IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 20-0792

AUTO CLUB PROPERTY CASUALTY INSURANCE CO.
Defendant Below, Petitioner,

v.

JESSICA A. MOSER,
Plaintiff Below, Respondent.

RESPONDENT'S BRIEF

Honorable Michael Lorensen, Judge
Circuit Court of Berkeley County
Civil Action No. 19-C-165

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STATEMENT OF THE CASE

Introduction

This is a first-party insurance declaratory judgment action. (App. at 2-12). On October 17, 2017, the Respondent and Plaintiff below, Jessica A. Moser ("Respondent" or "Moser") suffered bodily injury in a two-car motor vehicle crash in Berkeley County, West Virginia. (App. 120, 123-126, 310).

Thereafter, Moser made a claim against her own Medical Payments Coverage pursuant to a policy issued by Petitioner and Defendant below, Auto Club Property Casualty Insurance Company ("Petitioner" or "Auto Club"). (App. 57, 67-68, 83, 311). Moser was listed as a household driver and an assigned driver under the Auto Club policy. (App. 57-58, 311). Moser qualified as both a "named insured" and an "insured person" under said policy. (App. 57-58, 64-65, 311).

On April 27, 2018, Moser submitted medical records and bills from Rankin Physical Therapy, and requested payment in the full amount of $2,165.00. (App. 83, 311). Auto Club refused to pay the Rankin bill, first claiming that the Medical Payments Coverage policy does not allow duplication of benefits, then later claiming that, because Aetna Better Health of West Virginia ("Medicaid") had previously paid the Rankin bill, Moser never "incurred" the expense. (App. 86-88, 312). As explained more thoroughly hereinafter, there are several major problems with Auto Club's position on coverage with regard to the Rankin bill.

First, unlike some of the cases relied upon by Auto Club, Moser's Medical Payments Coverage provisions did not include any specific limitation or offset language applicable to the Rankin Physical Therapy bill previously paid by Medicaid. (App. 67-69). In fact, Auto Club's

plain policy language makes it clear that Moser is entitled to full payment of her reasonable medical expenses regardless of who else may make payments on the same bill. (App. 67-69).

Second, it is undisputed that Moser's Medical Payments Coverage is "primary" as opposed to "excess." (App. 68, 314; *see also* Pet'r Br., at pp. 17-18). Auto Club's denial of coverage on the basis that the Rankin Physical Therapy bill was not "incurred" is nothing more than an indirect and improper way of converting the coverage from primary to excess.

Procedural History

On May 30, 2019, Moser filed the instant action against Auto Club seeking declaratory judgment, as well as damages for breach of contract, breach of implied covenant of good faith and fair dealing, and unfair claim settlement practices. (App. 2-12). The Declaratory Judgment portion of Moser's Complaint was brought pursuant to W.Va. Code § 55-13-1, *et seq.*, also known as the Uniform Declaratory Judgments Act, and the principles set forth in *Christian v. Sizemore*, 181 W.Va. 628, 383 S.E.2d 810 (1989), with one of the purposes thereof being for the court to declare and adjudicate the issues of insurance coverage. (App. 2-12). This action sought the lower court's declaration of the rights, duties, and responsibilities of the parties under a policy of automobile insurance issued by Auto Club to Joshua Jandreau under policy number AUTO 41845795. (App. 2-12).

On March 13, 2020, Moser filed a motion for (partial) summary judgment. (App. 42-91). After briefs were filed by both parties, the Circuit Court held oral argument on May 13, 2020. (App. 308, 483-519). In an Order dated June 5, 2020, the Circuit Court granted partial summary judgment in favor of Moser on Count I (declaratory judgment) and Count II (breach of contract) of her Complaint. (App. 310-316).

The Circuit Court further denied Auto Club's cross-motion for summary judgment. (App. 310-316). The Circuit Court ordered Auto Club to pay Moser the sum of $2,165.00, the amount incurred for services at Rankin Physical Therapy under the bill submitted to Auto Club for payment. (App. 315). Despite finding that Auto Club's payment to Equian, the collection company retained by Medicaid, should not have been made, the Circuit Court nevertheless invited Auto Club to furnish evidence of payments to Equian for the Rankin Physical Therapy bill, holding that Auto Club was entitled to a credit for any such amounts. (App. 315). It is undisputed that Auto Club never paid the full amount of the Rankin Physical Therapy bill of $2,165.00.

The Circuit Court further invited Moser to submit a petition for her reasonable attorneys' fees and costs incurred in securing the judgment against Auto Club. (App. 315). Pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, the Circuit Court also invited Auto Club to request that the judgment be made final and appealable prior to the court's resolution of the remaining Counts in the Complaint. (App. 316).

On July 7, 2020, the Circuit Court entered an Agreed Order granting Auto Club a credit in the amount of $822.9, the full amount paid by Auto Club to Rankin Physical Therapy, to be applied to the $2,165.00 Rankin invoice. (App. 354-355). Thus, the Circuit Court reduced the amount owed by Auto Club to Moser to $1,342.09, plus interest. (App. 354-355).

On July 30, 2020, Moser filed her Motion for Reasonable Attorneys' Fees. (App. 335-353). After full briefing by both parties, the Circuit Court held a Status Hearing on July 27, 2020. (App. 441-442; 457-468). At the Status Hearing, Moser's counsel advised they were not requesting an evidentiary hearing. (App. 460). Likewise, Auto Club's counsel advised the court that the issue of attorneys' fees had been "fully briefed" and that an evidentiary hearing on fees was not necessary. (App. 460).

On September 4, 2020, the Circuit Court entered an Order Granting Moser's Motion for Reasonable Attorneys' Fees, in which Auto Club was specifically ordered to pay Moser the sum of $34,026.75 for her reasonable attorneys' fees. (App. 453-455). By separate Order dated September 4, 2020, the Circuit Court entered Judgment against Auto Club. (App. 456). The court ordered that Moser recover the sum of $1,342.09 owed on the Rankin Physical Therapy bill, and the sum of $34,026.75 for attorney fees, plus interest. (App. 456). The court further determined that, although there are additional claims to decide, there "is no just reason for delaying" entry of the judgment pursuant to Rule 54 of the West Virginia Rules of Civil Procedure. (App. 456).

On December 30, 2020, Auto Club filed its Brief and Appendix Record. Auto Club raised only two (2) assignments of error. First, Auto Club asserts that the "Circuit Court erred in ruling that a policyholder is entitled to first-party medical payments coverage where: (a) her insurer made payments to Medicare to reimburse it for the amount paid towards the insured's medical bills reducing those bills to zero, (b) the policyholder settled with the liability carrier for less than the available liability limits, (c) the insurer waived subrogation pursuant to the liability settlement, and (d) the coverage results in a windfall." (Pet'r. Br., p. 1).

Auto Club's first assignment of error contains several significant mistakes and misstatements. First, Auto Club made no payments to *Medicare* to reimburse it for the amount paid toward the insured's medical bills reducing those bills to zero. (App. 319-32). Auto Club did, however, make inappropriate and untimely payment payments to *Medicaid* for small portions of the medical bills actually owing to Moser under the plain terms of the language of the subject policy. (App. 319-333).

Second, while it is true that Moser settled with the liability carrier for less than the available liability limits, Auto Club's claims that it "waived subrogation pursuant to the

liability settlement" are simply not true. Indeed, Moser has never requested that any such waiver be made, nor has Auto Club ever actually waived subrogation. Moreover, Auto Club has failed to offer any proof in the Appendix Record that it, in fact, waived its right of subrogation. Auto Club's sole reference to the record in support of this claim contains *zero* reference to its alleged waiver of subrogation. (*See* Pet'r Br., p. 4; App. 239). Furthermore, Moser's counsel held back a sum sufficient to satisfy Auto Club's subrogation claim when Moser settled her third-party claim. That subrogation claim will be satisfied by Moser when Auto Club has properly and fully paid Moser's medical payments claim pursuant to the terms of the Medical Payments Coverage policy.

As stated in further detail herein, it is Moser's position that there is no "windfall" for insureds like her who are a named insured in an automobile insurance policy containing *primary* medical payments coverage (without any applicable exclusions or setoff provisions) and, unlike her, actually collect the full amount of the medical bill as required by the policy. (App. 67-68).

In its second assignment of error, Auto Club claims that the "Circuit Court erred in awarding attorney fees in the amount of $34,026.75 where the fee award includes (a) block billing entries, (b) duplicative entries, (c) excessive time, and (d) an attorney fee award almost thirty times the compensatory damages award." (Pet'r. Br., p. 1).

Moser asserts that the Circuit Court carefully considered all of Auto Club's arguments with regard to the award of attorneys' fees in the amount of $34,026.75, and rejected those arguments upon mature consideration. (App. 443-455; 457-468). The court's thorough

consideration of the attorneys' fees issue is significant, as Auto Club has already conceded, as it must, in that the award of attorneys' fees is reviewable only upon an abuse of discretion standard.[1]

Statement of Facts

On October 17, 2017, Moser was the operator of a 2008 Toyota Scion TC owned by her boyfriend with whom she lived, Joshua Jandreau. (App. 112-115; 310). On that day, Moser suffered bodily injury in a motor vehicle crash resulting from the negligence of Jennifer Weaver. (App. 112-120; 310).

Auto Club issued an automobile insurance policy (number AUTO 41845795) to Mr. Jandreau in Berkeley County, West Virginia, for the policy term of April 20, 2017, through October 20, 2017. (App. 56-82). Moser was listed as a "household driver" and "assigned driver" under the automobile insurance policy. (App. 57; 311). Moser also qualifies as both a "Named Insured" and an "Insured Person" under the automobile insurance policy. (App. 64-65; 311).

The vehicle operated by Moser at the time of the motor vehicle crash was a vehicle within the meaning of "**your car**," and was a listed vehicle under the Auto Club policy. (App. 58; 63-64; 311) (original emphasis). The premium was fully paid up to date as of the date of the subject crash. (App. 311).

The automobile insurance policy issued by Auto Club to Mr. Jandreau included Medical Payments Coverage for the vehicle assigned to Moser, with a policy limit of $5,000.00. (App. 58, 67-68, 311). Subsequent to the crash, Moser presented a claim under the Medical Payments Coverage portion of the policy issued by Auto Club. (App. 83, 311).

[1] *Karpacs-Brown v. Murthy*, 224 W.Va. 516, 526, 686 S.E.2d 746, 756 (2009)

Moser underwent treatment at Rankin Physical Therapy from January 3, 2018, through March 23, 2018. (App. 128-129). Rankin's bill dated April 26, 2018, revealed total charges in the amount of $2,165.00. (App. 128-129).

By letter dated February 22, 2018, Equian, a collection company retained by Aetna Better Health of West Virginia ("Aetna"), advised Auto Club that Aetna was a Medicaid plan, and, as such, was the "payor of last resort." (App. 131-132). Equian further advised Auto Club that it was "primary over Medicaid and AetnaWV." (App. 131). While Equian advised Auto Club that it had paid medical benefits on behalf of Moser in the amount of $505.61, Equian did not demand immediate payment from Auto Club, but did request reimbursement "[a]t the conclusion of this matter." (App. 131). Instead of waiting until the conclusion of Moser's claims as requested by Equian, Auto Club prematurely sent payment to Equian on or about March 1, 2018, in the amount of $505.61. (App. 327; 330).

On April 25, 2018, Equian sent another letter to Auto Club once again reminding Auto Club that Auto Club was "primary," acknowledging receipt of $505.61, and advising that Aetna had paid the total sum of $1,437.61 on Moser's behalf. (App. 330). On or about May 3, 2018, long before the conclusion of Moser's claim, Auto Club paid $932.00, the amount remaining after its prior payment of $505.61, directly to Equian. (App. 330, 333).

On or about April 27, 2018, Moser, by counsel, submitted medical records and bills from Rankin Physical Therapy in the amount of $2,165.00 to Auto Club for payment under the Medical Payments Coverage of the policy. (App. 83-85, 311). By letter dated April 30, 2018, Auto Club issued a denial letter stating that no balance was owed by Respondent, and that the "auto policy does not allow duplication of benefits under the Medical Payments Coverage." (App. 86, 312).

On May 25, 2018, Moser, by counsel, asserted that the only non-duplication language in the policy was inapplicable, as it pertained to compulsory insurance laws of other states. (App. 89-90, 312). Moser once again requested full payment of the Rankin Physical Therapy bill in the amount of $2,165.00. (App. 89-90, 312).

By letter dated May 21, 2018, Auto Club once again denied payment for Moser's physical therapy bills, this time offering an entirely different basis for the continued denial of payment: that the physical therapy bills were not "incurred" by Moser, as said bills had been previously paid by Medicaid. (App. 87-88, 312).

By letter dated August 15, 2018, Moser's counsel objected to Auto Club's position that Moser had not "incurred" medical expenses which had been paid by Medicaid. (App. 430-432). By letter dated August 29, 2018, Auto Club maintained its denial of coverage for Moser's request for payment of the Rankin Physical Therapy bill, based upon its second theory for denial. (App. 433-440).

The Circuit Court found that Rankin Physical Therapy medical expenses submitted to Auto Club in the amount of $2,165.00 were reasonable medical expenses incurred for necessary medical services because of Moser's bodily injuries sustained in the motor vehicle crash of October 17, 2017. (App. 312). In fact, many of the facts set forth above were included by the Circuit Court in its Findings of Fact and Conclusions of Law entered in its Order Granting Plaintiff's Motion for Partial Summary Judgment dated June 5, 2020, which is one of the Orders from which Auto Club now appeals. (App. 310-316).

On June 30, 2020, Moser's counsel filed a "Motion for an Award of Reasonable Attorneys' Fees." (App. 335-353). In support of the motion, Moser's counsel applied the factors established by this court in *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986).

(App. 337-342). Moser's counsel also attached detailed itemizations of their time, as well as an Affidavit from attorney Laura C. Davis, Esquire. (App. 343-353). Moser's counsel moved the court to award attorneys' fees in the total amount of $35,082.50. (App. 341).

In response, Auto Club did not dispute that Moser substantially prevailed in this matter. (App. 356-380, 385-409, 447). In fact, Auto Club conceded that Moser was entitled to an award of reasonable attorneys' fees. (App. 385, 447). However, Auto Club failed to even mention the *Pitrolo* factors, much less assert that any of the factors weighed against the granting of any particular award of attorneys' fees in this case. (App. 356-380, 385-394, 447). Instead, Auto Club asserted that the requested fee award was excessive and must be reduced by a minimum of $9,091.25, plus an additional amount to be determined by the court. (App. 385-394).

In seeking a reduction of Moser's attorneys' fees, Auto Club argued that: (1) any work performed by Moser's counsel prior to the drafting and filing of the Complaint should be excluded in the attorney fee computation; (2) attorney fees based upon block billing should either be disregarded or reduced; (3) the first time entry on both attorney Harman's and attorney Jenkinson's time sheets should be excluded in the fee computation; (4) a number of entries totaling $5,206.25 were excessive and should be reduced; (5) the limited activity in this case demonstrated that the fee requested is unwarranted; and (6) an inaccurate computation resulted in an excessive claim of $32.50. (App. 385-409). In reply, counsel for Moser responded to each of Auto Club's claims, submitted amended time entries, and reduced their overall attorney fee claim from $35,082.50 to $34,026.25. (App. 414-440, 446).

On September 4, 2020, the Circuit Court entered an Order Granting Judgment on Plaintiff's Motion for Award of Reasonable Attorneys' Fees. (App. 443-455). In its thirteen (13) page Order,

the court thoroughly addressed (and rejected) all of Auto Club's arguments with regard to Moser's claimed attorneys' fees. (App. 443-455).

SUMMARY OF ARGUMENT

The Circuit Court correctly ruled that Auto Club failed to honor its contractual obligations in the Medical Payments Coverage provisions of the subject policy. (App. 310-316). The Circuit Court correctly noted that Auto Club's coverage in this situation was primary over Medicaid, and that Auto Club owed Moser the full amount of the Rankin Physical Therapy bill in the amount of $2,165.00. (App. 314). The court correctly ruled that the payments made directly to Equian (Medicaid's subrogation recovery contractor) were not authorized under the policy and should not have been made ***prior to*** reimbursement to Moser under the clear terms of the policy. (App. 313).

Most importantly, the Circuit Court correctly found that the Medical Payments Coverage portion of the policy made it clear that the Auto Club was well aware of the distinction between **primary coverage** and **excess coverage** in the provisions, specifically stating that coverage was primary if the insured is driving a vehicle defined as "**your car**" under the terms of the policy and excess coverage if the insured is not driving such a vehicle. (App. 313-314) (original emphasis).

With regard to the assignment of error on the award of attorneys' fees, Moser notes that the claim for attorneys' fees was fully briefed between the parties and carefully considered by the Circuit Court, which ultimately wrote a lengthy Order in which all of the arguments that Auto Club now raises in this appeal were addressed and in large part rejected. (App. 443-455). The Circuit Court undertook an exhaustive analysis of the *Pitrolo* factors and based its reasoning and ultimate decision on those factors and also upon other well established West Virginia law regarding the award of attorneys' fees. (App. 443-455). This issue is only reviewable upon an abuse of

discretion. It is clear that the Circuit Court's award was well within its discretion and that its ruling should also be upheld.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary in this case, as the dispositive issues have been authoritatively decided and adequately presented in the briefs. Therefore, the decisional process will not be significantly aided by oral argument.

ARGUMENT

I. STANDARD OF REVIEW

A Circuit Court's grant or denial of summary judgment is reviewed *de novo*. *Gastar Expl. Inc. v. Rine*, 239 W.Va. 792, 798, 806 S.E.2d 448, 454 (2017); Syl. Pt. 1, *Crystal R. M. v. Charlie A. L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). Likewise, the "interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination which, like the court's summary judgment, is reviewed *de novo* on appeal." *Payne v. Weston*, 195 W.Va. 502, 506-507, 466 S.E.2d 161, 165-166 (1995).

This court reviews the reasonableness of an amount of an award of attorney fees for an abuse of discretion. Syl. Pt. 2, *Daily Gazette Co. v. West Virginia Dev. Office*, 206 W.Va. 51, 521 S.E.2d 543 (1999)(citations omitted).

II. THE CIRCUIT COURT CORRECTLY RULED THAT A FIRST-PARTY MEDICAL PAYMENTS COVERAGE POLICYHOLDER IS ENTITLED TO PAYMENT OF MEDICAL EXPENSES PREVIOUSLY PAID BY HER HEALTH INSURER WHERE: (A) THE MEDICAL PAYMENTS COVERAGE IS PRIMARY, AND (B) THE POLICY DOES NOT EXPRESSLY EXCLUDE OR OTHERWISE PROHIBIT SUCH PAYMENT.

In its Order dated June 5, 2020, the Circuit Court granted partial summary judgment in favor of Moser on Count I (declaratory judgment) and Count II (breach of contract) of her Complaint. (App. 310-316). The Circuit Court further denied Auto Club's cross-motion for

summary judgment. (App. 310-316). While the Court ordered Auto Club to pay Moser the sum of $2,165.00, the amount of the Rankin Physical Therapy bill, the Court later granted Auto Club a credit in the amount of $822.91 for its previous payments to Equian. (App. 315, 354-355).

For the following reasons, the Circuit Court correctly ruled that a first-party medical payments coverage policyholder is entitled to payment of medical expenses previously paid by her health insurer where: (a) the medical payments coverage is primary, and (b) the policy does not expressly exclude or otherwise prohibit such payment. (App. 310-316).

A. Auto Club's Uncoordinated, *Primary* Medical Payments Policy Requires Full Payment of Moser's Medical Expenses Even if Previously Paid by her Health Insurance.

This court's examination of whether the Circuit Court correctly ruled below on the Declaratory Judgment count is "necessarily linked to the language of the applicable policy," including exclusions, limitations, and definitions. *Smith v. Animal Urgent Care*, 208 W.Va. 664, 666, 542 S.E.2d 827, 829 (2000). Nevertheless, Auto Club spends very little time in its Brief addressing all of the relevant language in its Medical Payments Coverage policy, instead relying heavily upon the claimed purpose of medical payments coverage, alleged insurance industry customs and practices, as well as non-binding authority from other jurisdictions. The reason for Auto Club's approach is clear: if it were to engage in a careful examination and discussion of all of the relevant policy language, it would have to concede that the Medical Payments Coverage was specifically written as *primary* coverage, which therefore requires that Moser's reasonable medical expenses be paid in full, notwithstanding the previous payments by Moser's health insurance.

"In West Virginia, insurance policies are controlled by the rules of construction that are applicable to contracts generally." *Payne, supra*, at 507, 166. It is well settled that "this [C]ourt

will apply, and not interpret, the plain and ordinary meaning of an insurance contract in the absence of some ambiguity or some other compelling reason." *Id.* This Court's "primary concern is to give effect to the plain meaning of the policy" and to do so requires construing "all parts of the document together." *Id.* This Court "will not rewrite the terms of the policy" but will instead "enforce it as written" and "ascertain the meaning of the policy as manifested by its language." *Id.* With these principles in mind, Moser directs this court to the pertinent language in the Auto Club Medical Payments Coverage policy. (App. 67-68).

Moser is an "***Insured Person***" as defined under the Medical Payments Coverage portion of the Auto Club policy. (App. 67) (original emphasis). In "Part II – **Medical Payments Coverage**," Petitioner Auto Club defined an "***Insured Person***" as follows:

> ***Insured Person*** means:
>
> 1. ***you*** or any ***resident relative***:
>
> a. while ***occupying***; or
>
> b. as a pedestrian when struck by;
>
> a motor vehicle designed for ***use*** mainly on public roads or a ***trailer*** of any type.
>
> 2. any other ***person*** while ***occupying***:
>
> a. ***your car***; or
>
> b. ***an other car*** operated by ***you*** or any ***resident relative*** who does not own a ***private passenger car***.

(App. 67) (original emphasis).The term "***you***" is defined in the general definitions section of the policy as "any ***person***" or organization named on the Declaration Certificate as:

> a. **principal named insured**; or
>
> b. principal driver, but only for the specific vehicle when so named[.]

(App. 64) (original emphasis). As Moser is listed in the Declaration Certificate as the principal (assigned) driver for the 2008 Toyota Scion TC involved in the subject motor vehicle crash, she meets the definition of an "***Insured Person***" under the policy. (App. 58, 64, 67, 311) (original emphasis). Auto Club does not dispute that Moser is an "***Insured Person***" under the policy. (App. 188) (original emphasis).

Moser also qualifies as a "***Named Insured***" under the Auto Club policy. (App. 64) (original emphasis). The general definitions section of the policy states that a "***Named Insured***" includes a "principal driver, but only for the specific vehicle when so named." (App. 64) (original emphasis). As Moser is listed in the Declaration Certificate as the principal (assigned) driver for the 2008 Toyota Scion TC involved in the subject motor vehicle crash, she also meets the definition of a "***Named Insured***" under the policy. (App. 58, 64, 203-205, 311) (original emphasis). Auto Club also does not dispute that Moser is a "***Named Insured***" under the policy. (App. 188) (original emphasis).

In "Part II – Medical Payments Coverage," Auto Club agreed as follows:

> **INSURING AGREEMENT**
>
> Subject to the Definitions, Exclusions, Conditions and Limits of Liability of this policy, ***we*** will pay reasonable ***medical expenses*** incurred for necessary medical and funeral services because of ***bodily injury***:
>
> 1. caused by accident; and
>
> 2. sustained by an ***insured person***.
>
> ***We*** will pay only those ***medical expenses*** necessary for services furnished within 3 years from the date of accident. ***We*** may request mental and physical exams to determine whether ***medical expenses*** incurred are reasonable or medical treatment is necessary.

(App. 67) (original emphasis). "***Medical Expenses***" is defined in the Medical Payments Coverage as "necessary medical and funeral expenses including, but not limited to, medical, dental,

ambulance, hospital and licensed nursing services, hearing aids and eyeglasses." (App. 67) (original emphasis). Auto Club does not dispute that the subject Rankin Physical Therapy bill qualifies as "***Medical Expenses***" under the policy. (App. 188) (original emphasis). In fact, Auto Club's only objection under the "Insuring Agreement" of the Auto Club policy that the Rankin bills were not "incurred." (Pet'r Br., pp. 10-17).

While Auto Club has denied medical payment coverage on the basis that the submitted medical bills were not "incurred" by Moser, the word "incurred" is not defined anywhere in the aforementioned insurance policy. (App. 60-82). When deciding cases concerning language employed in an insurance policy, our Supreme Court looks to the "precise words employed in the policy of coverage." *Boggs v. Camden–Clark Mem. Hosp. Corp.*, 225 W.Va. 300, 304, 693 S.E.2d 53, 57 (2010). As a general rule, our court accords the language of an insurance policy its "common and customary meaning." *Id.*, at 304-305, 57-58. "Language in an insurance policy should be given its plain, ordinary meaning." *Id.*, at 305, 58 (quoting *Horace Mann Ins. Co. v. Adkins*, 215 W.Va. 297, 301, 599 S.E.2d 720, 724 (2004)). "Where 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." *Id.* (quoting *Keffer v. Prudential Ins. Co.,* 153 W.Va. 813, 172 S.E.2d 714 (1970); Syl. Pt. 2, *West Virginia Fire & Cas. Co. v. Stanley*, 216 W.Va. 40, 602 S.E.2d 483 (2004)).

In part, the word "incurred" is defined in *Black's Law Dictionary* 768 (6th Ed. 1990) as "[t]o become liable or subject to." This Court has previously held that an injured party becomes "liable for the bills when the services were received," regardless of how, or even whether, the injured party's obligation to the medical provider is later discharged. *Kenney v. Liston*, 233 W.Va. 620, 631, 760 S.E.2d 434, 445 (2014). Using the common and customary meaning of the word

"incurred," Moser, in fact, "incurred" the entirety of the Rankin Physical Therapy bill previously submitted to Auto Club. In the words of this Court, Moser became "liable" for the Rankin bill when the services were rendered, regardless of how or whether the obligation was later discharged by Medicaid. *Id.*[2]

Auto Club's claim that the Circuit Court erred in relying upon this Court's opinion in *Kenney v. Liston* to interpret the word "incurred" is a red herring. (App. 313). While it is true that *Kenney* did not specifically define the word "incurred," the court in *Kenney* specifically addressed arguments from the defendant that Plaintiff did not "actually incur" those medical expenses which had been written off by medical providers. *Id.*, at 624, 438.

As noted above, the *Kenney* court established that an injured party's liability for a medical bill attaches at the time services are rendered, regardless of how or whether the obligation was later discharged. *Id.*, at 631, 445. As the definition of "incurred" includes to "become liable," this Court's decision in *Kenny* certainly is instructive. As the Circuit Court aptly noted below, the meaning of "incurred" (or when a party becomes liable for medical expenses) "cannot turn on who is asking." (App. 313).

Moser submits that the meaning of the undefined policy term "incurred" is clear and unambiguous, as Moser became liable for the Rankin Physical Therapy bill at the time the services were received. However, any doubt that the Auto Club policy does not permit the payment of the Rankin bill, even after the payment of the same by Medicaid, disappears when this court performs the required act of construing all parts of the policy together to give effect to its plain meaning. *Payne, supra*, at 166, 507.

[2] Moser addresses Auto Club's interpretation of the term "incurred" in further detail herein below.

It is important for this court to note that Auto Club, in denying coverage, is not relying upon any of the fourteen (14) exclusions in the Medical Payments Coverage policy. This is because there is not a single exclusion applicable to the Rankin Physical Therapy bill. (App. 67-68). Auto Club is also not relying upon the only non-duplication of benefits provision in the Medical Payments Coverage policy. This non-duplication clause, which exists under the heading "Out of State Coverage – Duplication of Payments," pertains only to compulsory insurance laws of other states. (App. 68). While Auto Club initially denied coverage based upon this non-duplication of benefits provision, it later abandoned this policy defense due to its obvious inapplicability to the Moser claims. (App. 86, 87-88, 312).

Most importantly, however, is the undisputed fact that the Auto Club Medical Payments Coverage was *primary* coverage as applied to Moser's claim. A closer examination of the Medical Payments Coverage portion of the Auto Club policy is very instructive here. First, at page 9 under the sub-heading "**Other Insurance**," the policy says as follows:

> This Medical Payments Coverage provides primary insurance for ***your car*** but for any ***car you*** do not own, this coverage is excess but only in the amount it exceeds all applicable other insurance coverages and programs, including self-insurance.
>
> Subject to the foregoing paragraph, if there is other similar applicable insurance or self-insurance, **we** will pay only our share of the loss. **Our** share is the proportion that **our** Limit of Liability bares to the total of all applicable limits, including that of self-insurance.
>
> If this policy and any other **car** insurance policy issued to **you** by **us** apply to the same accident, the maximum limit of **our** liability under all the policies shall not exceed the highest applicable Limit of Liability under any one policy.

(App. 68) (original emphasis).

"**[Y]our car**" is a defined term at page 4 of Auto Club policy as "the vehicle described on the Declaration Certificate and identified by a specific vehicle number[.]" (App. 63) (original emphasis). The Toyota Scion driven by Ms. Moser at the time of the subject motor vehicle crash was both described on the Declaration Certificate and identified by a specific vehicle number. (App. 110-114, 58). This clearly tells Moser, a named insured, that the Medical Payments Coverage is *primary* insurance for any automobile accident that occurred while she was in the Toyota Scion. (App. 63, 58). In this case, it is undisputed that at the time of the subject motor vehicle crash on October 17, 2017, Moser was occupying the 2008 Toyota Scion, which was a listed vehicle identified in the subject policy with its own number. (App. 110-114, 58, 311).

Accordingly, it is clear that Moser's Medical Payments Coverage was *primary* coverage and not the type of excess coverage described in the "**Other Insurance**" portion of the Medical Payments Coverage policy set forth hereinabove. (App. 68) (original emphasis). Put another way, Auto Club could have easily written its policy to state that Medical Payments Coverage, even when driving "**your car**," was excess coverage only and not primary coverage. It did not.

Even Auto Club has conceded on appeal that its Medical Payments Coverage was, in fact, primary coverage as it pertains to Moser's claim. (Pet'r Br., pp. 17-18). However, in order to continue its denial of coverage, Auto Club has resorted, in part, to a strained and legally unsupported interpretation of the word "primary." (Pet'r. Br., p. 18). Incredibly, Auto Club argues that its Medical Payments Coverage is "primary as it relates to *out-of-pocket payments*" for medical expenses. (Pet'r Br., p. 18) (original emphasis). In other words, Auto Club asserts that primary coverage means that the primary insurer is only liable for the payment of any amounts owed after all collateral payments. In essence, Auto Club is arguing that primary coverage actually means excess coverage.

Auto Club's interpretation of primary coverage is a thinly veiled attempt to completely avoid coverage for Moser's bills by converting its undisputed primary coverage to excess coverage. It also turns the traditional definition of "primary insurance" on its head. This Court has previously defined primary insurance, in pertinent part, as follows:

> A primary policy provides the first layer of insurance coverage. Primary coverage attaches immediately upon the happening of an "occurrence," or as soon as a claim is made. The primary insurer is first responsible for. . .indemnifying the insured in the event of a covered or potentially covered occurrence or claim[.]

Gauze v. Reed, 219 W.Va. 381, 387, 633 S.E.2d 326, 332 (2006) (quoting Douglas R. Richmond, "Rights and Responsibilities of Excess Insurers," 78 Denv.U. L.Rev. 29-30 (2000)).[3]

Auto Club has never argued that Moser's coverage was excess as opposed to primary coverage (Pet'r Br., p. 17). Nevertheless, the "excess" insurance clause in the Auto Club's Medical Payments Coverage policy, while inapplicable, is highly instructive in determining the meaning of the policy and Moser's entitlement to payment of the Rankin Physical Therapy bill. (App. 68). The "**Other Insurance**" provision in the Auto Club policy states clearly and unambiguously that while the policy is "primary" for Ms. Moser's car, it would be "excess" only for any car not owned by either Moser or Mr. Jandreau. (App. 68) (original emphasis). It is undisputed that Moser was driving Mr. Jandreau's car at the time of the loss.

Excess insurance clauses generally provide "for the payment of a loss to the extent the loss exceeds other available insurance." *State Farm Mut. Auto. Ins. Co. v. Cramer*, 109 Nev. 704, 709, 857 P.2d 751, 754, (1993) (per curium) (quoting *Starks v. Hospital Serv. Plan*, 182 N.J. Super. 342, 440 A.2d 1353, 1355 (N.J. Super. Ct. App. Div. 1981) (*aff'd*, 91 N.J. 433, 453 A.2d 159 (N.J. 1982)). That is exactly how the Auto Club excess insurance clause was drafted: *for non-owned*

[3] This court further noted in *Gauze* that, because primary coverage creates greater exposure, primary insurers charge larger premiums for coverage than do excess insurers. *Id.*, at 387, 332.

vehicles, unlike Moser's, Auto Club is only liable for any amount which "exceeds all applicable other insurance coverages and programs," which would naturally include health insurance programs such as Medicaid. (App. 68).

Excess insurance clauses essentially require that all other insurers pay first. *Scheafer v. Safeco Ins. Co.,* 374 Mont. 278, 288, 320 P.3d 967, 973, n.2 (2014) (citation omitted). Here, the Auto Club policy was specifically written as primary for a named insured, such as Moser, who is driving a listed vehicle, but the policy also provided for excess coverage in other circumstances which are inapplicable to Moser's claim. (App. 68). As the Circuit Court correctly noted below, this "excess" clause shows that Auto Club fully understood the difference between primary coverage and excess coverage, even where the insured is a Medicaid beneficiary. (App. 314). They sold it as the former and have improperly adjusted it as the latter.

Auto Club's inclusion of this excess coverage clause in its policy reveals its knowledge that other "insurance programs" may pay some or all of an insured's medical expenses. (App. 68). If it was Auto Club's intention to limit its liability by paying only the excess expenses incurred by all of its insureds after any payments by health insurers, Auto Club could have done so. It did not.

B. The Circuit Court Correctly Concluded that Respondent Moser "Incurred" Expenses for Medical Services Under Auto Club's Medical Payments Coverage Policy Terms.

The Circuit Court correctly held that the Rankin Physical Therapy bill in the amount of $2,165.00 had, in fact, been "incurred" under the terms of the medical payments coverage, despite the fact that the bill had previously been paid by Medicaid, leaving a balance of zero. (App. 310-316).

Without any applicable exclusions or specific limiting language applicable to Moser's claim, Auto Club improperly resorted to adjusting Moser's claim as an excess insurer, and litigating the term "incurred."

1. Medical Expenses Are "Incurred" at the Time Medical Services are Received.

Auto Club denied Medical Payments Coverage on the basis that the medical bills were not "incurred" by Moser, as said bills had previously been paid by Medicaid. (App. 87-88; 312). As noted above, the term "incurred" is not defined in the Auto Club policy. (App. 61-82).

"'Incur' is generally accepted to mean 'to become liable for,' not 'to pay for.'" *Coconino County v. Fund Adm'rs Ass'n,* 149 Ariz. 427, 430, 719 P.2d 693, 696 (Ct. App. 1986) (quoting *Collins v. Farmers Ins. Exch.,* 271 Minn. 239, 244, 135 N.W.2d 503, 507 (1965)). *See also Stout v. AMCO Ins. Co.,* 645 N.W.2d 108, 113 (Minn. 2002) ("the 'well[-]fixed and delineated' definition of 'incur' is 'to become liable for,' as distinguished from actually 'pay for'[.]") (quoting *Collins, supra*).

The next question to be determined by this court is *when* medical expenses are "incurred" by an insured. This court, in *Kenney*, previously held that an injured party becomes "liable for" medical bills when the medical services are received, regardless of how, or even whether, the injured party's obligation to the medical provider is later discharged. 233 W.Va. at 631, 760 S.E.2d at 445.

Numerous jurisdictions have similarly held that a person incurs or becomes liable for medical expenses at the time services are received. In *Winter v. State Farm Mut. Auto. Ins. Co.,* 375 Mont. 351, 357, 328 P.3d 665, 670 (2014), the Supreme Court of Montana noted that "a common sense understanding dictates that a person incurs medical expenses at the time of service because he is responsible for the charges from that moment forward." The *Winter* Court further

noted that "[i]f a third party, such as an insurer, ultimately pays some or all of those charges, the insurer is merely relieving the person of liability he has already assumed." *Id.* The court in *Winter* reasoned as follows:

> When a patient presents at a hospital or doctor's office, the provider makes clear that the patient is responsible for any and all charges, whether or not insurance or some third party ultimately pays them. The provider does not agree to hold patient harmless for the services rendered on his behalf, nor does an insurer assume liability for all medical expenses simply by issuing the policy[.]

Id. See also Rubin v. Empire Mutual Ins. Co., 25 N.Y.2d 426, 429, 306 N.Y.S. 2d 914, 917, 255 N.E.2d 154, 155 (1969) ("Certainly, there has to be some period of time between the initial treatment and the establishment of compensation liability and, regardless of who ultimately pays or where the bills are first sent, the insured has subjected himself to liability for payment simply by undergoing the treatment."); *Hollister v. Government Employees Ins. Co.*, 192 Neb. 687, 688, 224 N.W.2d 164, 165 (1974) ("Where services are furnished by one party to another, and knowingly accepted by him, the law implies a promise on his part to pay the reasonable value of the services") (citation omitted).

Auto Club asserts that medical expenses which are later reduced or eliminated by collateral payments are not "incurred" under the Auto Club Medical Payments Coverage policy. (Pet'r Br., pp. 12-15). However, the cases relied upon by Auto Club are easily distinguished. First, in *Atkins v. Great Am. Ins. Co.*, 15 N.C. App. 79, 83, 189 S.E.2d 501, 504 (1972), the insured sought medical payments coverage for dental services which had not yet been performed.

In *Newbury v. State Farm Fire & Cas. Ins. Co.*, 343 Mont. 279, 281, 184 P.3d 1021, 1023 (2008), the insured sought payment from his State Farm medical payments coverage policy for medical expenses previously paid by workers' compensation, despite the fact that State Farm's policy precluded medical payment coverage to the extent workers' compensation benefits were

required to be payable. By contrast, Auto Club's medical payment coverage policy at issue here contains no specific double recovery exclusion or similar provision preventing Moser from receiving medical expenses previously paid by her health insurance. (App. 67-68).

Auto Club's reliance upon the Supreme Court of Virginia's decision *State Farm Mut. Auto. Ins. Co. v. Bowers*, 255 Va. 581, 500 S.E.2d 212 (1988) is also misguided. In *Bowers*, the court noted that "an expense can only be incurred. . .when one has paid it or become legally obligated to pay it." *Id.*, at 586, 214 (internal quotations and citations omitted). Therefore, the court held that the insured did not "incur" amounts which had been "written off" by his medical providers. *Id.* Thus, it is apparent that under the *Bowers* decision, the issue of whether or not an insured has "incurred" medical expenses, and if so, in what amounts, is contingent upon some future occurrence, such as a reduction of the original bill as a result of payments by third parties or the insured. In this regard, the *Bowers* holding is contrary to the basic concepts of primary insurance coverage, and also discourages the prompt payment of medical expenses.

By contrast, this Court in *Kenney* has previously held that an injured party's liability for medical expenses attaches *at the time services are rendered*, regardless of whether or how the obligation to the providers is later discharged. 233 W.Va. at 631, 760 S.E.2d at 445. Thus, the *Bowers* decision is not controlling on the issue before this Court. Additionally, it is not clear that the subject policy in *Bowers* provided primary coverage, unlike the policy now before this Court, which the parties agree provides primary coverage.

Further, Auto Club's excess clause, while inapplicable to Moser's claim, gives express consideration to the payment of medical expenses by other insurance "programs." (App. 68). In this regard, Auto Club's proposed definition of the term "incurred" renders its own excess clause meaningless.

2. Medical Expenses Are "Incurred" Despite Collateral Payments.

As we discussed hereinbelow, numerous courts have held that claimants have "incurred" expenses within the scope of medical payments provisions, despite the fact that the expenses were paid or payable by health insurers, including governmental insurers such as Medicaid, Medicare, or military insurance programs. In *Stout,* the Supreme Court of Minnesota addressed whether or not the claimant's loss was equal to the amount originally billed or the post-discount balance after payment by the Department of Human Services in the form of Medicaid and MinnesotaCare. 645 N.W.2d at 108, 109-110. The court in *Stout* held that the claimant was entitled to the payment of gross amount of the bill under the medical payments coverage, and reasoned as follows:

> A reduction in the amount billed, whether obtained pursuant to a settlement agreement or a health insurer's fee schedule, does not modify the amount of medical expense incurred.

Id., at 113. The *Stout* Court further concluded that the medical expense incurred by Stout is the full amount reflected on his medical bills, and not the amount that was paid in satisfaction of those bills as the result of collateral transactions involving his health insurer. *Id.*, at 113 (citing *Collins,* 271 Minn. 239, 244-245, 135 N.W.2d 503, 507 (1965)).

In the same vein as *Stout*, a California Court of Appeals in *Holmes v California State Automobile Ass'n,* 185 Cal.Rptr. 521, 523, 135 Cal.App.3d 635, 637 (1982), addressed whether or not the claimant had "incurred" any medical expenses and thus whether she was entitled to recover them under the medical payments coverage provisions, despite the fact that Medicare had paid most of those expenses. The court in *Holmes* held as follows:

> When a legal obligation to pay was created upon the rendition of services, the Medicare agreement became applicable and the hospital was bound by its commitment "not to charge," i.e., not to enforce against the patient liability for the costs incurred by the

> patient. We conclude that respondent was liable under the terms of the policy; it was not proper to grant summary judgment dismissing the appellant's complaint.

Id., at 524, 639.

In reaching its holding, the court in *Holmes* further noted that "[o]ther state courts have similarly interpreted the term 'incurred' in the context of insurance contracts." *Id.* (*citing Black v. American Bankers Insurance Company*, 478 S.W.2d 434, 438 (Tex. 1972); *Niles v. American Bankers Ins. Co.,* 229 So.2d 435, 438 (La.Ct. 3d Cir.), *cert. denied*, 255 La. 479, 231 So.2d 394 (La. 1970); *Dunbar v. Security Life & Accident Ins. Co.,* 439 S.W.2d 892 (Civ. App. Tex. 1969)).

Likewise, in *Hollister v. Government Employees Ins. Co,* 192 Neb. 687, 688, 224 N.W.2d 164, 168 (1974), the claimant was an active duty member of the United States Army and was entitled to have his medical expenses incurred in non-government hospitals paid by the United States. The Supreme Court of Nebraska held in *Hollister* that the claimant "incurred" the medical expenses previously paid by the United States Army, and reasoned as follows:

> The hospital services were furnished to plaintiffs and accepted by them with the knowledge that a charge would be made for them. The fact that as a part of their renumeration for services rendered to the United States the government would pay for the hospital expense does not alter the fact that [the insured] was himself primarily liable for the expense and would have had to pay it if the government did not.

Id., at 689, 165.

In *Samsel v. Allstate Ins. Co.,* 204 Ariz. 1, 11, 59 P.3d 281, 291 (2002), the Supreme Court of Arizona similarly held that medical expenses were "actually incurred" by the claimant within the meaning of medical payments coverage, despite the fact that those expenses were paid by the insured's HMO and a statute immunized the HMO enrollees from legal liability for covered expenses. The Court in *Samsel* reasoned that if Allstate "had intended to limit [the insured's]

coverage to expenses for which she had actually become directly legally liable or even those she had actually paid, it could have so stated in the policy," but Allstate provided no evidence of such intention. *Id.*; *see also Golchin v. Lib. Mut. Ins. Co.,* 466 Mass. 156, 157, 993 N.E.2d 684, 686 (2013) ("[W]e conclude that [the insured] is entitled to the MedPay benefits provided by her auto policy, notwithstanding that the medical expenses at issue were covered by and paid under a separate policy of health insurance.").

C. The Partial Summary Judgment Order is Consistent with the General Purpose and Scope of Medical Payments Coverage: The Speedy Reimbursement of Medical Expenses.

Auto Club's assertion that Judge Lorensen's Order Granting Plaintiff Moser Partial Summary Judgment ("Order") conflated first party and third-party coverages and thwarted the purpose of medical payments coverage is without merit. (Pet'r Br., p. 8). To the contrary, the Order properly considered the first-party aspect of medical payments coverage, and its result is consistent with the general purpose and scope of first-party medical payments coverage.

To discern the purpose of first-party medical payments coverage, this Court need look no further than its own opinion in *Ferrell v. Nationwide Mut. Ins. Co.,* 217 W.Va. 243, 249, 617 S.E.2d 790, 796 (2005), wherein this Court stated that such coverage "permits the insured to gain *speedy* reimbursement for medical expenses incurred as a result of a collision without regard to the insured's fault." (emphasis added). In this case, Auto Club improperly adjusted Moser's *primary* Medical Payments Coverage as *excess* coverage by refusing to pay the Rankin Physical Therapy bill previously paid by Medicaid. (App. 86, 312, 430-432)).

Auto Club's improper adjustment of Moser's claim on an excess basis is actually in direct contravention of the goal of the speedy reimbursement for medical expenses incurred by automobile collision victims. In *Stout*, the Minnesota Supreme Court noted that "[b]y holding that

[the insured] is entitled to the full amount reflected on his medical bills, we remove the incentive for no-fault insurers to delay the payment of meritorious claims in the hope that the injured person's health insurer will step in and pay his or her medical bills at a discounted rate."[4] 645 N.W.2d 108, 113 (Minn. 2002).

In arguing that medical payments coverage is designed to "shield" the insured from the "eventual" payment of out-of-pocket expenses, Auto Club's heavy reliance upon the Supreme Court of Montana's opinion in *Newbury v. State Farm Fire & Cas. Ins. Co.*, 343 Mont. 279, 184 P.3d 1021 (2008), is misguided. As noted above, the insured in *Newbury* sought medical payments coverage for amounts previously paid by workers' compensation, notwithstanding the existence of a clear exclusion of such coverage. *Id.*, at 281, 1023.

Auto Club also overlooks that the very same Supreme Court of Montana, in *Winter,* distinguished its prior holdings which prohibited double recovery in both *Newbury* and *Conway v. Benefits Health System*, 369 Mont. 309, 297 P.3d 1200 (2013). *See Winter v. State Farm Mut. Auto. Ins. Co.,* 375 Mont. 351, 357, 328 P.3d 665, 670 (2014). In *Winter*, the Supreme Court of Montana was confronted with the same general issue currently before this Court: whether or not the medical payments coverage insurer was required to pay plaintiff's medical expenses which had previously been paid by plaintiff's health insurer. *Id.*, at 355, 669.

The court in *Winter* distinguished its prior decisions in *Newbury* and *Conway* by noting that State Farm policy at issue in *Winter* contained "no double recovery exclusion or limitation," while both of the insureds in *Newbury* and *Conway* "sought to recover excess sums despite the fact that *the insurance policy clearly did not provide a mechanism for such recovery.*" *Id.*, at 360, 362, 672-673. (original emphasis). The court in *Winter* further noted that the insured in *Newbury*

[4] The court in *Stout* further stated that its holding effectuates the statutory purpose of ensuring *prompt* payment of benefits to those injured in automobile accidents. *Id.*

"sought a double payment by rendering an express exclusion unenforceable." *Id.* The court in *Winter* stated that:

> "Where plaintiff has an uncoordinated no-fault insurance contract with defendant that provides no limitation on plaintiff's right to recover from defendant in the context of duplicate insurance coverage [the defendant does not have] the right to refuse payment to plaintiff where plaintiff's injuries fall within the coverage of her policy with defendant."

Id., at 364, 675 (quoting *Shanafelt v. Allstate Ins. Co.,* 217 Mich.App. 625, 643, 552 N.W.2d 671, 678 (1996)). Like the defendant in *Winter*, Auto Club's uncoordinated, primary medical payments policy contained no specific limitation or offset language on which it may reasonably rely, thereby permitting a double recovery through the plain policy language. (App. 67-68).

D. The Payment of the Rankin Physical Therapy Bill Would Not Result in a "Windfall."

Auto Club asserts that allowing Moser to receive full payment of the Rankin Physical Therapy bill would result in a "windfall" recovery. However, the two cases primarily relied upon by Auto Club in support of this proposition, *Newbury* and *Bowers*, are easily distinguished as noted above.

Moreover, where a medical payments policy (such as Auto Club's) "does not contain nonduplication provision or set-off provision, courts and commentators conclude that a double recovery is permissible." *Golchin v. Lib. Mut. Ins. Co.,* 466 Mass. 156, 166, 993 N.E.2d 684, 686 (2013) (quoting 6 J.E. Thomas & C. J. Robinette, *New Appleman on Insurance Law* §64.04[2], at 64-57 (2012)). Like all insurers, Auto Club is bound by the provisions of its own policy, and if it desired to prevent double recoveries for all insureds, it should have placed appropriate language in the policy. *Ferrell v. Nationwide Mut. Ins. Co.,* 217 W.Va. 243, 247, 617 S.E.2d 790, 794 (2005).

In holding that the claimant "incurred" medical expenses previously paid by her HMO, the Arizona Supreme Court in *Samsel v. Allstate Ins. Co.,* soundly rejected the same double recovery/windfall argument advanced by Auto Club herein, explaining as follows:

> [W]e see no windfall when insureds who paid for a separate coverage collect just what they have paid for. Recovery of expenses from both medical payments coverage and other sources has long been both recognized and accepted in Arizona and elsewhere.

204 Ariz. at 10, 59 P.3d at 290. The *Samsel* court further noted that the "'tendency has been to allow double recovery where collection of the first benefits has been from a completely different source, such as a hospitalization policy or Medicare.'" *Id.* (quoting 8A *Appleman on Insurance Law & Practice* §4902.7 (1997)).

Excess medical payments clause are actually "designed to prevent an insured from receiving a double recovery or windfall." *Scheafer v. Safeco Ins. Co.,* 374 Mont. 278, 288, 320 P.3d 967, 973, n.2 (2014) (citing *Nat. Cas. Co. v. American Bankers Ins. Co.*, 304 Mont. 163, 19 P.3d 223 (2001)). It is abundantly clear that Auto Club, in an attempt to prevent Moser from receiving payment in full of the Rankin bill allowed under her primary coverage, inappropriately positioned itself as an excess insurer on a primary policy.

E. The Circuit Court Did Not Err in Considering the Doctrine of Reasonable Expectations.

Auto Club asserts that the Circuit Court erred in basing its holding, in part, on the conclusion that Moser had a reasonable expectation that her Medical Payments Coverage was primary and that Defendant Auto Club owed her the full amount of the Rankin Physical Therapy bill. (Pet'r Br., pp. 17-18; App. 314).

In support of its argument, Auto Club claims that "at no point" did it contend through its actions that the coverage was "excess" as opposed to "primary." (Pet'r Br., p. 17). However, the

record is crystal clear that Auto Club inappropriately positioned itself in Moser' claim as an excess medical payments insurer by refusing to pay the full amount of the Rankin bill.

Moser asserts that the provisions of the Auto Club Medical Payments Coverage policy, including the term "incurred," are clear and unambiguous, and thus are not subject to judicial construction or interpretation. *Boggs v. Camden-Clark Mem. Hosp. Corp.,* 225 W.Va. 300, 305, 693 S.E.2d 53, 58 (2010). *At worst* for Moser, however, the term "incurred" as it is used in the subject Auto Club policy is ambiguous, which is defined as language which is "reasonably susceptible of two different meanings," or language "of such doubtful meaning that reasonable minds might be uncertain or disagree to its meaning." Syl. Pt. 1, *Shamblin v. Nationwide Mut. Ins. Co.,* 175 W.Va. 337, 332 S.E.2d 639 (1985).

Should this Court determine that an ambiguity exists, certain rules of construction will be implemented. First, any ambiguity in the policy is to be construed liberally in favor of the insured, as the policy was prepared by the insurer. *Horace Mann Ins. Co. v. Leeber*, 180 W.Va. 375, 378, 376 S.E.2d 581, 584 (1988). Additionally, ambiguous terms in insurance contracts are to be strictly construed against the insurer and in favor of the insured. Syl. Pt. 4, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987) (overruled on other grounds by *Potesta v. United States Fid. & Guar. Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998)).

Additionally, in the event that this Court determines that an ambiguity exists, this Court could certainly apply the well-settled doctrine of reasonable expectations used by the Circuit Court below. The reasonable expectation doctrine provides that the "objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of policy provisions would have negated those expectations." *Nat'l Mut.,* at Syl. Pt. 8.

Finally, it should be noted that while the Circuit Court considered the doctrine of reasonable expectations, the court's entire holding did not rest upon such findings. (App. 310-316). While the Circuit Court did note that Moser had a "reasonable expectation that her coverage was primary," the court had previously and correctly concluded that the Auto Club policy "makes it *clear* that the coverage is primary." (App. 314) (emphasis added). In this regard, the Circuit Court's application of the reasonable expectations doctrine may be considered superfluous. In addition, any ambiguity would be construed liberally in favor of Moser. *Horace Mann v. Leeber,* 180 W.Va. 375, 378, 376 S.E.2d 581, 584. "[T]his Court will disregard and regard as harmless any error, defect, or irregularity in the proceedings in the trial court which does not affect the substantial rights of the parties." Syl. Pt. 2, *Boggs v. Settle,* 150 W.Va. 330, 145 S.E.2d 446 (1965).

F. The Circuit Court Did Not Err in Holding that Auto Club Should Not Have Made Payments to Medicaid.

The Circuit Court correctly held that under the clear terms of the policy, Auto Club should not have made payments to Equian, the subrogation recovery company hired by Medicaid, prior to any reimbursement to Moser. (App. 313). The Court correctly noted that Auto Club had been informed by Equian that Auto Club's coverage was primary, and that Equian, who was not a party to the contract, did not "incur" any medical expenses because of bodily injuries in a covered automobile. (App. 313).

Additionally, W.Va. Code §9-5-11(d)(4) specifically exempts from subrogation any recovery of less than $20,000.00. Auto Club's reimbursement to Equian in March and May, 2018, were made long before it could be properly determined whether or not Moser's overall recovery would meet or exceed the threshold amount of $20,000.00. (App. 330, 333). Equian did not demand immediate payment from Auto Club, but instead directed Auto Club to remit payment "at the conclusion of this matter." (App. 131, 134). Instead of waiting until Moser's injury case was

concluded over a year later, Auto Club ignored Equian's instructions and made premature payment.

It is well settled that this Court may disregard and regard as harmless any error, defect, or irregularity in the trial Court's proceedings which does not affect the substantial rights of the parties. Syl. Pt. 2, *Boggs v. Settle,* 150 W.Va. 330, 145 S.E.2d 446 (1965). As the Circuit Court granted Auto Club a credit for the total amount it paid to Equian, any error by the Court in stating that Auto Club should not have paid Equian was harmless and should be disregarded. (App. 354-355).

G. The Circuit Court Did Not Disregard the Opinions of Auto Club's Expert.

Auto Club's claims that the Circuit Court "disregarded" or "excluded from consideration" the opinions from Rudy Martin, Esquire, its expert witness, are without merit. (Pet'r Br., pp. 21-22). To the contrary, the Court properly considered but *rejected* Mr. Martin's affidavit, noting that the issue of coverage "rises or falls on the language of the policy, any applicable statute, and the authority of the Supreme Court of Appeals." (App. 313).

III. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING MOSER'S ATTORNEYS' FEES.

The law on this issue in West Virginia is well established. When an insured is forced into litigation to secure the benefits to which they are entitled under the terms of the insurance contract, and the insured substantially prevails in the action, then they are entitled to an award of reasonable attorney's fees. *Hayseeds Inc. v. State Farm Fire and Casualty*, 177 W.Va. 323, 330, 352 S.E.2d 73, 80 (1986). A reasonable attorney's fee is presumptively one-third (1/3) of the face amount of the policy, unless the amount of the policy is either extremely small or enormously large. Syl. Pt. 5, *Richardson v. Kentucky National Insurance Company*, 216 W.Va. 464, 607 S.E.2d 793 (2004); Syl. Pt. 2, *Fauble v. Nationwide Mutual Fire Insurance Company*, 222 W.Va. 365, 664

S.E.2d 706 (2008). In these latter circumstances, the Judge shall conduct an inquiry concerning a reasonable attorney's fee. *Richardson,* 216 W.Va. at 472, 607 S.E.2d at 801. In this case, the Medical Payments Coverage policy limit of $5,000.00 is "extremely small," even though the issues raised by Auto Club's denial of payments thereunder may be extremely significant for all of Auto Club's policyholders in the State of West Virginia.

When attorney fees are sought against a third party, the test of what should be considered a reasonable fee is not determined solely by the fee arrangement between the attorney and his client. Instead, the reasonableness of attorney fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986). The lower court undertook a thorough analysis of these factors and then wrote a thirteen (13) page Order including detailed Findings of Fact and Conclusions of Law. (App. 443-455).

The lower court found that Moser substantially prevailed on the contractual issues in dispute between the parties, which were litigated on cross-motions for summary judgment. (App. 447). The court also made a specific finding that Auto Club did not dispute that Moser had substantially prevailed, and did not dispute Moser's entitlement to an award of reasonable attorneys' fees in this matter. (App. 447). Instead, Auto Club has asserted that, for various reasons, the amount sought ($35,082.50) was excessive and should be reduced. (App. 447). All of these

findings are contained in the court's Order awarding attorneys' fees entered below. (App. 443-455).

While Auto Club concedes that the standard of review on the issue of the award of attorneys' fees is for an abuse of discretion, they can barely bring themselves to allege any specific instance in which the Circuit Court actually abused its discretion in rendering the award of attorneys' fees in this matter. This Court has made it clear that, in order to conduct a meaningful review of the lower court's award or denial of attorneys' fees in this situation, the lower court must make detailed findings of fact and conclusions of law. *Tri State Petroleum Corp. v. Coyne*, 240 W.Va. 542, 564, 814 S.E.2d 205, 227 (2018). Here, the Circuit Court entered a thorough decision which included detailed findings of fact and conclusions of law, including an evaluation of the *Pitrolo* factors. (App. 443-455).

The law also requires that the parties be permitted a hearing to present evidence on the attorneys' fees issue both on their own behalf and also be allowed to test their opponent's evidence on this issue by cross-examination. *Id.*; *see also Tri State Petroleum Corp. v. Coyne*, 240 W.Va. 542, 564, 814 S.E.2d 205, 227 (2018). In this case, it is undisputed that Auto Club was permitted to fully brief and oppose Moser's claim for attorneys' fees **and**, critically, was offered the opportunity for an evidentiary hearing on the issue, at which time they advised that the issue of attorneys' fees had been fully briefed and that they were not requesting an evidentiary hearing on that issue. (App. 460).

Again, Auto Club does not seriously assert that Moser is not entitled to an award of attorneys' fees in this situation, but merely seems to be quibbling over the amounts awarded by the lower court. The court considered all of those arguments and offered them an evidentiary hearing on the same. That offer was declined by Auto Club and the court considered their

arguments, but rejected them for the reasons set forth in the court's detailed ruling on the attorneys' fee award. (App. 443-455).

The general tone of Auto Club's complaints suggests that they believe that counsel for Moser spent too much time on this matter and that the matter was simple and routine and not deserving of an attorneys' fees award in excess of $30,000.00. This conveniently overlooks the fact that Auto Club has hired multiple lawyers to litigate this matter, both in the lower court and now before this Court, from two (2) of the largest law firms in the State of West Virginia. Virtually all of these lawyers are vastly experienced in insurance and/or appellate law. Interestingly, Auto Club does not set forth the detailed billings of their own attorneys to demonstrate the excess nature of the fees now claimed by Moser's counsel. While there is certainly no rule requiring that they disclose their own detailed billing records, there is also no rule that prohibits them from doing so. Moser suspects that the reason Auto Club has not done this is that, were they to do so, it would reveal that Moser's claim for attorneys' fees for winning the case in the lower court is not excessive at all.

The notion or argument that this matter was not heavily litigated before the lower court or that it was not complex and presented only routine legal questions is again, inconsistent with Auto Club having hired multiple lawyers from two (2) of the best law firms in the entire State. Furthermore, on appeal to this Court, Auto Club now requests oral argument because, they say, the case presents legal issues of first impression in the State of West Virginia.[5] Accordingly, given that Auto Club has barely even alleged, much less established, that the lower court abused its discretion in making its award of attorneys' fees in this case, Moser asks that that ruling of the lower Court remain undisturbed.

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[5] See Auto Club's STATEMENT REGARDING ORAL ARGUMENT AND DECISION at page 7 of the Petitioner's brief.

CONCLUSION

The record is clear. The lower court carefully considered the subject policy language and analyzed it based upon well-established legal principals regarding such insurance policy provisions. Conversely, Auto Club has attempted to distract from the policy language by referring to inapplicable buzz words such as "windfall" and irrelevant arguments relating to the "purpose and intent of Medical Payments Coverage." Auto Club has admitted that it wrote the Medical Payments Coverage portion of the policy as primary coverage. However, on appeal to this Court, it continues to pretend that it did not attempt to adjust it as excess coverage under the facts of this case when it is clear that this is exactly what it did. Moser asks that this Court uphold and affirm the ruling of the lower court with regard to coverage.

With regard to the award of attorneys' fees, Auto Club first notes that the Circuit Court's ruling is to be reviewed upon an abuse of discretion standard. The Circuit Court carefully considered all of the arguments of Auto Club with regard to its complaints about the award of attorneys' fees. Upon mature consideration of all of those arguments, the court entered a lengthy thirteen (13) page Order and made the award of attorneys' fees that Auto Club now seeks to overturn. Again, the Circuit Court's award was made in a manner entirely in accord with a long line of West Virginia cases permitting such awards. Auto Club has given this Court no reason to overturn that award. Accordingly, Moser requests that the appeal be denied and the lower court's rulings be upheld and affirmed in all respects and that this matter be remanded to the lower court for further proceedings in accordance with the Judge's rulings.

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By Counsel

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0792

AUTO CLUB PROPERTY CASUALTY INSURANCE CO.
Defendant Below / Petitioner,

v.

JESSICA A. MOSER,
Plaintiff Below / Respondent.

CERTIFICATE OF SERVICE

I, Ronald M. Harman, counsel for Plaintiff Below / Respondent Jessica A. Moser, hereby certify that I have served a true copy of the "Respondent's Brief" upon the following counsel of record via first class mail this **11th** day of **February, 2021**:

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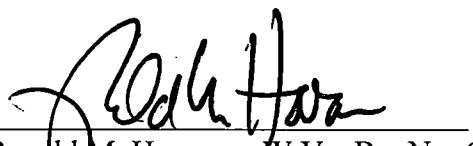

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