No. 32573 - *Pamela E. Howe, individually, and as adoptive parent and next friend of Trey J. Howe, a minor v. Duane A. Howe, American Standard Insurance company of Ohio, a foreign insurer, and American Family Insurance Company, a foreign insurer*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., concurring:

In this case the majority opinion found that the circuit court correctly determined that Ohio law applied to this case and that there was no liability coverage for the claims asserted. I agree completely with these conclusions. I write separately to express my view that when litigation occurring in West Virginia involves a household exclusion contained in an automobile liability policy that is issued in another state and is valid under the laws of that state, the exclusion should not be automatically rejected on public policy grounds.

As Justice Albright's dissent correctly observes, this Court has limited the applicability of household exclusions with respect to a named insured by holding that such an exclusion is invalid up to the minimum coverage amounts required under West Virginia law. *See* Syl. pt. 2, *Dairyland Ins. Co. v. East*, 188 W. Va. 581, 425 S.E.2d 257 (1992) ("A named insured exclusion endorsement is invalid with respect to the minimum coverage

amounts required by the West Virginia Motor Vehicle Safety Responsibility Law, West Virginia Code §§ 17D-1-1 to 17D-6-7 (1991 & Supp. 1992). Above the minimum amounts of coverage required by West Virginia Code § 17D-4-12 (1992), however, the endorsement remains valid.").[1] It must not be overlooked, however, that, unlike the case at bar, *Dairyland* did not involve residents of *another state* who contracted for their policy of insurance under the laws of that *other state*. Rather, the insured in *Dairyland,* was a resident of West Virginia, the parties contracted for the insurance policy in West Virginia, and, therefore, they were on notice that the policy would be subject to the laws of this State. For this reason, I find that *Dairyland* is not persuasive authority in deciding the case presently before the Court.

Notably, during the same term that this Court handed down the *Dairyland* decision, it also handed down its decision in *Nadler v. Liberty Mutual Fire Insurance Company*, 188 W. Va. 329, 424 S.E.2d 256 (1992). *Nadler* involved a two vehicle accident

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[1]The named insured exclusion endorsement in *Dairyland* stated:

> NAMED INSURED EXCLUSION ENDORSEMENT [--] This endorsement modifies *your* policy in the following way: LIABILITY INSURANCE [--] The liability insurance provided by this policy doesn't apply to injuries to the person named on the declarations page. It doesn't apply to the husband or wife of that person if they are living in the same household.

Dairyland Ins. Co. v. East, 188 W. Va. 581, 583, 425 S.E.2d 257, 259 (1992) (footnote omitted).

that occurred in West Virginia. A tractor trailer crossed the center line and collided with a vehicle that was owned an occupied by a family who were residents of Ohio. *Nadler*, 188 W. Va. at 331-32, 424 S.E.2d at 258-59. Both parties were insured by Liberty Mutual Fire Insurance Company, but the tractor trailer was insured by a policy that was issued in West Virginia, while the policy covering the Ohio vehicle was issued in Ohio. *Id.* 188 W. Va. at 332, 424 S.E.2d at 259. Subsequently, a declaratory judgment action was filed in the United States District Court for the Southern District of West Virginia raising questions involving only the Ohio policy.[2] *Id.* The District Court ultimately certified a question to this Court asking which state's law should be applied. *Id.* It was undisputed that the Ohio family would not be able to recover under their policy if Ohio law was applied.[3] *Id.* at 332-33, 424 S.E.2d at 259-60. However, the set-off provision in the policy, which would prevent the Ohio family from recovering under their policy if Ohio law applied, was not enforceable in West Virginia as such provisions had been found to be against public policy. *Id.* at 333, 424

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[2]The full liability limit of the West Virginia policy, $325,000, had been paid to the Ohio family. *Nadler v. Liberty Mut. Fire Ins. Co.*, 188 W. Va. 329, 332, 424 S.E.2d 256, 259 (1992). The Ohio policy provided underinsured motorist coverage in the amount of $300,000, but contained a provision that "expressly denied coverage when the amount of liability insurance available from another source was equal to or greater than the amount of underinsured motorist coverage available under the policy and provided for a set-off for any liability insurance received by the insured." *Id.* (footnote omitted). When the Ohio family tried to recover underinsured motorist benefits under their own policy, coverage was denied. *Id.* The denial of coverage prompted the declaratory judgment action in the United States District Court. *Id.*

[3]Under Ohio law, the set-off provision of the insurance policy that prevented the Ohio family from receiving underinsured motorist benefits was valid. For a discussion of the set-off provision, see *supra* note 2.

S.E.2d at 260. In it's discussion of the issues presented by the certified question, the *Nadler* Court surveyed how other jurisdictions handled choice of law questions where a court was being asked to enforce a provision of an insurance policy that violated the forum state's public policy, when the policy of insurance had been issued in another state to residents of the other state, and was enforceable under the law of the other state. *Id.* at 336-37, 424 S.E.2d at 263-64. The *Nadler* Court then explained that

> [o]ur substantive law governing uninsured and underinsured motorist coverages in motor vehicle insurance policies is intended to apply only to insurance transactions which occur in West Virginia or which affect the rights and responsibilities of West Virginia citizens. For this reason, the public policy of full compensation underlying our uninsured/underinsured motorist law is implicated only when the parties and the transaction have a substantial relationship with this state. The importance of the public policy is directly proportional to the significance of that relationship. The more marginal the contact West Virginia has with the parties and the insurance contract, the less reason there is to consider the public policy behind our uninsured/underinsured motorist law as a factor bearing on the choice of law determination.
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> When the issue is viewed in this light, it is clear that the public policy concerns raised by the plaintiffs are adequately addressed by application of the significant relationship test approved by this Court in *Lee v. Saliga*. This approach provides an answer to questions which inevitably arise any time there is a conflict between the laws of one state and the laws of another. It is also consistent with promoting the reasonable expectations of the parties to the insurance contract, an important premise for our adoption of the conflicts rule stated in *Lee v. Saliga*. The reasonable expectations of the parties with respect to the terms of an insurance contract should not be lightly disregarded. *See National Mut. Ins. Co. v. McMahon & Sons, Inc*., 177 W. Va. 734, 356 S.E.2d 488 (1987). Finally, we believe that this approach is not inconsistent with the results reached by the

> majority of courts that have addressed the issue. *See, e.g., Andrews v. Continental Ins. Co.*, *supra*; *Draper v. Draper*, 115 Idaho 973, 772 P.2d 180 (1989); *Boardman v. United Servs. Auto. Ass'n*, *supra*; *Sotirakis v. United Serv. Auto. Ass'n*, 106 Nev. 123, 787 P.2d 788 (1990); *State Farm Mut. Auto. Ins. Co. v. Simmons' Estate*, *supra*; *Dairyland Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 41 Wash. App. 26, 701 P.2d 806, *review denied*, 104 Wash. 2d 1016 (1985).

Nadler, 188 W. Va. at 337, 424 S.E.2d at 264. The significant relationship test of *Lee v. Saliga*, to which the *Nadler* Court referred, holds that:

> [t]he provisions of a motor vehicle policy will ordinarily be construed according to the laws of the state where the policy was issued and the risk insured was principally located, unless another state has a more significant relationship to the transaction and the parties.

Syl. pt. 2, *Lee v. Saliga*, 179 W. Va. 762, 373 S.E.2d 345 (1988). Finally, the *Nadler* Court held, at Syllabus point 4, that

> [w]here a choice of law question arises with regard to the interpretation of coverage provisions in a motor vehicle insurance policy executed in another state, the public policy considerations inherent in the fact that the substantive law of the other state differs from our own will ordinarily be adequately addressed by application of the significant relationship conflict of laws test enunciated in Syllabus Point 2 of *Lee v. Saliga*, 179 W. Va. 762, 373 S.E.2d 345 (1988).

188 W. Va. 329, 424 S.E.2d 256. Applying this holding, the *Nadler* Court concluded that Ohio law governed the interpretation of the contract at issue.

Nadler is the controlling case for resolving the instant appeal. In the present case, the insureds are residents of Ohio, and the insurance policy was contracted under the

laws of Ohio with no expectation that West Virginia law would be applied to the contract. West Virginia has no significant relationship to the transaction or the parties. Therefore, the majority opinion was correct in concluding that West Virginia public policy should not be applied to void the household exclusion contained in the Howe's insurance policy. Thus, for the reasons herein explained, I respectfully concur with the majority opinion.