pt. 2 of Starr**, the Court held that “[u]nder provisions of a motor vehicle insurance policy which tie a permissive user's right to uninsured/underinsured motorist benefits to his or her occupancy of a covered automobile, a person who is injured while occupying a covered vehicle with the permission of the named insured or his or her spouse is entitled to recover uninsured or underinsured motorist benefits under the named insured's coverage only on the occupied vehicle involved in the accident and may not stack the named insured's uninsured/underinsured motorist coverage on another vehicle.”

The Respondent suggests **Starr** stands for the blanket conclusion that Class Two insureds are always with lesser rights against an insurer. *See Respondent's Brief, p. 11*. To the contrary, **Starr** concludes merely that Class Two insureds may not be able to stack the UM/UIM coverages of various motor vehicle policies in certain circumstances. The basis for this conclusion is not that Class One insureds are generally of a higher status, but rather because the Court found that a Class Two insureds' status under an uninsured or underinsured coverage policy to be occupancy-based coverage. **See Id. at 317-318, 423 S.E.2d at 926-927**. Thus, the Class Two insured is only insured as an occupant of a covered vehicle and not those other vehicles covered under the policy or various policies. **See Id.** This is in no manner an indication

that Class Two insureds are without legal recourse against first-party insurers who commit statutory or common law bad faith.

**F. Respondent Progressive Classic Insurance Company's criticisms regarding the Petitioner's reliance upon *Goff v. Penn Mut. Life Ins. Co.*, 229 W.Va. 568, 729 S.E.2d 890 (2012) actually support the Petitioner's contentions as to why non-premium-paying insureds should always be considered first-party insureds.**

Interestingly, in an effort to disparage the Petitioner's reliance upon **Goff v. Penn Mut. Life Ins. Co.**, 229 W.Va. 568, \_\_\_, 729 S.E.2d 890, 895 (2012), the Respondent actually supports the Petitioner's interpretation of **Loudin**. First, the Respondent suggests that the life insurance beneficiary scenario is different considering that if the beneficiary could not sue there would be no person who would be able to hold the insurer accountable for bad faith. *See Respondent's Brief*, p. 12. However, the same logic applies herein. If a non-premium-paying first-party insured cannot sue the insurer for bad faith in its dealings with her, there is no one to sue. The premium-paying insured has suffered no damage and arguably has no standing to present such a claim since the damage caused by the insurer is personal to the non-premium-paying insured. The Respondent is, thus, arguing for an interpretation of **Loudin** that results in no one being capable of holding the insurer responsible. Second, the Respondent posits an interpretation of **Goff** and **Loudin** that suggests that "the key inquiry to determining whether a claimant is a first- or third-party claimant is to determine who occupies the status, or stands in the shoes of, a premium-paying policyholder." *See Respondent's Brief*, p. 12. While the Petitioner disputes this conclusion, the statement is an interesting admission by the Respondent. The Respondent implicitly concedes that **Goff** expanded its proposed definition of first-party insured by including claimants other than premium-paying policyholders can occupy the status as first-party insureds by adopting this position.

**Goff** at \_\_, 729 S.E.2d at 894 -895(emphasis added) synthesized the **Loudin** decision as follows:

Because the claim involved in *Loudin* <sup>□</sup> presented characteristics of both a first- and a third-party bad faith claim, we reviewed the definitional parameters for such actions. **Elevating the definition** first adopted in *Gaughan*, we held in syllabus point two of *Loudin* that “[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 filed by the insured.” 228 W.Va. at 35, 716 S.E.2d at 697. **We affirmed the accepted definition of a third-party action as one brought against an insurer by a plaintiff who has already prevailed in a separate action against an insured tortfeasor.** *Id.* at 38, 716 S.E.2d at 700. Neither one of those definitions squarely fit the situation presented by the facts of *Loudin*. As a result, the Court undertook an analysis of the principles which underlie both insurance in general and bad faith actions in particular. *See id.* at 40–41, 716 S.E.2d at 702–03.

Accordingly, the **Goff** decision makes crystal clear that the Court in **Loudin** was not seeking to degrade non-premium-paying insureds as third-party claimants.

**G. The Respondent is incorrect in its contention that it is “admitted” that the Petitioner is not an “insured” under the policy. Footnote 4 of page 3 of the Petitioner’s Appeal Brief is an obvious misnomer insofar as it contradicts the Petitioner’s arguments stated throughout the brief, the Respondent’s admissions hereinbelow, and the August 29, 2012 Memorandum Order of the Circuit Court of Ohio County.**

The Respondent asserts that the Petitioner admits that she is not an insured under the subject policy. *See Respondent’s Brief, p.4.* The Respondent references footnote 4 of at page 3 of the Petitioner’s Appeal Brief to support this contention. The Petitioner submits that this statement is an obvious misnomer, as the facts of the case and arguments set forth in the brief clearly argue the contrary. The Petitioner’s position at footnote 4 at page 3 should have stated that “it is undisputed that the Petitioner, Johanna Dorsey, is an insured under the policy” and the Petitioner corrects this misnomer by reference as if fully set forth in said footnote.

It cannot be asserted that Ms. Dorsey was not an insured under the policy. She presented a claim for Five Thousand Dollars (\$5,000.00) against the subject Progressive policy, and her

claim was honored as admitted by the Respondent in its pleadings hereinbelow. *See Appx., pp. 14,21,25.* In that the Respondent, hereinbelow, expressly asserted that Ms. Dorsey was an insured under the policy as a guest passenger. *See Appx., pp. 28-29.* In fact, at page 13 of the subject Progressive policy, guest passengers such as Ms. Dorsey are included in the definition of “insured person.” *See Appx., p. 44.* The August 29, 2011 Memorandum Order of the Circuit Court of Ohio County even found that she was afforded Five Thousand Dollars (\$5,000.00). *See Appx., p. 268.*

Therefore, despite this awkward misstatement, it is silly to suggest that the Petitioner’s position is that Ms. Dorsey was uninsured when she presented a valid claim against the policy that was honored by the insurer. That position is contrary to all of the contentions asserted by the Petitioner and Respondent in the instant appeal and hereinbelow. Ms. Dorsey was a claimant against the Progressive policy and provided coverage by the same policy, for all intents and meanings she is an “insured” under the policy.

### **III. 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);

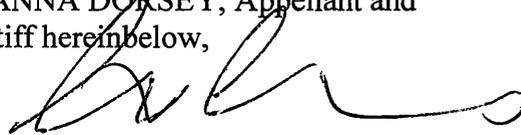
2.) That this Honorable Court issue a Syllabus Point defining Appellant and Plaintiff hereinbelow, Johanna Dorsey, and others similarly situated, as first-party insureds/claimants who may sue for both common law bad faith and statutory bad faith (e.g., violations of the West Virginia Unfair Trade Practices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

JIVIDEN LAW OFFICES, PLLC  
*Of Counsel for Appellant*

David A. Jividen, Esq. (WV Bar #1889)  
Chad C. Groome, Esq. (WV Bar #9810)

729 N. Main Street  
Wheeling, WV 26003  
(304) 232-8888  
(304) 232-8555 facsimile  
[djviden@jvidenlaw.com](mailto:djviden@jvidenlaw.com)  
[cgroome@jvidenlaw.com](mailto:cgroome@jvidenlaw.com)

**CERTIFICATE OF SERVICE**

Now comes the undersigned counsel and hereby certifies that a true and accurate copy of the instant **REPLY BRIEF OF PETITIONER, JOHANNA DORSEY** was served upon all parties to this appeal by regular U.S. mail, postage pre-paid on this 4<sup>th</sup> day of March, 2013, as follows:

E. Kay Fuller, Esq.  
Martin & Seibert, L.C.  
1453 Winchester Avenue  
P.O. Box 1286  
Martinsburg, WV 25405  
*Of Counsel for Appellant, Progressive Classic*

Karen Mascio, Esq.  
Law Offices of Terry L.M. Bashline  
A Field Legal Office of Liberty Mutual Group  
K&L Gates Center, Suite 3500  
210 Sixth Avenue  
Pittsburgh, PA 15222  
*Of Counsel for Liberty Mutual*

Jill Cranston Rice, Esq.  
Mychal Sommer Schultz, Esq.  
Jacob A. Manning, Esq.  
Dinsmore & Shohl, LLP  
P.O. Box 11887  
Charleston, WV 25339  
*Of Counsel for Amicus Curiae,  
West Virginia Insurance Federation*



---

*Of Counsel for Plaintiff*