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SUPREME COURT OF APPEALS

OF WEST VIRGINIA

Albright, Justice, concurring:

I concur with the result reached by the majority in upholding the trial court's grant of summary judgment based solely on Appellants' failure to submit any counter evidence to refute Appellees' evidence that the insurance policy at issue was a custom-designed policy. I write separately, however, to recognize a flaw in the majority's application of syllabus point five of *Gibson v. Northfield Insurance Co.*, 219 W.Va. 40, 631 S.E.2d 598 (2005). In relying on *Gibson* to enforce a workers' compensation exclusion in the subject insurance policy, the majority wrongly focused on the negotiating efforts of BRIM. The only evidence of a custom-designed policy in the record of this case was the affidavit of Bob Mitts, the underwriting manager for BRIM. The majority relies wholly on that affidavit, stating that it demonstrated that "BRIM had investigated and researched the need for the workers' compensation exclusion and had caused its inclusion in the National Union policy."

I submit that the custom-design evidence contemplated by syllabus point five of *Gibson* could not be fulfilled by the affidavit prepared by BRIM's underwriter. Even a cursory reading of *Gibson* demonstrates that the requisite evidence of a custom-designed

policy must relate to the efforts on the part of a political subdivision, in this case, the Logan County Board of Education, to negotiate for specific policy exclusions.¹ That evidence is simply not present in this case. Because there is no evidence in the record of this case that demonstrates that the insured political subdivision at issue engaged in specific negotiations that resulted in a custom-designed policy, I respectfully disagree with the majority's conclusion that the workers' compensation exclusion contained in the National Union policy is enforceable under this Court's holding in *Gibson*.

¹In syllabus point five of *Gibson*, this Court made clear that because of the statutory language of West Virginia Code § 29-12A-16(a) which is written in terms of the action taken by a political subdivision, "[t]he limiting terms and conditions must . . . be the result of some choice, judgment, volition, wish or inclination as a result of investigation or reasoning by the governmental entity." 219 W.Va. 40, 631 S.E.2d 598, syl. pt. 5, in part.