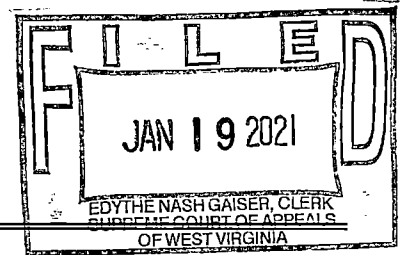


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No. 20-0851



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

PROGRESSIVE MAX INSURANCE COMPANY,

Defendant Below, Petitioner,

v.

CIVIL ACTION NO. 19-C-210

AMBER R. HESS,

Plaintiff Below, Respondent.

FILE COPY

APPEAL BRIEF OF PETITIONER

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B. THE CIRCUIT COURT ERRED BY FAILING TO APPLY THE PROPER ANALYSIS TO THE QUESTION OF WHETHER AMBER R. HESS IS AN INSURED UNDER THE PROGRESSIVE POLICY, AND/OR WEST VIRGINIA CODE § 33-6-31(C)...... 1

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I. ASSIGNMENTS OF ERROR

- A. THE CIRCUIT COURT ERRED IN HOLDING THAT WEST VIRGINIA CODE § 33-6-29(B) EXTENDS UNDERINSURED MOTORIST COVERAGE TO ALL GUEST PASSENGERS IN RENTAL VEHICLES, REGARDLESS OF THE LANGUAGE OF THE POLICY.**
- B. THE CIRCUIT COURT ERRED BY FAILING TO APPLY THE PROPER ANALYSIS TO THE QUESTION OF WHETHER AMBER R. HESS IS AN INSURED UNDER THE PROGRESSIVE POLICY, AND/OR WEST VIRGINIA CODE § 33-6-31(C).**

II. STATEMENT OF THE CASE

A. BACKGROUND OF INSTANT ACTION

1. On or about July 16, 2019, Respondent Hess filed a Complaint to seek underinsured motorist benefits from Petitioner, Progressive Max Insurance Company (“Progressive”), for injuries she sustained as a passenger in a vehicle being operated by a Progressive Insured, Bindernagel. (JA 001)

2. On June 30, 2020, Progressive filed a Motion for Summary Judgment. (JA 069)

3. On July 1, 2020, Hess filed a Motion for Summary Judgment. (JA 095)

4. On July 31, 2020, Hess filed a response in opposition to Petitioner’s Motion for Summary Judgment. (JA 147)

5. On August 1, 2020, Progressive filed its response in opposition to the Motion for Summary Judgment filed by Hess. (JA 161)

6. The Court set oral argument on the cross-Motions for Summary Judgment and counsel appeared before the Court and presented extensive argument on same.

7. In its Order dated September 18, 2020, the Circuit Court granted summary judgment in favor of Hess, denying the summary judgment of Progressive. (JA 167)

8. The Circuit Court granted summary judgment to Hess with respect to her declaratory judgment claims for coverage and denied summary judgment to Progressive on its claim for declaratory judgment. The Circuit Court designated its Order as "final and appealable" under Rule 54(b) of the West Virginia Rules of Civil Procedure.

9. It is from the Circuit Court's September 18, 2020 Order that Progressive brings the instant appeal.

B. SUMMARY OF CLAIMS

The facts of this case are not in dispute. Petitioner would suggest to the Court that the relevant facts are as follows:

1. In this matter, Hess seeks underinsured motorist benefits from Progressive for injuries she sustained as a passenger in a vehicle being operated by Bindernagel. (JA 005, 007)

2. On July 20, 2017, Bindernagel was operating a 2017 Toyota Camry owned by Enterprise, LLC ("Enterprise rental car"). (JA 002)

3. At the time of the accident which is the subject of the Plaintiff's Complaint, Progressive was insuring Bindernagel under a West Virginia policy of insurance, Policy No. 914686362-000, with an effective period of April 29, 2017 to October 29, 2017 ("Policy"). (JA 021-062, 105-146)

4. The Policy contains the following insuring agreement for underinsured motorist bodily injury coverage:

PART III UNINSURED/UNDERINSURED MOTORIST COVERAGE

....

INSURING AGREEMENT—UNDERINSURED MOTORIST COVERAGE

If you pay the premium for this coverage, we will pay for damages that an **insured person** is legally entitled to recover from the owner or operator of:

1. an **underinsured motor vehicle** because of **bodily injury**:
 - a. sustained by an **insured person**;
 - b. caused by an accident; and
 - c. arising out of the ownership, maintenance or use of an **underinsured motor vehicle**; ...

(JA 036-037, 120-121)

5. The underinsured motorist coverage section of the Policy contains its own definition of an **"insured person"** for purposes of underinsured motorist coverage, as follows:

ADDITIONAL DEFINITIONS

When used in this Part III:

1. **"Insured person"** means:
 - A. **you, a relative, or a rated resident**;
 - B. any person while operating a **covered auto** with the permission of **you, a relative, or a rated resident**;
 - C. any person **occupying**, but not operating, a **covered auto**; and
 - D. any person who is entitled to recover damages covered by this Part III because of **bodily injury** sustained by a person described in a., b. or c.

(JA 037, 121)

6. Additionally, under GENERAL DEFINITIONS, the Policy provides, the following relevant definitions:

1. **"Additional auto"** means an **auto you** become the owner of during the policy period that does not permanently replace an **auto** shown on the **declarations page** if;
 - a. **we** insure all other autos **you** own;
 - b. the **additional auto** is not covered by any other insurance policy;
 - c. **you** notify **us** within 30 days of becoming the owner of the **additional auto**; and
 - d. **you** pay any additional premium due.

An **additional auto** will have the broadest coverage **we** provide for any **auto** shown on the declarations page. If you ask us to insure an **additional**

auto more than 30 days after **you** become the owner, any coverage we provide will begin at the time **you** request coverage.

....

5. **“Covered auto”** means:

- A. any **auto** or **trailer** shown on the **declarations page** for the coverages applicable to that **auto** or **trailer**;
- B. any **additional auto**;
- C. any **replacement auto**; or
- D. a **trailer** owned by **you**.

....

11. **“Replacement auto”** means an **auto** that permanently replaces an **auto** shown on the **declarations page**. A **replacement auto** will have the same coverage as the **auto** it replaces if the **replacement auto** is not covered by any other insurance policy. However, if the **auto** being replaced had coverage under Part IV—Damage To A Vehicle, such coverage will apply to the **replacement auto** only during the first 30 days after **you** become the owner unless **you** notify us within that 30-day period that **you want us** to extend coverage beyond the initial 30 days. If the **auto** being replaced did not have coverage under Part IV—Damage To A Vehicle, such coverage may be added, but the **replacement auto** will have no coverage under Part IV until you notify us of the **replacement auto** and ask **us** to add the coverage.

(JA 027-028, 111-112)

7. The Policy’s declarations page lists one automobile: a 2011 Subaru Legacy 4 Door Sedan with VIN No. 4S3BMBG69B3253984. (JA 021-022, 105-106)

C. PROCEEDINGS AND RULINGS BELOW

The Circuit Court granted summary judgment to Hess with respect to her respective declaratory judgment claims for coverage and denied summary judgment to Progressive on its claim for declaratory judgment. The Circuit Court held that West Virginia Code (“W.Va. Code”) § 33-6-29 and § 33-6-31 must be “read together,” and “Ms. Bindernagel’s policy is rendered applicable to the rental car by virtue of statute [W. Va. Code 33-6-29(c)].” The Circuit Court

incorrectly found that "West Virginia statutory requirements supersede policy language which otherwise defines a covered auto or excludes coverage to persons such as the Plaintiff."

III. SUMMARY OF ARGUMENT

The Circuit Court erred when it entered summary judgment in favor of Respondent finding that she was an insured under a policy issued to the driver of the rental car in which Respondent was a passenger. By doing so, the Circuit Court erred in ruling that Respondent was entitled to underinsured coverage (an optional insurance coverage) under a policy issued to the driver of a rental car under that driver's personal auto policy which was issued by Petitioner Progressive.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner maintains that oral argument is necessary pursuant to the criteria outlined under Rule 18(a) of the West Virginia Rules of Appellate Procedure because (a) the parties have not agreed to waive oral argument; (b) the petition is not frivolous; (c) the dispositive issues have not previously been authoritatively decided by this Court and the decisional process would be significantly aided by oral argument. This case is further suitable for argument under Rule 20 under the West Virginia Rules of Appellate Procedure because it potentially involves issues of first impression and issues of fundamental public importance.

V. ARGUMENT

A. STANDARD OF REVIEW.

This appeal arises from the granting of Summary Judgment by the trial court in favor of Respondent, and denying Plaintiff's Motion for Summary Judgment. (JA 167-174) In doing so, the trial court ruled upon an issue of first impression by the Court and found that the Respondent, a passenger in a rental vehicle operated by a Progressive insured was to be afforded coverage by

the driver's Progressive policy. (JA 021-062) Appellate review of the circuit court's order entering summary judgment is subject to this court's *de novo* review. E.g., Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

Summary judgment is appropriate in a case:

[i]f the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law.

W.Va.R.Civ.P. 56(c) (2016). "A genuine issue of does not arise until there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Jividen v. Law*, 194 W.Va. 705, 713, 461 S.E.2d 451, 459, (1995) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). This Court has ruled that,

[s]ummary judgment is appropriate if, from the totality of evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Syl. Pt. 2., *Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329. "While the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party, the nonmoving party must nonetheless offer some concrete evidence from which a reasonable finder of fact could render a verdict in its favor or other significant probative evidence tending to support the complaint." *Id.* at 60, 459 S.E.2d at 336-37 (citations omitted). When the moving party presents depositions, interrogatories, or affidavits or otherwise indicates there is a genuine issue as to any material fact, the resisting party, to avoid summary judgment must present some evidence that the facts are in dispute." See, *e.g., id.*

Pursuant to the West Virginia Rule of Civil Procedure 56, to survive a motion for summary judgment, the party opposing the motion must present some evidence to indicate that

the facts are in dispute when the evidence of the non-moving party shows no disputed facts. See *Brady v. Reiner*, 157 W.Va. 10, 30, 198 S.E.2d 812, 824 (1973), overruled on other grounds, *Bd. Of Church Extension v. Eads*, 159 W.Va. 943, 230 S.E.2d 911 (1976); W.Va. R. Civ. P. 56 (e) (2016). Under West Virginia Rule of Civil Procedure 56(e), “when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” The mere contention that an issue is disputable is not sufficient. See *id.*; see also *Painter v. Peavy*, 192 W.Va. 189, 192-93, 451 S.E.2d 755, 758-59 (1994) (the party opposing summary judgment must satisfy the burden of proof by offering more than a mere “scintilla of evidence,” and must produce evidence sufficient for a reasonable jury to find in the nonmoving party’s favor). In this case, there are no genuine issues of fact relevant to the interpretation of the clear and unambiguous terms of the policy of insurance. W.Va.R.Civ.P. 56(c). It is the trial court’s application of law to the provisions of the policy, a matter of first impression, that were in error.

B. THE CIRCUIT COURT ERRED IN HOLDING THAT W. VA. CODE § 33-6-29(B) EXTENDS UNDERINSURED MOTORIST COVERAGE TO ALL GUEST PASSENGERS IN RENTAL VEHICLES, REGARDLESS OF THE LANGUAGE OF THE POLICY.

In its Order, the Circuit Court held that W. Va. Code § 33-6-29 and W.Va. Code § 33-6-31 should be “read together,” and that therefore, these “West Virginia statutes require a guest passenger in a rental vehicle to be afforded underinsured motorist coverage under a policy of insurance issued by the Progressive Max Insurance Company (“Progressive”) that provides coverage to the rental vehicle in which she is a lawful guest passenger.” This finding ignored the fact that Respondent was not issued a Progressive policy, but rather it was Bindernagel, the

driver, who was a Progressive insured. It is apparent that the Circuit Court concluded that W.Va. Code § 33-6-29(b), which extends certain types of coverage in a liability policy to the insured while they are “operating” a rental vehicle, must also be read to extend underinsured motorist coverage to guest occupants of a non-owned rental vehicle, regardless of the language of the policy. This holding is a clear error of law.

W. Va. Code § 33-6-29 does not extend underinsured motorist coverage to rental vehicles. W. Va. Code § 33-6-29(b) reads, in operative part, as follows:

(b) Every policy or contract of **liability insurance** which insures a motor vehicle licensed in this state with **collision, comprehensive, property or bodily injury coverage** shall extend **these coverages** to cover the insured individual **while operating** a motor vehicle which he or she is permitted to use by a person, firm or corporation that owns the vehicle and is engaged in the business of selling, repairing, leasing or servicing motor vehicles.

W. Va. Code § 33-6-29(b) (emphasis added). The first sentence of W. Va. Code § 33-6-29(b) makes clear that it applies to policies of “liability insurance,” and this provision does not reference “underinsured motorist” insurance or coverage. By definition, a “liability policy” covers damages incurred as a result of the insured’s liability to a third-party. Underinsured motorist policies on the other hand provide *optional* additional first-party insurance. In West Virginia, although insurers must offer it, *underinsured motorist coverage is optional*. *Imgrund v. Yarborough*, 199 W.Va. 187, 483 S.E.2d 533 (1997). The public policy underlying West Virginia’s minimum mandatory financial responsibility statutes should not operate to override otherwise valid and bargained-for language in a policy of *underinsured motorist coverage*. In enacting W.Va. Code § 33-6-29(b), the Legislature chose to omit any reference to “underinsured motorist” coverage.

The West Virginia Legislature provided a separate mechanism for rental customers to obtain underinsured motorist coverage directly from the rental car company. W.Va. Code § 33-

12-32(h)(4)(B) provides rental companies limited licenses to sell underinsured motorist coverage to renters. In the case of *Wang-Yu Lin v. Shin Yi Lin*, 224 W. Va. 620, 624, 687 S.E.2d 403, 407 (2009), this Court expressed its opinion that, in light of the Legislature’s enactment of W.Va. Code § 33-12-32, application of West Virginia’s omnibus clause to automobile rental insurance was “questionable.” In support of its reasoning, this Court in *Lin* noted that “[t]his Court has stated that the applicability of W. Va. Code § 33–6–31(a) to automobile rental insurance is questionable in light of the Legislature's enactment of W. Va. Code § 33–12–32 (2004), which pertains to limited licenses for rental companies.” *Lin*, 224 W. Va. 620, 624, 687 S.E.2d 403, 407.

Under the express language of the statute, the listed liability coverages are extended only where the insured is “operating” the rental vehicle. In its Order, the Circuit Court correctly found that it was Ms. Bindernagel who was “operating” the rental vehicle, while the Respondent Hess was a guest passenger. (JA 167) However, the Circuit Court committed clear legal error in holding that W.Va. Code § 33-6-29(a) extends underinsured motorist coverage to all guest passengers of rental vehicles, regardless of the language of the policy itself. This Court should reverse this holding by the Circuit Court and direct the Circuit Court to grant summary judgment to Progressive on its Counterclaim for Declaratory Judgment.

C. THE CIRCUIT COURT ERRED BY FAILING TO APPLY THE PROPER ANALYSIS TO THE QUESTION OF WHETHER HESS IS AN INSURED UNDER THE PROGRESSIVE POLICY, AND/OR WEST VIRGINIA CODE § 33-6-31(C).

In determining whether Respondent Hess met the definition of an insured under either the language of the Policy, and that of W.Va. Code § 33-6-31(c), Progressive urged the Court to consider the central question of whether Hess, who was a not resident relatives of the operator Ms. Bindernagel, were using a vehicle that was covered by the Policy. Progressive argued that

Respondent Hess does not meet either text's definition of an insured because (1) the rental car at issue does not meet the Policy's definition of a "covered auto," and/or (2) Hess was not using or occupying "a vehicle to which the coverage applies." W. Va. Code § 33-6-31(c).

To meet the definition of an insured under W.Va. Code § 33-6-31(c), Respondent Hess must have been using "the motor vehicle to which the policy applies." W.Va. Code § 33-6-31(c) states, in operative part:

...the term "insured" means the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and **any person, except a bailee for hire, who uses, with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies.**

Id. (emphasis added). (JA 078) The clear language of W.Va. Code §33-6-31(c) recognizes two classes of an "insured." The first class consists of "the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either...." Under this first category, these specific persons are insured "while in a motor vehicle or otherwise." *See* W.Va. Code §33-6-31(c) (underlined text above). The second category of insured under the statute applies to **any** person, as long as certain conditions exist. Under the second category, any person is an insured "who uses, with the consent, expressed or implied, of the named insured, **the motor vehicle to which the policy applies.**" *Id.* (bolded text above). This second category of insured applies to "any person"; however, under the second category, the person must be using, with permission, "the motor vehicle to which the policy applies." *Id.*

This Court has recognized these two classes of insureds in the case of *Starr v. State Farm Fire & Cas. Co.*:

The statute clearly differentiates between the named insureds and their resident relatives, who are considered insureds "while in a motor vehicle or otherwise," and any other "person ... who uses ... the motor vehicle to which the policy applies" with the consent of the named insured.

This analysis of our statute brings about the same result that was obtained from our consideration of State Farm's policy definition. The named insured and his or her spouse and resident relatives are Class One insureds and enjoy broader uninsured/underinsured motorist protection because their coverage is not limited to their occupancy of a particular motor vehicle. On the other hand, the Class Two insured is statutorily limited to coverage under the policy covering the vehicle he or she was occupying at the time of the accident.

Thus, we conclude that W.Va. Code, 33–6–31(c), creates two classes of insureds for purposes of uninsured/underinsured motorist insurance. The first class includes the named insured, his or her spouse, and their resident relatives. The second class consists of the permissive users of the named insured's vehicle.

....

The foregoing cases generally hold that because the Class Two insured's coverage is tied to occupancy of *the covered motor vehicle*, such occupant is not an “insured” for purposes of the policyholder's uninsured/underinsured motorist coverage *on any other vehicle*.

Starr v. State Farm Fire & Cas. Co., 188 W. Va. 313, 318–19, 423 S.E.2d 922, 927–28 (1992) (emphasis added). The *Starr* Court held that its plaintiff was a “Class Two” insured and therefore she was not entitled to underinsured motorist coverage because she was not occupying a covered vehicle. *Id.* In the instant case, it was undisputed that Respondent Hess is not a “Class One” insured because she is neither the named insured Susan Bindernagel, her spouse, or a resident relative. (JA 078-080, 163-165) Accordingly, her status as an insured for purposes of underinsured motorist coverage will depend on whether the rental car she was occupying or using was a “motor vehicle to which the coverage applies.” W. Va. Code § 33-6-31(c).

The Policy’s definition of an “insured” also creates two classes: (1) the named insured, a relative, or a rated resident, and (2) any other person while operating or occupying a “covered auto.” (JA 078-079, 163-164) Thus, the Policy is in substantial accord with the definition supplied by W.Va. Code § 33-6-31(c). As Petitioner Progressive argued to the Circuit Court below, the Enterprise rental car is not a “covered auto” as that term is defined in the Policy

because it is neither (1) an auto shown on the declarations page, (2) an “additional auto,” nor a “replacement auto.” The Progressive Policy contains the following relevant language:

First, the underinsured motorist coverage section of the Policy contains its own definition of an “**insured person**” for purposes of underinsured motorist coverage, as follows:

ADDITIONAL DEFINITIONS

When used in this Part III:

1. “**Insured person**” means:
 - A. **you, a relative, or a rated resident;**
 - B. any person while operating a **covered auto** with the permission of **you, a relative, or a rated resident;**
 - C. any person **occupying**, but not operating, a **covered auto;** and
 - D. any person who is entitled to recover damages covered by this Part III because of **bodily injury** sustained by a person described in a., b. or c.

(JA 037, 121)

It is clear and unambiguous that for purposes of underinsured motorist bodily injury coverage, an “insured person” must either be the named insured, a “relative”, or a “rated resident”; or, if none of these, they must have been occupying or using a “covered auto”. (JA 027, 111) Of note is that the policy further defines a “relative” and “rated resident” as one who resides “in the same household as you at the time of the loss.” (JA 078) Respondent met none of these requirements.

Additionally, under GENERAL DEFINITIONS, the Policy provides, the following relevant definitions:

1. “**Additional auto**” means an **auto you** become the owner of during the policy period that does not permanently replace an **auto** shown on the **declarations page** if;
 - a. **we** insure all other autos **you** own;
 - b. the **additional auto** is not covered by any other insurance policy;

- c. **you** notify **us** within 30 days of becoming the owner of the **additional auto**; and
- d. **you** pay any additional premium due.

An **additional auto** will have the broadest coverage **we** provide for any **auto** shown on the declarations page. If you ask us to insure an **additional auto** more than 30 days after **you** become the owner, any coverage **we** provide will begin at the time **you** request coverage.

....

5. “**Covered auto**” means:

- A. any **auto** or **trailer** shown on the **declarations page** for the coverages applicable to that **auto** or **trailer**;
- B. any **additional auto**;
- C. any **replacement auto**; or
- D. a **trailer** owned by **you**.

....

11. “**Replacement auto**” means an **auto** that permanently replaces an **auto** shown on the **declarations page**. A **replacement auto** will have the same coverage as the **auto** it replaces if the **replacement auto** is not covered by any other insurance policy. However, if the **auto** being replaced had coverage under Part IV—Damage To A Vehicle, such coverage will apply to the **replacement auto** only during the first 30 days after **you** become the owner unless **you** notify us within that 30-day period that **you** want **us** to extend coverage beyond the initial 30 days. If the **auto** being replaced did not have coverage under Part IV—Damage To A Vehicle, such coverage may be added, but the **replacement auto** will have no coverage under Part IV until you notify us of the **replacement auto** and ask **us** to add the coverage.

(JA 027-028, 111-112)

Finally, the Policy’s declarations page lists one automobile: a 2011 Subaru Legacy 4 Door Sedan with VIN No. 4S3BMBG69B3253984. (JA 021-022, 105-106) Under these unambiguous terms, the rental car at issue clearly does not meet the definition of a “covered auto” under the Policy. For these reasons, Respondent Hess does not meet the Policy’s underinsured motorist definition of “an insured.” The Circuit Court erred in holding that Respondent was an insured under the Petitioner’s policy issued to Bindernagel.

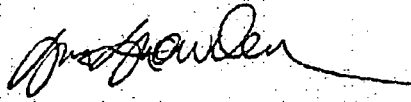
The Circuit Court committed clear error by failing to apply the above-described analysis. Instead, in its Order, the Circuit Court appeared to conclude that all rental vehicles are “covered autos” or “motor vehicle(s) to which the policy applies,” by the operation of W.Va. Code § 33-6-29(b), and therefore, all guest passengers of rental vehicles in West Virginia must be afforded underinsured motorist coverage, by law. As set forth in Assignment of Error No. 1, this holding relies on a misreading of the plain language of the statute. This Court should reverse this holding by the Circuit Court and direct the Circuit Court to grant summary judgment to Petitioner Progressive on its Counterclaim for Declaratory Judgment.

IV. CONCLUSION

For the reasons set forth above, Petitioner would request that this court reverse the decision granting summary judgment to the Respondent and direct the Court to enter judgment in favor of Petitioner on coverage, specifically finding that the Enterprise rental car in this matter was neither a “covered auto” under the policy nor a “motor vehicle to which the policy applies” under West Virginia Code §33-6-31(c). Further, Petitioner would ask that the court find that the Circuit Court erred and that Respondent Hess does not meet the definition of an insured and cannot recover for underinsured motor vehicle bodily injury under the policy.

**PROGRESSIVE MAX INSURANCE
COMPANY,
BY COUNSEL**

JACKSON KELLY PLLC

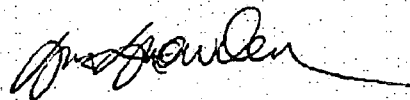


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CERTIFICATE OF SERVICE

I, Susan R. Snowden, counsel for Petitioners hereby certify that I served a true copy of the foregoing upon the following individuals, via U.S. Mail, postage prepaid, on this the **19th** day of **January, 2021**:

John R. Angotti
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Susan R. Snowden