INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

WV National Auto Insurance Company,

Defendant Below, Petitioner

vs.

No. 23-ICA-101
(Appeal from a final order
of the Circuit Court of Logan
County (20-C-98))

Danny J. Dobbins and Jackie L. Dobbins,

Plaintiffs Below, Respondents.

Petitioner's Brief

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STATEMENT OF THE CASE

This Appeal arises out of a civil action filed by Respondents' Danny J. Dobbins and Jackie L. Dobbins to recover uninsured motorist coverage benefits under a policy of insurance issued to Mrs. Dobbins by West Virginia National Auto Insurance Company ("WV National") bearing policy number WV 1186251. This civil action is pending in the Circuit Court of Logan County, West Virginia, before The Honorable Joshua Butcher, styled *Danny J. Dobbins and Jackie L. Dobbins, his wife, Plaintiffs, v. John Doe, an unknown entity(s)/person(s); and WV National Auto Insurance Company, a West Virginia Corporation, Defendants.*, Civil Action No. 20-C-98. Among those vehicles insured by this policy of insurance was a 2001 Dodge Dakota.

According to Respondents' Complaint, they allege that they are entitled to uninsured motorist coverage benefits because on February 15, 2019, Mr. Dobbins, while operating the 2001 Dodge Dakota, insured by WV National's policy, at or near Lorraine Street in the City of Logan, Logan County, West Virginia, his vehicle was struck by a black Toyota vehicle. *See* App. at 0026-0027, Compl. Mr. Dobbins alleges that the driver of the black Toyota vehicle fled the scene following contact with Mr. Dobbins' vehicle, never stopping to render aid or provide information relating to him/her or his/her insurance. *Id.* Mr. Dobbins claims that the driver of the black Toyota vehicle operated the vehicle in such a careless, reckless and negligent manner

that the vehicle struck Mr. Dobbins' vehicle with such great force and violence that Mr. Dobbins sustained serious and permanent bodily injury. *Id.*

Respondents sought (1) a declaration that they are entitled to uninsured motorist coverage benefits under the WV National policy; and (2) to be compensated for their alleged injuries and damages as a result of the alleged incident. *Id.* at 0027-0031.

A. Respondents' failure to report incident to police.

Again, Respondents allege that on February 15, 2019, Mr. Dobbins was the victim of a hit-and-run incident. Notably, however, Respondents are not aware of any police or law enforcement agency having been contacted on the date of the incident. App. at 0073, at Resp. to Interrog. No. 2. Mr. Dobbins admitted during his deposition that he never reported the incident on the day that it occurred, February 15, 2019. App. at 0078, D. Dobbins, at 46-49. Admittedly, Mr. Dobbins did not call 911 on the day of the incident or at any time after the incident. App. at 0076, at 26-27. Instead, a few days later, he reportedly went to "city hall." *Id.* at 48-49. More specifically, Mr. Dobbins testified as follows:

> A. I'm saying I went to City Hall to report that and they said that I waited too long.
> Q. Okay.
> A. So I guess they didn't want to even -- nothing to do with me, I guess.
> Q. So whenever you went down there, was it days later?
> A. Yeah, it was few days later.

App. at 0078, at 49. According to Mrs. Dobbins, it was "so many days after or several days after" the incident that she and Mr. Dobbins went to City Hall, and, at that time, they were informed by City Hall that they could not make a police report because too much time had passed since the incident. App. at 0086-0087; 0090 at J. Dobbins at 21-23; 48.

Despite allegedly being turned away by those at the Logan City Hall days after the accident, Mr. and Mrs. Dobbins did report the incident to WV National on February 19, 2019, approximately **four** days after it occurred. App. at 0081-0082, at 58-62. Notably, at that time, however, neither Mr. Dobbins nor anyone on his behalf had attempted to make contact with any policing agency within or around Logan County to report the subject incident. App. at 0084, at 78-79. *See also* App. at 0088, at 27.

Mr. Dobbins admits that he possessed knowledge of the incident on February 15, 2019, such that, if he wished to report it to anyone, he could have done so at that time. App. at 0083, at 74. Mr. Dobbins further admits that he was physically and emotionally able to report the incident to anyone he wanted to immediately following the incident. App. at 0083, at 74-77. Mrs. Dobbins further confirmed both her and Mr. Dobbins' fitness such that they could have immediately reported the incident following its occurrence had they chosen to do so. App. at 0086-0087; 0089, at 21-23; 42. Neither Mr. Dobbins nor anyone on his behalf, including Mrs. Dobbins, reported the subject incident to any policing agency in or around Logan County, West Virginia, including the Logan City Police Department, the Logan County Sheriff's Department, or the Logan County detachment of the West Virginia State Police, within the 24 hours after the incident occurred.[1] App. at 0083, at 75-76.

[1] Mr. Dobbins does not dispute that The Logan County Emergency Operations Center does not have any documentation or information related to any motor vehicle accident occurring on February 15th, 2019 and reported by him or his wife. *See* App. at 0078-0079, at 48-50. This includes the lack of a Police Report, statements or recorded written information to suggest an accident was reported to the Logan Police Department. *See id.* Admittedly, the Logan City Police Department would not record any information from Mr. Dobbins because, according to Mr. Dobbins, he waited too long to report the incident. App. at 0079-0080, at 50-55. Mr. Dobbins has also admitted that he never contacted the Logan County Sheriff's Office or the Logan County detachment of the West Virginia State Police to make a report. App. at 0080, at 55-57. WV National notes that, with regard to the Logan County Sheriff's Office, in their written responses to discovery, Respondents initially stated that they contacted the Logan County Sheriff's Department; however, both Respondents testified during the depositions that they contacted the Logan City Police Department located at "City Hall" regarding the subject incident. *See* App. at 0073, at Interrog. No. 3; *see also* Ex. App. at 0078, at 49; App. at 0086-0087; 0090, at 21-23; 48.

Mr. and Mrs. Dobbins cannot recall the exact day they did finally attempt to report the event to the Logan City Police Department, but were reportedly turned away; however, it appears that it was more than four days after the subject accident because, as noted previously, they had not reported it to any "authorities" at the time they first contacted WV National regarding the incident on February 19, 2019. App. 0084, at 78-79; App. at 0088, at 27; App. at 0091, at Automobile Loss Notice.

Despite the event having not been reported to the police, in an effort to learn more about Respondents' claim, including the identity of any investigating agency, WV National sent a letter to Respondents on February 21, 2019. App. at 0092, at Ltr. At that time, WV Virginia National requested that an enclosed claim form be completed and returned to WV National. *See id.* It appears that WV National received the completed form on April 1, 2019, approximately 39 days after it was initially mailed to Respondents. *See* App. at 0093-0094, at Completed "Insured Driver Statement Form." The completed Form stated that no police report was made and no police department was identified as having investigated the incident. *See id.* It is unclear whether Respondents had gone to "city hall" to report the incident, but were turned away, at the time Respondents completed this Form.

WV National contacted both the Deputy Director of the Logan County Emergency Operation and the Logan County Sheriff to locate any report of the subject incident. Jeana Rockel, the Deputy Director of the Logan County Emergency Operations Center, reviewed the recordings and tapes of all calls received by the Logan County Emergency Operations Center beginning on February 15, 2019, through February 28, 2019. *See* App. at 0095-0096, at Aff. of J. Rockel. Her review included both emergency and non-emergency calls to the Logan County Emergency Operations Center. *Id.* Ms. Rockel did not locate any calls from Danny Dobbins or

Jackie Dobbins regarding a motor vehicle accident between February 15, 2019, and February 28, 2019. *Id.* Further, Ms. Rockel reviewed all the documents available to the Logan County Emergency Operations Center, but could not locate a report of a motor vehicle accident by either Danny Dobbins or Jackie Dobbins to the Logan County Emergency Operations Center on February 15, 2019. *Id.* According to Ms. Rockel, the Logan County Emergency Operations Center does not have any documentation or information related to any motor vehicle accident occurring on February 15, 2019, and reported by Danny Dobbins or Jackie Dobbins. *Id.* This includes the lack of a police report, statements, or recorded written information to suggest an accident was reported to the Logan Police Department. *See id.*

Further, according to Sheriff Paul Clemens, his office also has no record of any report of an accident that occurred on February 15, 2019, involving Danny Dobbins. App. at 0097, at Ltr.

Contact was also made with the Logan City Police Department's Records Clerk, Stephanie Avis. Ms. Avis also informed undersigned counsel's office that there was no report on file regarding a motor vehicle accident involving Mr. Dobbins in February 2019.[2] Although efforts were made to secure an affidavit from Ms. Avis, they have been unsuccessful. Regardless, Ms. Avis' representations to undersigned counsel's office are consistent with Respondents' statements that the Logan City Police Department would not make a report regarding the subject incident because Mr. Dobbins had waited too long to report it.

[2] Based upon Mr. Dobbins' deposition testimony, it does not appear that he ever contemplated reporting the incident to the West Virginia State Police. App. at 0077, at 44. In fact, based upon his testimony, it appears that Mr. Dobbins is not completely certain that he knew, or at least contemplated, the existence of a State Police detachment being located in Logan County at the time of the incident. *Id.*

B. Relevant policy language from WV Virginia National policy bearing number WV 1186251.

At the time of the subject incident, Mrs. Dobbins was the named insured of a Personal Auto Policy bearing number WV 1186251. *See* App. at 0098-0102, at Relevant Portions of Personal Auto Policy. In relevant part, the policy provides as follows:

PART E – DUTIES AFTER AN ACCIDENT OR LOSS

We have no duty to provide coverage under this policy if the failure to comply with the following duties is prejudicial to us:

A. We must be notified promptly of how, when and where the accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses.

***

C. A person seeking Uninsured Motorists Coverage must also:

1. Promptly notify the police if a hit-and-run driver is involved.

***

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

UNINSURED/UNDERINSURED MOTORISTS COVERAGE – WEST VIRGINIA

I. Part C – Uninsured Motorists Coverage is replaced by the following:

***

Insuring Agreement

A. We will pay compensatory damages which an "insured" is legally entitled to recover from the owner or operator of an "uninsured motor vehicle" or

"underinsured motor vehicle" where such coverage is indicated as applicable in the Schedule or in the Declarations because of:

1. "Bodily injury" sustained by an "insured" and caused by an accident; and
2. "Property damage" caused by an accident.

***

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PART E – DUTIES AFTER AN ACCIDENT OR LOSS

Part E – Subsection C.1. is amended to read as follows:

C. A person seeking Uninsured Motorists Coverage must also:

1. Within twenty-four hours after the insured discovers, and being physically able to report the occurrence of such accident, the insured or someone on his or her behalf, reports the accident to a police, peace or to a judicial officer, unless the accident has already been investigated by a police officer.

See id.

C. WV National's Motion for Summary Judgment.

In accordance with the Circuit Court's Scheduling Order, WV National filed its Motion for Summary Judgment on May 21, 2021. App. at 0053-0103. WV National's Motion for Summary Judgment was initially set for hearing for June 22, 2021, at 2:30 p.m. Thereafter, Respondents, on June 1, 2021, filed their Motion for Partial Summary Judgment and Response in Opposition to WV National's Motion for Summary Judgment. App. at 0104-0181. On June 16, 2021, WV National filed its Response to Respondents' Motion for Partial Summary Judgment and its Reply to Respondents' Response in Opposition to WV National's Motion for Summary Judgment. App. at 0182-0211. That same day, the parties were notified by the Circuit Court that the June 22, 2021 hearing on the Motions for Summary Judgment had to be moved to a different

date. Ultimately, September 9, 2021, was selected for the hearing at which the parties could present and argue their Motions for Summary Judgment. The Circuit Court continued the remaining deadlines set forth in the Court's Scheduling Order until the Motions for Summary Judgment were heard and ruled upon. Thereafter, Respondents filed their Reply to WV National's Response to their Motion for Partial Summary Judgment on August 27, 2021. App. at 0212-0232.

As scheduled, the Circuit Court held the September 9, 2021, hearing on the Motions for Summary Judgment. A copy of the transcript from this hearing is included in the accompanying Appendix. App. at 233-279. On February 14, 2023, the Circuit Court wrongly granted Respondents' Motion for Partial Summary Judgment, declaring that WV National must afford coverage under the Auto Policy to the Respondents for the hit-and-run collision. App. at 0001-0024. The Circuit Court tolled the 24 hour period set forth in West Virginia Code §33-6-31(e), concluding that because the 24 hour period expired on Saturday, February 16, pursuant to West Virginia Code §2-2-1, the 24 hour period was tolled until February 19, the first day that was not a Saturday, Sunday or legal holiday. *Id.* The Court, contrary to the evidence, including Respondents' own recollections of the events at their depositions, selectively chose portions of Respondents' testimony, assigned a date certain to when Respondents, finally, sought to inform authorities about the incident, concluding it was on February 19, 2019, within the "tolled" 24 hour period. *Id.* In support of its findings, the Court also cited to *Lusk v. Doe*, 175 W. Va. 775, 338 S.E.2d 375 (W. Va. 1985), a decision that is factually distinguishable and does not support the Court's conclusion. *Id.* In a tortured and plainly wrong reading of additional West Virginia common law, the Circuit Court applied a "prejudice" standard concluding that, even if Respondents had reported the alleged hit-and-run incident to authorities outside of the 24-hour

reporting period established by West Virginia Code §33-6-31(e) and WV National's policy language, WV National could not show any prejudice to its investigative ability of the alleged subject incident. *Id.* The Circuit Court ignored the fact that WV National's Policy language mirrored a legal duty statutorily imposed on Respondents, and that this legal duty, the 24-hour reporting requirement, required reporting to the authorities, *i.e.*, law enforcement, not to the insurance company.

SUMMARY OF ARGUMENT

First, the Circuit Court improperly tolled the notice requirement of West Virginia Code Section 33-6-31(e). The undisputed facts in this litigation clearly demonstrate that Respondents failed to report the underlying incident within the 24 hours immediately following its occurrence to a police, peace or judicial officer. As such, Respondents' claim is barred by the plain language of West Virginia Code §33-6-31(e)(1). WV National was entitled to summary judgment and a declaration that Respondents are not entitled to uninsured motorist coverage under its policy issued to Mrs. Dobbins. The Circuit Court ignored the legislature's clear purpose and intent behind this reporting requirement, disregarding the legislature's clear recognition of the urgency with which hit-and-run incidents must be investigated, if the incident itself is to be (1) confirmed and (2) any opportunity to locate and hold accountable the criminal perpetrator is to be preserved.

West Virginia Code §2-2-1 was not meant to toll this requirement. West Virginia Code §2-2-1 (and for that matter §2-2-2) was meant to identify official State holidays and to guide citizens who could not perform an act, event, default or omission required by law because an intermediate Saturday, Sunday or legal holiday prevented it. Emergency service personnel do not close for Saturdays, Sundays, legal holidays or even inclement weather. Police officers, like

firefighters and EMTs, are accessible 24 hours a day, seven days a week, 365 days per year. Under these circumstances, neither §2-2-1 nor §2-2-2 were intended to and do not toll the 24-hour reporting period set forth in West Virginia Code §33-6-31.

The plain language of West Virginia Code §33-6-31 and this Court have never authorized such tolling. Liberally construing the statute does not permit the reading out of the statute the provisions of the statute that, however inconveniently, preclude an insured's claim for uninsured benefits. While this Court's policy may be to construe W.Va. Code §33-6-31 liberally, the legislature defined the limits of that liberal construction, and, the West Virginia Supreme Court has plainly and consistently imposed said limits. *See generally, Lusk.*

Second, even if the reporting period was properly tolled, the Circuit Court improperly concluded that Respondents sought to report the incident within the "tolled" period. The available testimonial evidence, the only available evidence as to the issue of whether and when Respondents sought to report the alleged hit-and-run incident to the authorities, does not support the Circuit Court's decision. Mr. and Mrs. Dobbins' testimony actually illustrates that they could not recall the exact day or time they finally attempted to report the event to the Logan City Police, but were reportedly turned away because of their extended delay, *i.e.,* had failed to report the incident within 24-hours of its occurrence. On February 19, 2019, Mr. and Mrs. Dobbins reported the subject incident to WV National. Respondents informed WV National that the authorities had not been contacted. During their depositions, neither Mr. Dobbins nor Mrs. Dobbins could remember when they traveled to "City Hall" to attempt to report the alleged subject accident. All they could say was that they couldn't remember or that it was so many days after or several days. Neither Mr. Dobbins nor Mrs. Dobbins knew when they sought to inform the authorities of the incident, and, there is no other available evidence to demonstrate if

and when they may have done this. Accordingly, as a matter of law, there is no available evidence upon which the Circuit Court, or anyone else, could conclude that Mr. and/or Mrs. Dobbins sought to report the incident within the "tolled" period established by the Circuit Court.

Third, the Circuit Court erred when it failed to apply WV National's unambiguous policy language, but instead, applied a prejudice standard. Pursuant to the terms of the WV National policy (which mirrored the statutory requirements in West Virginia), if Respondents wished to recover uninsured motorist coverage benefits for the subject incident, then, just as required by the West Virginia Code, they were required to report the same to the police within 24 hours. Respondents have admitted they failed to notify the police, as required, within 24 hours of the incident, despite having also admitted they were neither physically nor mentally incapacitated following the incident and could have notified anyone they wished of its occurrence, including the police. The Circuit Court ignored these undisputed facts, relying upon *State Auto. Mut. Ins. Co. v. Youler*, 183 W. Va. 556, 396 S.E.2d 737 (1990), an underinsured motorist coverage case, relieving Respondents of the notice provisions contained in the policy and Code §33-6-31(e)(1) and imposing a "prejudice to the investigative interest" standard. This is plainly wrong because *Youler* involves notice to the insurer of an underinsured motorist coverage claim, not notice to the police of an alleged hit-and-run accident. Delayed notice to an insurance company of an insured's claim for benefits is not the same as delayed notice to the authorities of a hit-and-run accident, a crime. In *Youler*, the plaintiffs' reporting requirement was the subject of a provision contained in an insurance policy. Here, while Respondents' reporting requirement is subject to a provision contained in an insurance policy, that requirement mirrors a legal requirement imposed by West Virginia statute. The issue of notice involved in *Youler* did not involve notice to the authorities and it did not mirror an affirmative legal duty imposed by West Virginia law. In fact,

contrary to the Circuit Court's holding, *Colonial, Kronjaeger* and *Bowyer* also do not support the Court's application of a prejudice standard to the circumstances of this case.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the Rules of Appellate Procedure, WV National respectfully requests that this Court grant oral argument. The Circuit Court, in this case, has wrongly applied settled West Virginia law to the facts and circumstances of this case. In doing so, the Court has entirely eliminated the intent and purpose of the notice provision set forth in West Virginia Code §33-6-31(e)(1) and recognized by the West Virginia Supreme Court of Appeals, wrongly applied a "prejudice standard" to the plain, unambiguous policy language contained in WV National's policy in contravention of West Virginia law and ignored the indisputable facts established by Respondents' own deposition testimony to wrongfully conclude that Respondents' reported the alleged hit-and-run incident within this newly prescribed period created by the Circuit Court. Under Rule 19 of the West Virginia Rules of Appellate Procedure, oral argument is appropriate to address this issue. Thereafter, this matter may be disposed of by memorandum decision.

ARGUMENT

I. THE CIRCUIT COURT IMPROPERLY TOLLED THE NOTICE REQUIREMENT OF WEST VIRGINIA CODE §33-6-31(e).

West Virginia Code §33-6-31(e) imposes three mandates upon an insured, if he or she wishes to recover uninsured motorist coverage benefits. Of those three mandates, only one is at issue here, and, it provides, in relevant part, the following:

> (e) If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, the insured, or someone in his or her behalf, in order for the insured to recover under the uninsured motorist endorsement or provision, shall:
>
> (1) **Within twenty-four hours after the insured discover, and being physically able to report the occurrence of such accident, the insured, or someone in his**

or her behalf, reports the accident to a police, peace or to a judicial officer, unless the accident has already been investigated by a police officer;

W. Va. Code §33-6-31(e)(1). (Emphasis supplied.) The undisputed facts in this litigation clearly demonstrate that Respondents failed to report the underlying incident within the 24 hours immediately following its occurrence to a police, peace or judicial officer. Admittedly, neither of the Respondents were physically, or emotionally, incapable of reporting the occurrence of the underlying incident. As such, Respondents' claim is barred by the plain language of West Virginia Code §33-6-31(e)(1). WV National was entitled to summary judgment and a declaration that Respondents are not entitled to uninsured motorist coverage under its policy issued to Mrs. Dobbins.

In *Lusk v. Doe*, 175 W. Va. 775, 338 S.E.2d 375 (W. Va. 1985), *overruled on other grounds by Hamric v. Doe*, 201 W.Va. 615, 499 S.E.2d 619 (1997), the West Virginia Supreme Court of Appeals recognized that subsection (e) of West Virginia Code § 33-6-31 contains notice provisions applicable to "hit and run" situations. *Id.* at 379. The first notice provision recognized in *Lusk*, and the one applicable to this litigation, is contained in subsection (e)(i) [now (e)(1)] and provides for notice of a "hit and run" accident to the police.[3] *Id.*

There, the Court explained that, under West Virginia Code § 33-6-31(e)(i) [now (e)(1)], those injured in person or property are separate "insureds" for the purposes of the notice requirement. *Id.* at 381. The Court concluded that "[b]y the clear language of this provision, the twenty-four hour notice period is tolled as to insureds "physically unable to report the occurrence of such accident ... ." *Id.* The Court explained:

[3] At the time of the *Lusk* decision, West Virginia Code § 33-6-31(e)(i) (Supp.1985), permitted the reporting of a hit-and-run to the commissioner of motor vehicles. West Virginia Code § 33-6-31(e)(i) [now (e)(1)] has since been revised to remove the commissioner of motor vehicles as an individual or entity to which such an incident may be reported.

> Although another person, whether it be another named or additional insured, or a friend, relative or witness to the accident, may report the accident on behalf of a physically injured insured, their failure to do so cannot prejudice those unable to make such report within the initial twenty-four hour period immediately following such accident. *See generally Helvy v. Inland Mutual Insurance Company*, 148 W.Va. 51, 132 S.E.2d 912 (1963) (under policy provisions requiring notice of accident, failure of additional insured to give notice does not relieve insurer of its liability under the policy where named insured complied with the notice provision). The provision reasonably requires that once a victim of a "hit and run" is physically able to report the accident, that victim has twenty-four hours to make the report unless someone in his or her behalf acts within the same extended time period.

Id.

In the present litigation, Mr. Dobbins admits that, on the day of the subject alleged incident, he possessed knowledge of the incident such that, if he wished to report it to anyone, he could have done so at that time. App. at 0083, at 74. Mr. Dobbins further admits that he was physically and emotionally able to report the incident to anyone he wanted to immediately following the incident. App. at 0083, at 74-77; *See also* App. at 0086-0087, at 21-23. In other words, Mr. Dobbins was in no way incapacitated such that he could not call 911 or visit any police station within Logan County at the time of the incident, or, at any time within 24 hours of its occurrence. Further, there is also no evidence to suggest that Mrs. Dobbins, the named insured, was in anyway incapacitated preventing her from reporting the subject incident within 24 hours of its occurrence. It is important to remember, Mrs. Dobbins was not even involved in this accident – so there is not a hint of a physical or mental ailment that would have prevented her from reporting this as required by State Code. Yet, neither Mr. Dobbins nor anyone on his behalf, including Mrs. Dobbins, reported the subject incident to any police agency in or around Logan County, West Virginia, including the Logan City Police Department, the Logan County Sheriff's Department or the Logan County detachment of the West Virginia State Police, within the 24 hours after the incident occurred. *See* App. at 0083, at 75-76. As a result, Respondents,

being of sound mind and body, failed to comply with the first criteria of West Virginia Code Section 33-6-31(e)(1), and, as a result, they are precluded from collecting uninsured motorist coverage benefits under WV National policy bearing number WV 1186251.

Further, there is no available evidence to demonstrate that Respondents were relieved of their affirmative duty to report the incident to a police, peace or to a judicial officer. In other words, there is absolutely no evidence that the incident had already been investigated by a police officer. *See* West Virginia Code Section 33-6-31(e)(1). Indeed, there is no evidence that any authorities responded to the scene of the incident on Lorraine Street. Further, the Deputy Director of the Logan County Emergency Operation and the Logan County Sheriff have confirmed that they have no evidence of any report of an incident having occurred on February 15, 2019, involving Mr. Dobbins at or around Lorraine Street such that an investigation by a police officer would have been conducted. *See* App. at 0095-0097. Finally, there is no evidence that the Logan City Police Department responded to the scene of the accident on February 15, 2019, conducting an investigation of the same either.

Under these circumstances, the Circuit Court erred when it failed to conclude that Respondents are precluded from recovering uninsured motorist coverage benefits under WV National policy bearing number WV 1186251 because Respondents failure to adhere to the requirements of West Virginia Code Section 33-6-31(e)(1), which is fatal to their claim for such benefits.

Instead of applying the clear, unambiguous, and applicable provisions from West Virginia Code Section 33-6-31(e)(1), the Circuit Court improperly tolled the statutory 24-hour reporting period. The Court reasoned that West Virginia Code §2-2-1(e) operated to toll the 24 hour reporting period because West Virginia Code §33-6-31(e) designated a particular date on,

before or after which an act, event, default or omission was required, and that particular date fell on a Saturday, Sunday, legal holiday or designated day off. The Court concluded, therefore, that the date on which the 24 hour notice requirement expired was tolled until the next day that was not a Saturday, Sunday, legal holiday or designated day off, which was February 19, 2019. This is plainly wrong.

The Circuit Court ignored the legislature's clear purpose and intent behind this reporting requirement, disregarding the legislature's clear recognition of the urgency with which hit-and-run incidents must be investigated, if the incident itself is to be (1) confirmed and (2) any opportunity to locate and hold accountable the criminal perpetrator is to be preserved. The prompt 24 hour reporting requirement for a hit-and-run incident set forth in West Virginia Code §33-6-31(e)(1) enables police to determine if such an incident did in fact occur, *i.e.,* is not a fraudulent claim[4] – from interviews with people in the neighborhood, possible location and review of video that may exist, and the presence of debris, fluids, and tire marks at the alleged scene. It also increases the likelihood of apprehension of the offender, thus facilitating inquiry as to whether the hit-and-run vehicle was in fact an uninsured vehicle, and allowing the insurer to enforce its subrogation rights against a negligent uninsured hit-and-run motorist. In *Lusk,* the West Virginia Supreme Court of Appeals recognized the urgency associated with reporting hit-and-run incidents, explaining in Syl. Pt. 2 of *Lusk, supra,* that the initial twenty-four hour period prescribed by statute is that period "**immediately** following such accident."

[4] To further demonstrate the importance of the 24 hour reporting requirement and the Circuit Court's complete failure to appreciate the importance of it expiring in the 24 hours immediately following the incident, the Circuit Court actually concluded "no evidence has been adduced to suggest the plaintiffs have presented a fraudulent insurance claim herein." To the extent any such evidence existed, much, if not all of such evidence, especially the presence or absence of debris on the roadway would have been lost in the days following the alleged incident when the incident went unreported. Hit-and-run drivers' identities are typically shielded by the vehicle they operate, making identification of the actual driver nearly impossible. If reported within the 24 hours immediately following the incident, the authorities are more likely to have an opportunity to locate the vehicle and identify the driver.

West Virginia Code §2-2-1 was not meant to toll this requirement. West Virginia Code §2-2-1 was meant to identify official State holidays and to guide citizens who could not perform an act, event, default or omission required by law because an intermediate Saturday, Sunday or legal holiday prevented it. Indeed, both West Virginia Code §§2-2-1 and 2-2-2 govern "official acts" or "court proceedings" and define days upon which such official acts or court/official judicial business can be conducted and/or required of someone. West Virginia Code Section §§ 2-2-1 and 2-2-2 were enacted to govern the transaction of official acts or court proceedings, taking into account that typically, government offices, including West Virginia's judicial system, conduct business only Monday through Friday, and only then, when such days are not, Saturdays, Sundays, legal holidays or other sanctioned days *See State ex rel. Varney v. Ellis*, 149 W.Va. 522, 524, 142 S.E.2d 63, 65 (W. Va. 1965) ("[A] trial is a judicial proceeding which, in the absence of a statute providing otherwise, can not [sic] be conducted on a Sunday. It appears clear from the provisions of Code, 1931, 2-2-2, that the Legislature intended Sunday to be a nonjudicial day."). *See also Crawford v. Erwin*, 171 W. Va. 7, 297 S.E.2d 206 (W. Va. 1982) (The West Virginia Supreme Court of Appeals applied West Virginia Code §2-2-2 to find that a January 2 filing was timely where the petitioner's deadline for filing her appeal with the West Virginia Civil Service Commission for her dismissal from her employment ended on a legal holiday, January 1.)

The reporting of an accident to authorities and/or summoning of the authorities to an accident scene is not an "official act" or a "court proceeding" as meant by either West Virginia Code §§2-2-1 or 2-2-2. Summoning city, county and state authorities, more particularly, police officers, sheriffs or deputies and troopers, to the scene of an accident or making a report to city, county or state authorities is not an act that requires consideration of the day of the week or

whether the particular day is a legal holiday. Emergency service personnel do not close for Saturdays, Sundays, legal holidays or even inclement weather. There are always (365 days per year) law enforcement officers on duty, regardless of the agency with which they are affiliated, allowing individuals to report crimes like the hit-and-run allegedly committed in this litigation. The Legislature has acknowledged this by enacting a separate code section to govern police officers' payment and/or compensatory leave for working holidays. *See* West Virginia Code §8-14-2a. Police officers, like firefighters and EMTs, are accessible 24 hours a day, seven days a week, 365 days per year. Society has deemed their accessibility so paramount to the continued orderly and peaceful operation of our nation that they are uniformly accessible nearly anywhere one is located by merely dialing 911. With one call, all three – police officers, firefighters and EMTs – can be summoned to a single scene of an incident. Under these circumstances, West Virginia Code §2-2-1 was not intended to and does not toll the 24-hour reporting period set forth in West Virginia Code §33-6-31. In fact, application of West Virginia Code §2-2-1 to a hit and run accident only serves to frustrate, if not eliminate the goals behind West Virginia Code §33-6-31(e)(1). One need not wait for a non-Saturday, Sunday or legal holiday day to report a crime, which is exactly what Respondents allege occurred here. Crime can be reported on any day of the week, at any time, and, as a society, we encourage expeditious reporting of crime to prevent further acts and to hold those responsible accountable. Moreover, in the context of a hit and run accident, the potentiality for fraud must be a strong consideration and extending the reporting period would open pandora's box for advancing illegitimate claims for UM coverage.

The Circuit Court mistakenly concludes that WV National argues that because Respondents failed to call 911, then Respondents' claim is barred by West Virginia Code §33-6-31. App. at 12. Clearly, this is not, and never was, WV National's argument. WV National

makes reference to 911 to illustrate the ease with which one can summons the aid of law enforcement in this State 24 hours a day, seven days a week, 365 days a year. WV National makes reference to 911 to illustrate that West Virginia Code §2-2-1 was not intended to and does not toll the 24-hour reporting period set forth in West Virginia Code §33-6-31. Furthermore, 911 is not the only way in which to report the occurrence of a crime. In fact, law enforcement agencies typically afford the public 24-hour non-emergency numbers by which the authorities may be called to report crimes, suspected crimes and/or to provide information relative to an active investigation. Moreover, law enforcement officers serve the public and can be approached directly while on duty. Frankly, there are so many ways to report a hit and run accident, that even the most basic imagination could create an endless number of scenarios. Calling 911 is an example of the easiest way, and that was the point raised by WV National as part of its argument.

Furthermore, the plain language of West Virginia Code §33-6-31 and the West Virginia Supreme Court of Appeals have never authorized such tolling. Without question, the West Virginia Supreme Court of Appeals has repeatedly recognized that West Virginia Code Section 33-6-31 "is remedial in nature and, therefore, must be construed liberally in order to effect its purpose." Syl. Pt. 7, *in part, Perkins v. Doe*, 177 W.Va. 84, 350 S.E.2d 711 (1986); *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (2000). As the Court observed in *State Auto. Mut. Ins. Co. v. Youler*, 183 W. Va. 556, 396 S.E.2d 737 (1990):

> the legislature has articulated a public policy of full indemnification or compensation underlying both uninsured or underinsured motorist coverage in the State of West Virginia. That is, the preeminent public policy of this state in uninsured or underinsured motorist cases is that the injured persons be fully compensated for his or her damages not compensated by a negligent tortfeasor, up to the limits of the uninsured or underinsured motorist coverage.

183 W.Va. at 564, 396 S.E.2d at 745). In *Pristavec v. Westfield Insurance Company*, 184 W. Va. 331, 400 S.E.2d 575 (1990):

> "... in light of the preeminent public policy of the underinsured motorist statute, which is to provide full compensation, not exceeding coverage limits, to an injured person for his or her damages not compensated by a negligent tortfeasor, this Court holds that underinsured motorist coverage is activated under W. Va. Code, 33-6-31(b), as amended when the amount of such tortfeasor's motor vehicle liability insurance actually available to the injured person in question is less than the total amount of damages sustained by the injured person, regardless of the comparison between such liability insurance limits actually available and the underinsured motorist coverage limits."

184 W.Va. at 338, 400 S.E.2d at 582. Notwithstanding this liberal construction of West Virginia Code Section 33-6-31, the West Virginia Supreme Court of Appeals has also recognized the legitimacy and applicability of the notice provisions set forth in West Virginia Code Section 33-6-31. As explained previously, in *Lusk, supra*, the Court explained that the notice requirement set forth in subsection (e) of West Virginia Code Section 33-6-31 is enforceable, noting only that "[b]y the clear language of this provision, the twenty-four hour notice period is tolled as to insureds "physically unable to report the occurrence of such accident ... ." *Id.* at 381. While the policy may be to construe West Virginia Code §33-6-31 liberally, the legislature defined the limits of that liberal construction, and, the West Virginia Supreme Court has plainly and consistently imposed said limits, finding only physical impossibility tolls the running of the 24-hour reporting period. *See generally, Lusk.* Otherwise, the 24-hour period prescribed in West Virginia Code § 33-6-31 is that period "**immediately** following such accident." *Lusk,* at Syl. Pt. 2.

For good reason, the West Virginia Supreme Court has found the 24-hour reporting period enforceable. This requirement allows both a plaintiff and his or her insurer an expeditious police investigation of an incident that may allow location of the driver that caused the subject incident. Prompt notification of the police allows for the use of such resources as a BOLO ("be on the lookout"), for the liable driver. Further, real time witness statements may be collected on

the day in question to determine the potential identity of the driver and/or his or her purpose for traveling in or around the area of the incident, which may lead law enforcement to identification of this individual and allowing this individual to be held responsible, criminally and/or civilly, for the crime committed and the damages he or she caused. The collection of physical evidence left at or around the scene of the incident may also occur, which could include any available video surveillance that could reveal the identity of the offending driver. Further, it also helps prevent fraudulent insurance claims by ensuring the collection of all available evidence from the scene of the incident to ensure that an event did, in fact, occur for which uninsured motorist coverage is sought. Essentially, in the present case, Respondents' failure to report the incident to authorities within the first 24-hours after its occurrence not only frustrated all of these objectives, it completely defeated them.

The Circuit Court claims that its holding follows "the reasoning set forth in *Lusk*," noting that the Respondents "provided timely notice of this collision unto West Virginia National in conformity with W.Va. Code §33-6-31(e), and that said requirement to notify in twenty-four (24) hours is not a hard and fast rule that could be extended if circumstances require it." The Circuit Court's holding does not follow *Lusk*. The twenty-four (24) hour requirement contained in West Virginia Code §33-6-31(e) is a hard and fast rule, except where an individual is **physically unable** to report the occurrence of such accident. In fact, the Circuit Court's holding, excusing Respondents of the 24-hour reporting requirement, creates disparity in treatment of hit-and-run victims. While the Circuit Court is correct that there are "circumstances" that could extend the 24 hour reporting period, the Circuit Court is wrong that those "circumstances" exist in this case.

The Respondents, whose hit-and-run incident occurred on Friday, possessed the same access to law enforcement in the 24-hours immediately following the alleged incident as a

hypothetical individual whose incident occurred on a Wednesday. Nevertheless, instead of acting as the Code requires, and despite this same access, by application of the Circuit Court's decision, these Respondents need not report their incident until the first business day after Saturday, Sunday and President's Day to enjoy access to uninsured motorist benefits – frustrating the intent and purpose of the 24-hour reporting requirement. The other hypothetical individual, however, was required to either report it within the first 24 hours immediately following the incident or forego any opportunity to collect uninsured motorist coverage – furthering the intent and purpose of including the statutory requirement. Respondents have argued that they "are innocent West Virginia citizens who were injured in the subject motor vehicle collision" and that this Court is required to liberally construe the UM statute to protect them against the hardships and losses caused by a hit-and-run. Arguably, the other hypothetical individual above is also an "innocent West Virginia citizen" similarly situated as Respondents. Yet, the Circuit Court's liberal construction of a plain, unambiguous statutory requirement creates a disparity among two similarly situated individuals. Simply put, the ability of this Court to "liberally construe the UM statute" is not without its limits. If Respondents wished to avail themselves of the remedial benefits of West Virginia Code Section 33-6-31, they were required to comply with the mechanism outlined in this Section to recover uninsured motorist coverage benefits for bodily injury or property damage caused by an uninsured motor vehicle whose driver or operator was unknown.

In the present litigation, Respondents have admitted in written discovery that they were neither physically nor mentally unable to report the occurrence of the subject incident. *See* App. at 200-209. Further, Respondents have also admitted in written discovery that they did not undertake any efforts or steps to report and did not report said incident to any law enforcement

agencies within or around Logan County, West Virginia within the 24 hours after the subject incident occurred. *See id.* Further, during his deposition, Mr. Dobbins admitted that, on the day of the subject incident, he possessed knowledge of the incident such that, if he wished to report it to anyone, he could have done so at that time. App. at 0084, at 74. Mr. Dobbins further admitted that he was physically and emotionally able to report the incident to anyone he wanted to immediately following the incident. App. at 0084, at 74-77; *see also* App. at 0086-0087, at 21-23. In other words, Mr. Dobbins was in no way incapacitated such that he could not call 911 or visit any police station within Logan County at the time of the incident, or, at any time within 24 hours of its occurrence. Further, there is also no evidence to suggest that Mrs. Dobbins, the named insured, was in anyway incapacitated preventing her from reporting the subject incident within 24 hours of its occurrence.

Under these circumstances, the liberal construction Respondents seek from this Court is the removal of the 24-hour reporting requirement from the statute, a construction that has never been authorized by the West Virginia Supreme Court of Appeals. Moreover, this is essentially a license to eviscerate the protections against fraud and to give the investigating law enforcement agency a fair opportunity to investigate, charge, and possibly remove from the highway negligent, careless, and reckless motorists. At a minimum, it certainly prevents any attempt to hold those that caused the accident responsible for what they have done. Finally, as discussed above, this opens the window for an easy path to submit fraudulent claims for insurance coverage.

Statutory construction does not permit the tortured reading performed by the Circuit Court. West Virginia Code §§2-2-1 and 2-2-2 have no application to West Virginia Code §33-6-31(e)(1). However, even if this Court were to find that it does, West Virginia Code §33-6-

31(e)(1) must prevail as the statutes are in apparent conflict and they cannot be construed to give each effect. *See* Syl. pt. 4, *in part, State ex rel. Graney v. Sims,* 144 W. Va. 72, 105 S.E.2d 886 (1958). "When it is not reasonably possible to give effect to both statutes, the more specific statute will prevail." *Barber v. Camden Clark Mem'l Hosp. Corp.*, 240 W. Va. 663, 670, 815 S.E.2d 474, 481 (2018). In that regard, the West Virginia Supreme Court of Appeals has held that "[t]he general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Syl. pt.1, *UMWA by Trumka v. Kingdon,* 174 W. Va. 330, 325 S.E.2d 120 (1984). *See Wells v. State ex rel. Miller*, 237 W. Va. 731, 752, 791 S.E.2d 361, 382 (2016) ("This Court has long recognized that when both a general and a specific statute apply to a given set of facts, our well-established rules of statutory construction instruct that the specific statute governs."); *In re Chevie V.*, 226 W. Va. 363, 371, 700 S.E.2d 815, 823 (2010) ("As a rule, when both a specific and a general statute apply to a given case, the specific statute governs."); *Newark Ins. Co. v. Brown*, 218 W. Va. 346, 351, 624 S.E.2d 783, 788 (2005) ("When faced with a choice between two statutes, one of which is couched in general terms and the other of which specifically speaks to the matter at hand, preference is generally accorded to the specific statute."). Here, if this Court were to find that West Virginia Code §§2-2-1 and 2-2-2 apply to §33-6-31(e)(1), then it is clear that the statutes are in conflict. Application of West Virginia Code §§2-2-1 and/or 2-2-2 to §33-6-31(e)(1) would nullify the 24-hour reporting requirement and the purpose and intent of such requirement in relation to the specific requirements relating to uninsured motorist coverage. West Virginia law dictates that §33-6-31(e)(1) must prevail.

II. EVEN IF THE REPORTING PERIOD WAS PROPERLY TOLLED, THE CIRCUIT COURT IMPROPERLY CONCLUDED THAT RESPONDENTS SOUGHT TO REPORT THE INCIDENT WITHIN THE "TOLLED" PERIOD.

The available testimonial evidence, the only available evidence as to the issue of whether and when Respondents sought to report the alleged hit-and-run incident to the authorities, does not support the Circuit Court's decision. A complete reading of the testimony clearly demonstrates that the Circuit Court failed to consider Respondent's full testimony and erred in its decision. Mr. and Mrs. Dobbins' testimony actually illustrated that they could not recall the exact day they finally attempted to report the event to the Logan City Police, but were reportedly turned away, and, as a result, the Circuit Court erred when it concluded "that the plaintiffs reported this collision to the police within twenty-four (24) hours as contemplated under W.Va. Code §2-2-l(e)." App. at 0011. As a matter of law, neither Mr. Dobbins nor Mrs. Dobbins have any evidence that they attempted to report the subject accident on or before February 19, 2019, within the "tolled" period as defined by the Circuit Court.

First, with regard to Mr. Dobbin's testimony, he testified that on February 19, 2019, he and Mrs. Dobbins reported the subject incident to West Virginia National. Ex. B, attached to West Virginia National's Motion, at 58-62. At the time that report was made, Respondents informed West Virginia National that the authorities had not been contacted. App. at 0081, at 61. In an effort to determine when Mr. Dobbins did, finally, attempt to report the subject incident to the authorities, Mr. Dobbins was asked whether he was "sure you either went down there before you made that phone call to report this to the insurance company or did you do it after you were told that you needed to have an accident report?" App. at 82, at 62. In response to this question, Mr. Dobbins responded, "I don't remember." *Id.* This acknowledgment of his lack of memory as to the actual date and time upon which he attempted to report the alleged incident

to the authorities is contained in the five lines immediately following the testimony cited by the Circuit Court in its Order to support its conclusion. In fact, when the testimony cited by the Circuit Court is read together with this additional testimony what becomes readily apparent is that Mr. Dobbins did not fully understand the questions being asked him until undersigned counsel was able to clarify with him the information being sought. It was at this time Mr. Dobbins acknowledged that he did not recall when he had sought to report the accident to the authorities:

> Q. Okay. Would you agree with me that that form accurately reflects that you had not contacted the authorities as of February 19th, 2019?
> A. Yeah, because they wouldn't let me report it.
> Q. Okay. Do you know if you had even went down there by February 19th, 2019?
> A. Yeah, I went down there to report it, yeah. She said you waited too late.
> Q. Listen to me. Okay? According to the information that we have, you waited several days before you went down there. Is that correct?
> A. Yeah, yeah.
> Q. You didn't go the next day, you went several days later?
> A. Yeah.
> Q. Is that correct?
> A. Yeah.
> Q. Okay. Are you sure you either went down there before you made that phone call to report this to the insurance company or did you do it after you were told that you needed to have an accident report?
> A. I don't remember.

App. at 81-82, at 61-62. The Circuit Court ignored this plain testimony. It also ignored page 79 of Mr. Dobbins' deposition testimony wherein he provides the following testimony:

> Q. I understand you went down there at some point. What I'm trying to say is, is that when you called in and you gave this information on February 19th, this was four days after the accident, it says that you had not contacted the police as of that date.
> A. Yeah, yeah.
> Q. Would you agree that as of that date you hadn't made the contact?
> A. Yeah.
> Q. Okay.

App. at 84, at 79.

What is more the Circuit Court goes on to summarily conclude that Mrs. Dobbins corroborated Mr. Dobbins' alleged testimony (testimony cited by the Court, but not corroborated by the deposition transcript when read in context) "by advising she went with plaintiff Danny Dobbins to Logan City Hall to report this collision." App. at 11. Page 36 of Mrs. Dobbins' deposition testimony offers no testimony as to the date she and Mr. Dobbins purportedly went to "Logan City Hall." App. at 0229, at 36. Instead, all it does is suggest that Mr. and Mrs. Dobbins went, together, to City Hall sometime after the accident. In that regard, page 36 states as follows:

> Q. And then below there, it talks about police information. Do you see that?
> A. Yes, sir.
> Q. Now here it says, "Was police report made." Was there a police report made?
> A. No.
> Q. Okay. Did you all actually go down there and try to report this?
> A. Yes.
> Q. Did you go with him?
> A. I went to the City Hall, yes.
> Q. So what police department did you go down there to report it to? Was it the Logan City Police?
> A. I guess it was city police because -- yeah, the city police right there, where the City Hall is. I guess it's all on one or something. I don't know.
> Q. Have you all went down there to talk to the city police before you signed and sent this form back that's –

Id. Clearly, the Circuit Court's citation to Mrs. Dobbins' testimony as evidence supporting its conclusion that Respondents reported the subject incident within the "tolled" period as defined by the Circuit Court is plainly wrong and a mischaracterization of Mrs. Dobbins' testimony. In fact, on the very next page, page 37, in answer to the final question asked on page 36, Mrs. Dobbins testified as follows: "I can't really remember that. I just know that we went down there days later after the accident." App. at 0229, at 37. Additional testimony from Mrs. Dobbins regarding this issue is even more telling as she testified as follows:

Q. The information that's written on there, that's filled out by the insurance company, says that the authorities were not contacted. Would you agree with me that as of February 19th, 2019 when West Virginia National was notified of this accident, that you had not contacted the authorities?

A. Yes.

Q. Because that's what Mr. Dobbins said. He said that he doesn't –

A. Yes.

Q. -- he doesn't remember contacting them before February 19th, 2019.

A. Yes.

Q. And you agree with that?

A. Yes.

Q. Okay. Now since it looks like February 19th, we agree that you hadn't contacted the police about this, do you know when it was that you did contact the police or go down there to City Hall?

A. No, I just know it was so many days after or several days after.

Q. Okay. All right. And do you know if it was the following week or was it -- had you already made your way into the month of March before you guys made it down there?

A. Well, I'm really not for sure, but, you know, I just know they said it was because of something about 24 hours or something, they didn't take -- you know, take our thing about it.

App. at 0088, at 26-27. The Circuit Court committed plain error when it assigned a date certain to when Respondents sought to inform authorities about this incident. The only available evidence of when Respondents may have reported the subject incident to the authorities (Respondents' own recollections at their depositions) clearly demonstrates that neither Mr. Dobbins nor Mrs. Dobbins know when they sought to inform the authorities of the incident, but have acknowledged that they had not done so at the time they reported the incident to WV National on February 19, 2019. There is no available evidence to support the Circuit Court's conclusion that Mr. and Mrs. Dobbins sought to report this incident on February 19, 2019. As a result, as a matter of law the Circuit Court erred when it concluded that Respondents reported the subject incident within the (improperly applied) "tolled" period defined by the Circuit Court. Accordingly, WV National should have been granted summary judgment.

III. THE CIRCUIT COURT ERRED WHEN IT FAILED TO STRICTLY APPLY WV NATIONAL'S POLICY LANGUAGE, INSTEAD, APPLYING A PREJUDICE STANDARD.

The time period prescribed by WV National's Policy is authorized by West Virginia Code §33-6-31(e)(1). Pursuant to the terms of WV National's policy, if Respondents wished to recover uninsured motorist coverage benefits for the subject incident, then, just as required by the West Virginia Code, they were required to report the same to the police within 24 hours. *See* App. at 98-102. Respondents did not timely notify the authorities, thereby failing to comply with the notice provision of the policy as well as the State's statute. No "prejudice" standard may be applied to policy language that is authorized by and mirrors that required by State statute. The Court's application of such a standard is clear error as it improperly constricts West Virginia Code §33-6-31(e)(1) and precludes the enforcement of the plain, unambiguous insurance policy language.

The Court improperly relies upon *State Auto. Mut. Ins. Co. v. Youler*, 183 W. Va. 556, 396 S.E.2d 737 (1990), an underinsured motorist coverage case that is distinguishable from the facts and circumstances of this case. *Youler* was a case presented to the West Virginia Supreme Court of Appeals upon certified questions. *Id.* at 183 W. Va. at 559, 396 S.E.2d at 740. The area of concern in *Youler* that the Circuit Court apparently deemed relevant to the facts and circumstances of this case was "delay in giving notice of an automobile accident to one's own insurer providing underinsured motorist coverage." *Id.* The Youlers' automobile insurance policies contain a part, applicable to all coverages, on "Duties After an Accident or Loss[.]"*Id.* One of the "General Duties" thereunder is that the insurer, State Auto, "must be notified promptly of how, when and where the accident or loss happened." *Id.* In the same part of the policies, one of the "Additional Duties for Uninsured [or Underinsured] Motorists Coverage" is

that a person seeking such coverage must also "[p]romptly send [State Auto] copies of the legal papers if a suit is brought." *Id.* State Auto received notice of the accident in question, in the form of a copy of the Youlers' complaint against Moore, nearly three years after the accident occurred, specifically, on April 26, 1988. *Id.*

Certified question number 3 related to whether prejudice to the insurer in a case of uninsured or underinsured motorist coverage was a material factor to be considered in determining **if a delay in notifying such insurer of an accident justifies the denial of coverage**. *Id.* at 183 W. Va. at 561, 396 S.E.2d at 742. The Court answered this question, "yes," concluding that in an uninsured or underinsured motorist case, where there has been delay in complying with the notification requirement of an insurance policy requiring notification to an insurer, "prejudice to the investigative interests of the insurer is a factor to be considered, along with the reasons for delay and the length of delay, in determining the overall reasonableness in giving notice of an accident." *Id.* "In the typical case, the insured must put on evidence showing the reason for the delay in giving notice. Once this prerequisite is satisfied, the insurer must then demonstrate that it was prejudiced by the insured's failure to give notice sooner. If the insurer fails to present evidence as to prejudice, then the insured's failure to give notice sooner will not be a bar to the insured's recovery. If the insurer puts on evidence of prejudice, however, the reasonableness of the notice ordinarily becomes a question of fact for the fact finder to decide. On remand, there should be further proceedings consistent with these guidelines." *Id.*

Unlike *Youler*, Respondents' claim does not involve underinsured motorist coverage. Moreover, WV National does not seek to strictly enforce a notice provision of its policy that requires notice to **WV National, an insurer,** to justify its denial of the Respondent's claim. Rather, Respondent's claim is one for uninsured motorist coverage and strict enforcement of a

notice provision to a police, peace or to a judicial officer that mirrors West Virginia Code §33-6-31(e)(1). In *Youler*, the respondents' reporting requirement was the subject of a provision contained in an insurance policy. Here, while the reporting requirement is subject to a provision contained in an insurance policy, that requirement mirrors a legal requirement imposed by West Virginia statute. The issue of notice involved in *Youler* did not involve notice to the authorities and it did not mirror an affirmative legal duty imposed by West Virginia law. The duty to report a hit-and-run incident to a police, peace or judicial officer is not the same duty considered in *Youler*.

The *Youler* Court never considered the application of its "prejudice to the investigative interest of the insurer" where the delay in notification by an insured violated a statutory duty, mirrored in the policy language, to report a hit-and-run accident for purposes of uninsured motorist coverage to a **police, peace or judicial officer**. Notably, however, the West Virginia Legislature has. By establishing the 24-hour reporting period, the West Virginia legislature concluded that reporting a hit-and-run accident after that initial 24-hour reporting period, prejudices law enforcement's ability to effectively investigate hit-and-run accidents. WV National was well within its contractual right to incorporate this same legal requirement into its Policy's language. After all, law enforcement officers are "first responders." As explained previously, they are some of the first, if not the first, people to arrive at an accident scene, and, they employ trained investigative techniques and tools to apprehend suspects and solve crimes. Failure to comply with a legal requirement to notify law enforcement of crimes is detrimental, and, in some cases, fatal, to their ability to solve these crimes. Under these circumstances, *Youler* is clearly not controlling. For that matter, it simply is not persuasive as to the Respondent's failure to comply with the statutory and policy notice requirement. The Circuit Court's reliance

upon it to impose a prejudice standard upon Respondent's requirement to report a hit-and-run accident to law enforcement was plain error.

In Footnote 15 of its Order, the Circuit Court explained,

> [t]here is a litany of cases which hold that an insurer must show it was prejudiced by an insured's delayed notification. *See Colonial Ins. Co. v. Barrett*, 208 W.Va. 706, 542 S.E.2d 869 (W.Va. 2000) [holding that that the notice requirement in an insurance contract is satisfied when the said insurer receives notice of the claim from any source (the insured or a third party) and, therefore, the issue is whether the notice was unreasonably delayed so as to prejudice the insurer's rights]; *Kronjaeger v. The Buckeye Union Ins. Co.*, 200 W. Va. 570, 490 S.E.2d 657 (W.Va. 1997) [holding that an insurer must show it was prejudiced due to an insured failing to obtain the insurer's consent to settle and waiver of subrogation before settling with the tortfeasor to justify a refusal to pay UIM benefits]; and *Bowyer by Bowyer v. Thomas*, 423 S.E.2d 906, 188 W.Va. 297 (W.Va. 1992) [holding that before an insurance policy will be voided because of an insured's failure to cooperate, such failure must be substantial and of such nature to prejudice the insurer's rights].

App. at 21. The Circuit Court's reliance on these cases is as flawed as its reliance on *Youler*. None of these cases involve notice requirements that mandate notice to law enforcement, which mirror an affirmative legal duty imposed by West Virginia law. The Circuit Court is confusing prejudice for reporting to the insurer, when the issue in the instant case is reports mandated by West Virginia Code and policy language that follows our Code requirements.

For example, *Colonial* reached the West Virginia Supreme Court of Appeals from a declaratory judgment concerning a requirement in a liability insurance policy that notice of a claim against a policyholder be given to the insurance company as soon as possible. *Id.* 208 W. Va. 706, 542 S.E.2d at 871. There, the insurance company received prompt notice of a claim from a person injured by a policyholder's negligence. *Id.* However, the insurance company argued below that the policyholder had failed to give any notice of the claim to the insurance company, and the policy's notice requirements had not been met. *Id.* The circuit court entered an order holding that because the policyholder had failed to give the insurance company notice of

the claim, there was no coverage under the policy. *Id.* The Court concluded that the notice requirements of an insurance policy may be satisfied when notice of a claim is provided to the insurance company from any source, including a person injured by a policyholder's negligence. *Id.* Notably, there was no discussion of the notice language contained in WV National's policy, which mirrors the statutory obligations of Respondents under West Virginia Code §33-6-31(e)(1). In other words, there was no discussion by the Court of the application of a "prejudice standard" to policy language that adopts an affirmative, statutory duty imposed upon an insured to make a reporting to law enforcement.

Similarly, in *Kronjaeger v. The Buckeye Union Ins. Co.*, 200 W. Va. 570, 582, 490 S.E.2d 657, 669 (W.Va. 1997), there was, once again, no discussion of the notice language contained in WV National's policy, which mirrors the statutory obligations of Respondents under West Virginia Code §33-6-31(e)(1). Instead, there, the West Virginia Supreme Court of Appeals held that in cases like the one before it, where the insured had failed to obtain his/her insurer's consent before settling with a tortfeasor, but in settling had procured the full policy limits available under the tortfeasor's insurance policy, the insurer must show that it was prejudiced by its insured's failure to obtain its consent to settle in order to justify a refusal to pay underinsured motorist benefits. *Id.* Again, there was no discussion by the Court of the application a "prejudice standard" to policy language that adopts an affirmative, statutory duty imposed upon an insured to make a reporting to law enforcement.

Finally, in *Bowyer by Bowyer v. Thomas*, 188 W. Va. 297, 423 S.E.2d 906 (W.Va. 1992), it also did not involve the imposition of a "prejudice standard" to policy language that adopted an affirmative, statutory duty imposed upon an insured to make a reporting to law enforcement. Like the previous cases, there was no discussion by the Court of the application a "prejudice

standard" to policy language that adopts an affirmative, statutory duty imposed upon an insured to make a reporting to law enforcement. Instead, it considered only an insured's duty to cooperate with his or her insurer under an automobile liability policy.

All of the cases cited by the Circuit Court are easily distinguishable and none of them set forth a standard of law that is applicable or that should be applied to the facts and circumstances of the present case. The prejudice standard applied by the Circuit Court to WV National's Policy language exceeds the rule of law set forth in West Virginia Code §33-6-31(e)(1) (the source of WV National's Policy language), and therefore, is plainly wrong. The Circuit Court's conclusion that *Youler, Colonial, Kronjaeger* and *Bowyer* would not exist if it were as simple as determining whether the exclusionary language contained in an insurance policy was clear and unambiguous (*i.e.*, a Court would not be required to consider whether an insurer's investigative interests were prejudiced as a factor in an UIM or UM case when determining the reasonableness of any delayed notification) demonstrates the Circuit Court's lack of understanding of the legal duty imposed by West Virginia Code §33-6-31(e)(1), which is an absolute legal duty with which an insured must comply, if he or she wishes to recover uninsured motorist coverage. Of the four cases cited by the Circuit Court none of them consider an insured's compliance with West Virginia Code §33-6-31(e)(1) or if an insured is entitled to uninsured motorist coverage.

The Circuit Court goes to great lengths to excuse Respondents' undue delay in reporting the hit-and-run accident, in accordance with WV National's Policy language, including the Respondents' limited education. Simply put, before one signs a contract, he or she is charged with the duty of knowing what is in that document. Furthermore, the provision of WV National's policy that the Circuit Court seeks to excuse compliance with mirrors an affirmative statutory duty imposed upon Respondents. It is a general principle of law that every individual is

presumed to know the law, and, ignorance of the law, generally speaking, is not a defense to one's noncompliance with it. Furthermore, the Circuit Court goes to great lengths to attack WV National's investigation of the alleged subject incident, which is plainly wrong. The policy provision cited by WV National, which, again, mirrors the affirmative legal duty imposed by West Virginia Code §33-6-31(e)(1), requires reporting of the incident to law enforcement, not WV National. As noted previously, as a matter of law, the West Virginia legislature deemed the reporting of a hit-and-run accident more than 24-hours after its occurrence, prejudicial to law enforcement's ability to effectively investigate hit-and-run accidents. As such, by operation of statutory law, failure to comply with this reporting requirement precludes an insured from recovering under the uninsured motorist endorsement or provision. W. Va. Code §33-6-31(e)(1).

Under West Virginia law, "[w]here the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." Syl., *Keffer v. Prudential Ins. Co.*, 153 W. Va. 813, 172 S.E.2d 714 (1970); accord Syl. Pt. 2, *Buckhannon-Upshur County Airport Auth. v. R & R Coal Contracting, Inc.*, 186 W. Va. 583, 413 S.E.2d 404 (1991). Once it is determined that the exclusionary language is clear and unambiguous, the inquiry becomes one of whether the language is contrary to statute or public policy. *Russell v. State Auto. Mut. Ins. Co.*, 188 W. Va. 81, 83, 422 S.E.2d 803, 805 (1992) (citing *Nationwide Mut. Ins. Co. v. Scarlett*, 116 Idaho 820, 780 P.2d 142 (1989)0. Here, the notice requirement contained in WV National's policy when a "hit-and-run" is involved is plain and unambiguous. There is no occasion for construction. The Court is bound to adhere to the policy as written, enforcing it as made. The plain, ordinary meaning of the 24-hour notice requirement contained in the policy mirrors what is required by West Virginia Code §33-6-31(e)(1). It, like the State Code, does not contain any tolling

provision or specify business days. Respondents have admitted they failed to notify the police, as required, within 24-hours of the incident, despite having also admitted they were neither physically nor mentally incapacitated following the incident and could have notified anyone they wished of its occurrence, including law enforcement.

CONCLUSION

The Circuit Court's order granting Respondents' Partial Motion for Summary Judgment should be reversed, and, Petitioner West Virginia National's Motion for Summary Judgment should be granted. Respondents failed to comply with the 24-hour notice requirement of their alleged hit-and-run incident to law enforcement, and, as a result, they are not entitled to uninsured motorist coverage under WV National's Policy.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 2023, true and accurate copies of the foregoing **Petitioner's Brief** was served electronically and also United States mail, postage prepaid to all other parties to this appeal as follows:

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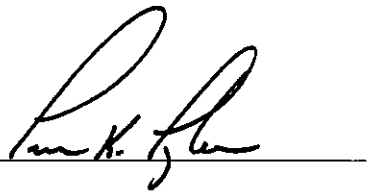
Signed: 

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