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Maynard, Justice, concurring:

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RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

I am writing separately in order to emphasize that the majority's decision in this case is consistent with this Court's holdings in *Trent v. Cook*, 198 W.Va. 601, 482 S.E.2d 218 (1996) **and** *Gibson v. Northfield Insurance Co.*, 219 W.Va. 40, 631 S.E.2d 598 (2005). Rather than create a new benefit for state employees who use state-owned vehicles which the Legislature did not contemplate, the majority's decision recognizes that the Legislature has exempted custom-designed insurance policies issued to governmental entities from the requirements of the omnibus statute, W.Va. Code § 33-6-31 (1998). As long as the exclusions in such policies are bargained for and agreed upon by the governmental entity and the insurance company, they are valid even if they otherwise violate the provisions of the omnibus statute. Syllabus Point 5, *Gibson*.

In this case, the circuit court had before it the affidavit of the Board of Risk and Insurance Management ("BRIM") underwriter, Bob Mitts, which indicated that BRIM had investigated the terms of the subject insurance policy including the worker's compensation exclusion and had expressly chosen to include that exclusionary language during its negotiations with the insurance company. No evidence to dispute this affidavit was offered,

and it is clear that the exclusion was included in the policy at the request of BRIM which negotiated and obtained the policy on behalf of the governmental entity, the Logan County Board of Education, pursuant to W.Va. Code § 19-12A-16(a) (2003). Consequently, the exclusion contained in the insurance policy at issue denying underinsured motorist coverage when workers' compensation benefits are available is valid and enforceable under this Court's decisions in *Trent* and *Gibson*.

In Syllabus Point 1 of *Trent*, this Court recognized that,

West Virginia Code § 29-12A-16(a) (1992) conveys broad discretion to both the West Virginia State Board of Risk and Insurance Management, as well as governmental entities, with regard to the type and amount of insurance to obtain. Consequently, when an insurer issues a custom-designed insurance policy to a governmental entity pursuant to the the Governmental Tort Claims and Insurance Reform Act, West Virginia Code §§ 29-12A-1 to -18 (1992), that entity may incorporate language absolutely limiting liability under the policy, even if such language would otherwise violate the provisions of West Virginia Code § 33-6-31(b) (1996).

Clearly, BRIM employees such as Mr. Mitts have the statutory authority to limit the coverage available to state employees and anyone else using state-owned vehicles. It is not this Court's job to second guess the decisions that BRIM employees make pursuant to that statutory authority. In Syllabus Point 5 of *Gibson*, this Court held that any limiting terms and conditions included such policies must be "the result of some choice, judgment, volition, wish or inclination as a result of investigation or reasoning by the governmental entity."

Because the appellants produced absolutely no evidence to refute the matters set forth in the affidavit of Mr. Mitts, there is simply nothing suggesting that BRIM's decision to include the exclusionary language was not the result of an *honest-to-goodness* deliberative act on the part of the government entity.

The majority's decision in this case upholds the legislative policy of this State. Just as it would not be proper for this Court to take away benefits which the Legislature has chosen to provide to the hard-working employees of this State who travel the highways in state-owned vehicles, it would also be improper for this Court to create new benefits and impose new costs on governmental entities in contravention of W.Va. Code § 19-12A-16(a). As with all insurance, broader coverage typically costs more. By allowing governmental entities to custom-design their own policies, the Legislature intended to place the ultimate decision of how much to pay and how many benefits to provide in the hands of those entities. In this case, BRIM chose not to provide underinsured motorist coverage for employees who are covered under workers' compensation. While I have sympathy for any state employee who is injured on the job, this Court has no authority to take away the discretion to negotiate the terms and conditions of state insurance policies which the Legislature expressly gave to BRIM. Accordingly, I concur with the majority's decision in this case.