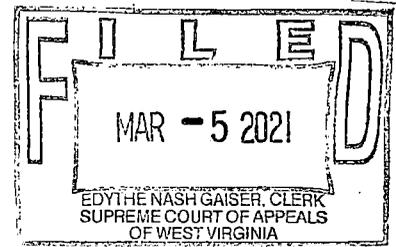


**FILE COPY**

No. 20-0851

(Consolidated with Case No. 20-0850)



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**At Charleston**

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**PROGRESSIVE MAX INSURANCE COMPANY,  
PETITIONER AND DEFENDANT BELOW,**

**DO NOT REMOVE  
FROM FILE**

**VS.**

**MONONGALIA COUNTY CIRCUIT COURT  
CASE NO.19-C-210 (JUDGE SCOTT)**

**AMBER R. HESS,**

**RESPONDENT AND PLAINTIFF BELOW,**

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**BRIEF OF RESPONDENT, AMBER R. HESS**

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**John R. Angotti  
W.Va. State Bar No. 5068  
David J. Straface, Esquire  
W.Va. State Bar No. 3634  
Chad C. Groome  
W.Va. State Bar No. 9810  
ANGOTTI & STRAFACE, L.C.  
274 Spruce Street  
Morgantown, WV 26505  
Telephone: (304) 292-4381  
Facsimile: (304) 263-7110  
[chadgroome@angottistrafacelaw.com](mailto:chadgroome@angottistrafacelaw.com)  
[johnangotti@angottistrafacelaw.com](mailto:johnangotti@angottistrafacelaw.com)  
*Of Counsel for Respondent, Amber R. Hess***

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES**.....*ii*

**I. STATEMENT OF THE CASE**.....1

**a. BACKGROUND OF INSTANT ACTION**.....1

**b. SUMMARY OF CASE**.....1

**c. PROCEEDINGS AND RULINGS BELOW**.....3

**II. SUMMARY OF ARGUMENT**.....4

**III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**.....4

**IV. ARGUMENT**.....5

**a. W.VA. R. CIV. P. 56 STANDARD OF REVIEW**.....5

**b. DISCUSSION OF LAW**.....5

**1. The Circuit Court of Monongalia County did not err in its conclusion that Respondent, Amber R. Hess, was an UIM insured under the subject Progressive policy as the Circuit Court properly reasoned that W.Va. Code § 33-6-31(c) and W. Va. Code § 33-6-29 rendered Ms. Hess an “insured” and that the definition of “insured” contained within the policy was in conflict with those statutes**.....5

**2. Despite the Petitioner’s contentions, W.Va. Code § 33-12-32 is not applicable to the instant insurance coverage dispute as the UIM coverage at issue is not part of a motor vehicle rental policy, but a standard automobile insurance policy**.....13

**V. CONCLUSION AND RELIEF REQUESTED**.....16

**TABLE OF AUTHORITIES**

**W.Va. Rules and Statutes:**

W.Va. R. App. P. 10(c)(6) and (d).....4

W.Va. R. App. P. 19.....4-5

W.Va. R. App. P. 20.....4-5

W.Va. R. Civ. P. 56.....4-5

W. Va. Code § 33-1-16.....8

W.Va. Code § 33-6-17, (1931) as amended.....12-13

W. Va. Code § 33-6-29.....4-6, 9-12, 16

W. Va. Code § 33-6-29(b).....9-11

W.Va. Code § 33-6-31.....7-8, 10-11, 13, 15, 16

W. Va.Code § 33-6-31(b).....12

W.Va. Code § 33-6-31(c).....4-10, 11-12, 16

W. Va. Code § 33-6-31(k).....8

W.Va. Code § 33-12-32.....13-16

W.Va. Code § 33-12-32(h).....15

W.Va. Code § 33-12-32(h)(4)(B).....15

W.Va. Code § 55-13-1, *et seq.*, *West Virginia Uniform Declaratory Judgments Act*..... 4

**W. Va. Caselaw:**

**Adkins v. Meador**, 201 W. Va. 148, 153, 494 S.E.2d 915, 920 (1997).....7

**Deel v. Sweeney**, 181 W.Va. 460, 383 S.E.2d 92 (1989).....9-10, 12

**Jenkins v. City of Elkins, 230 W. Va. 335, 351, 738 S.E.2d 1, 17 (2012)(citing State Automobile Mutual Insurance Co. v. Youler, 183 W.Va. 556, 396 S.E.2d 737 (1990))(emphasis supplied therein).....11**

**Johnson v. Cont'l Cas. Co., 157 W. Va. 572, 572, 201 S.E.2d 292, 293 (1973).....12**

**Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).....5**

**Perkins v. Doe, 177 W.Va. 84, 350 S.E.2d 711 (1986).....12**

**Powderidge Unit Owners Ass'n v. Highland Properties, Ltd., 196 W. Va. 692, 698, 474 S.E.2d 872, 878 (1996)..... 5**

**Russell v. State Auto. Mut. Ins. Co., 188 W. Va. 81, 81–82, 422 S.E.2d 803, 803–04 (1992)...8**

**Starr v. State Farm Fire & Cas. Co., 188 W.Va. 313, 423 S.E.2d 922 (1992).....7-8**

**Wang-Yu Lin v. Shin Yi Lin, 224 W.Va. 620, 687 S.E.2d 403 (2009).....15-16**

**Williams v. Precision Coil, Inc., 194 W.Va. 52, 58, 459 S.E.2d 329, 335–36 (1995),(citing Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587–88, 106 S.Ct. 1348, 1356–57, 89 L.Ed.2d 538, 553 (1986)).....5**

**Extra-Jurisdictional Authorities:**

**Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).....5**

**6C John A. Appleman and Jean Appleman, *Insurance Law and Practice*, § 4354 (Richard B. Buckley, ed.1979).....7**

**I. STATEMENT OF THE CASE**

**a. BACKGROUND OF INSTANT ACTION**

The procedural background provided by the Petitioner, Progressive Max insurance Company, is substantially accurate. As such, the Respondent, Amber R. Hess, is not required to and it is unnecessary for the Respondent to set forth a complete statement of the background of the procedural events underlying this appeal.

**b. SUMMARY OF CASE**

The Respondent and Plaintiff hereinbelow, Amber R. Hess, agrees that the material facts of this case are not in dispute.

On or about July 20, 2017, the Respondent, Amber R. Hess, was guest passenger in a 2017 Toyota Camry operated by their friend and Morgantown, West Virginia resident, Susan Bindernagel. (JA 167). Christine Brehm was also a guest passenger in the subject vehicle. The aforementioned motor vehicle was owned by Enterprise, LLC, and had been rented by Ms. Bindernagel. (JA 147). At all times material and relevant, Ms. Bindernagel was insured by a West Virginia policy of motor vehicle insurance issued by Petitioner and Defendant hereinbelow, Progressive Max Insurance Company, and which contained underinsured motorists coverage limits of Twenty Five Thousand Dollars (\$25,000.00) per person/Fifty Thousand Dollars (\$50,000.00) per accident. (JA 167-168).

Ms. Bindernagel was operating the 2017 Toyota Camry on U.S. Route 19 in or near Star City, Monongalia County, West Virginia, when said vehicle was rear-ended by a 2016 Subaru Outback owned and operated by the tortfeasor, Dana D. Miller. (JA 148). The acts and/or omissions of the tortfeasor, Dana D. Miller, amounted to negligence against the Respondent,

Amber R. Hess. The liability of the tortfeasor, Dana D. Miller, for the subject collision was also reasonably clear. (JA 148).

As a direct and proximate result of the tortfeasor's negligence, the Respondent, Amber R. Hess, suffered bodily injuries requiring medical treatment and sustained damages for which she is/was legally entitled to recover against the tortfeasor, Dana D. Miller, including, but certainly not limited to, past and/or future physical pain and suffering, mental anguish and emotional distress, annoyance and inconvenience, medical bills, economic loss, loss of the ability to enjoy life, loss of the ability to fully function, and other special and general damages for which she should be compensated. (JA 148). As a direct and proximate result of the tortfeasor's negligence, Ms. Bindernagel and Ms. Brehm also suffered injuries and damages for which they are/were entitled to recover. (JA 148).

At the time of the subject motor vehicle collision, the tortfeasor, Dana D. Miller, was insured by a policy of motor vehicle liability insurance issued by USAA with available limits of Twenty Five Thousand Dollars (\$25,000.00) per person/Fifty Thousand Dollars (\$50,000.00) per accident. (JA 168). USAA collectively offered Ms. Hess, Ms. Bindernagel, and Ms. Brehm the available liability limits of its policy in exchange for a release of its insured - tortfeasor, Dana D. Miller. The total amount of said limits, Fifty Thousand Dollars (\$50,000.00), were to be split three (3) ways between the occupants of Ms. Bindernagel's vehicle. (JA 168). Each of them accepted this offer contingent upon Petitioner, Progressive Max Insurance Company, providing consent to settle and a waiver of subrogation. (JA 168). Each of them also advised the Petitioner, Progressive Max Insurance Company, of their intention to present UIM claims insofar as they were not made whole by the settlement with the tortfeasor. (JA 168).

The Petitioner, Progressive Max Insurance Company, provided consent to settle and a waiver of subrogation with respect to Ms. Bindernagel's claim and paid her UIM claim. (JA 168). However, the Petitioner, Progressive Max Insurance Company, claimed that Respondent, Amber R. Hess, and Ms. Brehm were not "insured person[s]" under Ms. Bindernagel's policy. (JA 168). Thus, the Petitioner claimed that there was no underinsured motorists coverage for their benefit. Specifically, Petitioner, Progressive Max Insurance Company, asserted that an "insured person" under the subject underinsured motorists coverage 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 [underinsured motorists coverage] because of bodily injury sustained by a person described in A., B., or C." Petitioner, Progressive Max Insurance Company, further asserted that a "covered auto" under the policy 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." (JA 149). The Petitioner implied that the Enterprise rental vehicle was not a "covered auto" under the policy. (JA 149-150).

Petitioner, Progressive Max Insurance Company's denial of UIM benefits to Ms. Hess compelled her to file suit in the Circuit Court of Monongalia County, Civil Action No. 19-C-210 (J. Scott), seeking Declaratory Judgment on the issue of UIM coverage (Count I) and presenting a claim for UIM benefits (Count II).

### **c. PROCEEDINGS AND RULINGS BELOW**

This instant appeal arises from the Circuit Court of Monongalia County's September 18, 2020 *Order Granting Plaintiff's Motion for Summary Judgment*. (JA 167-174). Therein, the

Circuit Court granted judgment in favor of Ms. Hess and against Progressive Max Insurance Company regarding the issue of Ms. Hess' entitlement to UIM insurance coverage under Ms. Bindernagel's policy of insurance. The aforesaid *Order* was a final appealable order and was rendered upon cross-motions for summary judgment, filed pursuant to **W.Va. R. Civ. P. 56**, on matters seeking a declaratory judgment on an issue of insurance coverage pursuant to **W.Va. Code § 55-13-1, et seq., West Virginia Uniform Declaratory Judgments Act**. The Circuit Court's *Order* also denied Progressive's cross-motion for summary judgment on the same issue. (JA 174).

## **II. SUMMARY OF ARGUMENT**

The Circuit Court of Monongalia County's September 18, 2020 *Order Granting Plaintiff's Motion for Summary Judgment* was not made in error. The Circuit Court correctly concluded that the Respondent, Amber R. Hess, was an "insured" under the UIM coverage of Ms. Bindernagel's Progressive insurance policy pursuant to the application of **W.Va. Code § 33-6-31(c)** and **W. Va. Code § 33-6-29**. The Circuit Court further correctly held that the provisions of the Progressive policy defining an UIM "insured" under the policy must cede to the statutory definition of an UIM "insured" provided by **W.Va. Code § 33-6-31(c)**. The Circuit Court's September 18, 2020 decision was in accord with the dictates of the **Code** and the substantial public policies of the State of West Virginia. As such, the September 18, 2020 *Order Granting Plaintiff's Motion for Summary Judgment* should be upheld on appeal and Ms. Hess should be afforded UIM coverage.

## **III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to the dictates of **W.Va. R. App. P. 10(c)(6) and (d)**, the Respondent, Amber R. Hess, states that oral argument pursuant to **W.Va. R. App. P. 19 or 20** may aid the decisional process. The instant matter regards the applicability of UIM coverage to guest passengers in a standard West Virginia motor vehicle insurance policies that is made applicable to a rental vehicle

operated by its insured. As such, this matter regards a narrow issue of insurance law. See **W.Va. R. App. P. 19(a)**. The factual scenario presented by this case is uncommon. Thus, it appears to be appears to be a matter of first impression for the Court. See **W.Va. R. App. P. 20(a)(1)**. While the matter may present an uncommon fact pattern, the case still regards the scope of UIM coverage in this State. Therefore, it presents a matter that many may find to be one of fundamental importance. See **W.Va. R. App. P. 20(a)(2)**.

#### **IV. ARGUMENT**

##### **a. W.VA. R. CIV. P. 56 STANDARD OF REVIEW**

The Court in **Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.**, 196 W. Va. 692, 698, 474 S.E.2d 872, 878 (1996) set forth the appellate standard of review for a grant of summary judgment as follows:

We review a circuit court's grant of summary judgment *de novo*, Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994), “and, therefore, we apply the same standard as a circuit court,” reviewing all facts and reasonable inferences in the light most favorable to the nonmoving party. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 58, 459 S.E.2d 329, 335–36 (1995), citing *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88, 106 S.Ct. 1348, 1356–57, 89 L.Ed.2d 538, 553 (1986). A grant of summary judgment “shall be rendered forthwith if the pleadings,<sup>10</sup> deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” W.Va.R.Civ.P. 56(c). Summary judgment is not a remedy to be exercised at the circuit court's option; it must be granted when there is no genuine disputed issue of a material fact. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986); *Williams*, 194 W.Va. at 59 n. 7, 459 S.E.2d at 335–36 n. 7 (“[i]f the nonmoving party does not controvert the proof offered in support of the motion, and the moving party's affidavit shows that it supports a judgment as a matter of law, Rule 56(c) mandates summary judgment be granted”).

##### **b. DISCUSSION OF LAW**

**1. The Circuit Court of Monongalia County did not err in its conclusion that Respondent, Amber R. Hess, was an UIM insured under the subject Progressive policy as the Circuit Court properly reasoned that W.Va. Code § 33-6-31(c) and W. Va. Code § 33-6-29 rendered Ms. Hess an “insured” and that the definition of “insured” contained within the policy was in conflict with those statutes.**

The Circuit Court of Monongalia County’s September 18, 2020 *Order Granting Plaintiff’s Motion for Summary Judgment* was not made in error. The Circuit Court correctly concluded that

the plaintiff, Amber R. Hess, was an “insured” under the UIM coverage of Ms. Bindernagel’s Progressive insurance policy pursuant to the application of **W.Va. Code § 33-6-31(c)** and **W. Va. Code § 33-6-29** and that the definition of “insured” under the UIM coverage in the policy was in conflict with these statutes. As such, the Circuit Court’s September 18, 2020 *Order Granting Plaintiff’s Motion for Summary Judgment* should not be disturbed on appeal and Ms. Hess should be afforded UIM coverage.

Petitioner, Progressive, asserted in the underlying matter that the Respondent’s claim for underinsured motorists coverage was not proper insofar as it claimed that she was not an “insured” pursuant to the terms of the subject policy. However, the Circuit Court found that Progressive’s definition of “insured” in the policy was in material conflict with the statutory definition of a UIM “insured” was set forth in **W.Va. Code § 33-6-31(c)**. (JA 172-173). The Petitioner, Progressive, on appeal asserts that it was error for the Circuit Court to find that the scope of coverage required by the **Code** trumped its policy language despite being in conflict with the statute. As the Court will see, the Circuit Court was correct in its conclusion.

**W.Va. Code § 33-6-31(c)** defines who is an “insured” for the purposes of both uninsured (UM) and underinsured (UIM) motorists coverage in this State. **W.Va. Code § 33-6-31(c)** instructs, with emphasis added, that “[a]s used in this section, the term ‘bodily injury’ includes death resulting therefrom and the term ‘named insured’ means the person named as such in the declarations of the policy or contract and also includes such person's spouse if a resident of the same household **and 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 or the personal representative of any of the above...**"

Pursuant to the foregoing, and as the Circuit Court properly found, one is an "insured" under an UIM coverage in West Virginia where they "use" a vehicle "to which the policy applies" as a guest passenger. There is no question that Ms. Hess "use[d]" the vehicle for the purposes of **W.Va. Code § 33-6-31(c)** as a guest passenger. In **Adkins v. Meador, 201 W. Va. 148, 153, 494 S.E.2d 915, 920 (1997)**, the Court found with regard to the scope of uninsured and underinsured motorists coverage to non-named insureds, "[t]he term 'use' is widely recognized to mean more than driving, or being driven in, a motor vehicle. One commentator has stated that '[o]ne may use an automobile without personally operating it, as the term use is broader than operating,' 6C John A. Appleman and Jean Appleman, *Insurance Law and Practice*, § 4354 (Richard B. Buckley, ed.1979)." "[I]t is apparent that the term "uses" as it is employed in West Virginia Code § 33–6–31 is less restrictive than the term 'occupying' as it is defined within the insurance policy at issue.' 198 W.Va. at 606, 482 S.E.2d at 223." **Id. at 154, 494 S.E.2d at 921**. "The employment of the broad term 'uses' in *W.Va.Code*, 33–6–31(c), instead of the limited term 'occupying,' is a policy choice well-grounded in reality. Many motor vehicles are used for tasks beyond transporting the owner or driver, and coverage is provided through *W.Va.Code*, 33–6–31(c) for persons involved with the reasonable use of those vehicles." **Id.** As such, "use" of a motor vehicle in West Virginia for the purpose of uninsured and underinsured motorists coverage is not limited to driving, but also encompasses occupying the vehicle.<sup>1</sup> Therefore, as a guest passenger of the vehicle, Ms. Hess was using the subject rental vehicle.

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<sup>1</sup> The Petitioner suggests that **Starr v. State Farm Fire & Cas. Co., 188 W.Va. 313, 423 S.E.2d 922 (1992)** is somehow dispositive of the Respondent's claim for UIM coverage as a guest passenger insofar as it classifies her as a Class Two insured.. However, the Petitioner's reliance upon **Starr** is misplaced as it is not controlling to the outcome of this case. The **Starr** decision dealt with an issue distinct from the one at bar - a guest passenger's right to ***stack***

The term “policy” as found in **Chapter 33 of the W.Va. Code** is defined by **W. Va. Code § 33-1-16** which instructs: “Policy means the contract effecting insurance, or the certificate thereof, by whatever name called, and includes all clauses, riders, endorsements and papers attached thereto and a part thereof.” As such, a “policy” of insurance by definition is the entirety of the insurance contract containing all of the coverages. The UIM coverage itself is not the “policy,” just a coverage contained within in. This distinction is important as, by using the term “policy,” the Legislature clearly sought to take away some of the insurance industry’s discretion in framing the scope of who is an “insured” under an UIM coverage in West Virginia. Moreover, it clearly intended to extend UIM coverage to guest passengers in every policy applicable to a motor vehicle, regardless of how the insurer defined the scope of an UIM insured within its own policies. Guest passengers are mandated to be “insureds” under the UIM coverage of any policy of motor vehicle insurance issued in this State where the policy is applicable to the motor vehicle in which they are a passenger.

If a policy of insurance issued in this State contains an exclusion or scope of coverage which provides for a definition of “insured” less than what **W.Va. Code § 33-6-31(c)** requires then that scope or exclusion is void. **W. Va. Code § 33-6-31(k)** instructs that “[n]othing contained [in the *Uninsured Motorists Law/Omnibus Clause*] prevents any insurer from also offering benefits

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UIM coverages from *other* policies issued to their driver that did not apply to the motor vehicle involved in the collision. **Starr** did not address the scenario of a guest passenger claiming UIM coverage under the primary policy of motor vehicle insurance applicable to the vehicle in which she was a passenger. This distinguishing factor renders the **Starr** decision inapplicable to the instant case. Similarly, the **Starr** decision did nothing to alter the public policy considerations at issue in this case. The decision in **Starr** actually does not come as a surprise as recognized West Virginia policy does not generally support “stacking” as a right by insureds, even by named insureds. In fact, the West Virginia Supreme Court of Appeals recognized in **Syl. Pt. 5, Russell v. State Auto. Mut. Ins. Co., 188 W. Va. 81, 81–82, 422 S.E.2d 803, 803–04 (1992)**, that “West Virginia Code § 33-6-31 (1992) does not forbid the inclusion and application of an anti-stacking provision in an automobile insurance policy where a single insurance policy is issued by a single insurer and contains an underinsured endorsement even though the policy covers two or more vehicles. Under the terms of such a policy, the insured is not entitled to stack the coverages of the multiple vehicles and may only recover up to the policy limits set forth in the single policy endorsement.” Furthermore, nothing in the **Starr** decision changes the scope of who is an UIM insured under **W.Va. Code § 33-6-31(c)**.

and limits other than those prescribed herein, nor does this section prevent any insurer from incorporating in such terms, conditions and exclusions as may be consistent with the premium charged.” However, as the Court held in **Syl. Pt. 3 of Deel v. Sweeney, 181 W.Va. 460, 383 S.E.2d 92 (1989)**, “[s]tatutory provisions mandated by the Uninsured Motorist Law, *W.Va. Code* § 33-6-31 [1988] may not be altered by insurance policy exclusions.” Likewise, the Court held that “[i]nsurers may incorporate such terms, conditions and exclusions in an automobile insurance policy as may be consistent with the premium charged, **so long as any such exclusions do not conflict with the spirit and intent of the uninsured and underinsured motorists statutes.**” **Syl. Pt. 3, Id. (emphasis added).**

The Circuit Court properly found the Petitioner’s insurance policy to be in conflict with the scope of coverage required by **W.Va. Code § 33-6-31(c)** regarding who is an “insured,” as it was undisputed that the Respondent, Amber R. Hess, was lawful guest passenger in a motor vehicle operated by named insured, Christine Bindernagel. (JA 172-173). As such, the Circuit Court correctly ruled that the definition of “insured” in **W.Va. Code § 33-6-31(c)** controlled.

There is no question that West Virginia law renders Ms. Bindernagel’s Progressive insurance policy applicable to a vehicle that she rents. Pursuant to **W. Va. Code § 33-6-29**, when a West Virginia insured operates a rental vehicle, the insured’s liability insurance coverage becomes the primary insurance coverage on the rental vehicle, regardless of how the insured’s policy defines a “covered auto.” Pursuant to **W. Va. Code § 33-6-29(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. Coverage under any motor vehicle insurance policy available to such insured individual shall be primary, and any collision, comprehensive, property or bodily injury insurance coverage owned or obtained by a person, firm or corporation that owns the motor vehicle and is engaged in the business of selling, repairing, leasing or servicing motor vehicles shall be secondary. Recovery under the motor vehicle owner's insurance policy shall not be permitted until the insured individual has exhausted the limits of all other insurance policies available to him or her: *Provided*, That the following conditions are met: (1) No separate consideration is paid by or on behalf of the insured individual at the time of his or her use of the vehicle; and (2) the insured individual is operating the vehicle with the business owner's permission as a replacement vehicle provided to the insured individual while his or her vehicle is out of use because it is being repaired or serviced by the business owner or another person with the permission of the business owner.”

As the Circuit Court properly concluded, pursuant to **W. Va. Code § 33-6-29**, Ms. Bindernagel’s insurance policy applied to the vehicle she rented. Once her insurance policy became applicable to her rental vehicle, **W.Va. Code § 33-6-31(c)** operated to render the UIM coverage of that vehicle applicable to Ms. Hess as Ms. Bindernagel’s guest passenger. Again, the Court correctly concluded that the UIM coverage contained in the Progressive’s policy was in conflict with these provisions of the **Code**, and, as such, those provisions were required to cede to the definition of “insured” set forth in the **Code**. See **Syl. Pt. 3 of Deel v. Sweeney, supra**.

The Petitioner asserts that the Court erred by reading **W.Va. Code § 33-6-31** and **W. Va. Code § 33-6-29** *in para materia*. The Petitioner contends that UIM coverages are never applicable to rental vehicles insofar as the express language of **§ 33-6-29** only renders the liability insurance coverages of a motor vehicle policy to vehicles which are rented. In essence, the Petitioner argues

that the Legislature never intended for UIM coverage contained in a motor vehicle policy to carry over to a rental vehicle since underinsured (UIM) motorists coverage was omitted from the scope of coverages listed in § 33-6-29(b). The problem with the Petitioner's argument is that § 33-6-29(b) also omits any reference to uninsured (UM) motorists coverage.<sup>2</sup> UM coverage is mandatory coverage in West Virginia. See **W.Va. Code § 33-6-31**. Thus, one must believe that the Legislature intended for rental vehicles to be operated in this State without mandatory UM coverage in order to believe the Petitioner's argument. The more likely scenario is that the Legislature intended to read § 33-6-29(b) and § 33-6-31 together. § 33-6-29(b) requires motor vehicle liability insurance to be applicable to rentals. § 33-6-31 sets forth the scope of UM and UIM coverage to automobile liability policies applicable in West Virginia. There was no need for the Legislature to address UM or UIM coverages in § 33-6-29(b) since the scope of those coverages was already delineated in § 33-6-31. The inescapable conclusion of reading those two statutes together is that Ms. Hess is an "insured" insofar as Ms. Bindernagel's Progressive policy contains UIM coverage and is a policy applicable to the subject rental vehicle. The Circuit Court recognized the harmony between the two statutes and properly read them together to give purpose to both. (JA 173).

The Circuit Court's findings were not only correct, but supported by substantial West Virginia public policy. (JA 173). The spirit, intent, and public policy behind **W.Va. Code § 33-6-31** was identified in **Jenkins v. City of Elkins**, 230 W. Va. 335, 351, 738 S.E.2d 1, 17 (2012)(citing **State Automobile Mutual Insurance Co. v. Youler**, 183 W.Va. 556, 396 S.E.2d 737 (1990))(emphasis supplied therein), wherein the Court stated that "the legislature has

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<sup>2</sup> Note also that § 33-6-29(b) does not state whether rental vehicles must carry State-minimum limits of liability insurance coverage. The reason for this is obvious – the Legislature intended for § 33-6-29(b) to be read in conjunction with § 33-6-31, which also sets the minimum limits for motor vehicle coverage in this State.

articulated a public policy of full indemnification or compensation underlying ... uninsured ... motorist coverage in the State of West Virginia. That is, the preeminent public policy of this state in uninsured ... motorist cases is that the injured person be *fully compensated* for his or her *damages* not compensated by a negligent tortfeasor, up to the limits of the uninsured ... motorist coverage.” Moreover, the West Virginia Supreme Court of Appeals “...repeatedly has recognized that W. Va.Code § 33–6–31(b) ‘is remedial in nature and, therefore, must be construed liberally in order to effect its purpose.’ Syl. pt. 7, in part, *Perkins v. Doe*, 177 W.Va. 84, 350 S.E.2d 711 (1986).” **Id.**

The Court in **Deel v. Sweeney, 181 W. Va. at 463, 383 S.E.2d at 95** further instructed that “[t]his Court will continue to be vigilant in holding the insurers’ feet to the fire in instances where exclusions or denials of coverage strike at the heart of the purposes of the uninsured and underinsured motorist statutes provisions.” Likewise, the West Virginia Legislature has articulated a public policy of ensuring that guest passengers are covered for bodily injury protection by policies applicable to motor vehicles in which they are occupants. This public policy is demonstrated by both **W.Va. Code § 33-6-31(c)** and **W.Va. Code § 33-6-29**, which precludes insurers from issuing policies in this State which exclude coverage for injuries to guest passengers and invitees caused by insureds. See also **Syl. Pt. 3, Johnson v. Cont’l Cas. Co., 157 W. Va. 572, 572, 201 S.E.2d 292, 293 (1973)** (“A policy of insurance issued in this State which purports by its terms to exclude coverage to an owner or operator of a motor vehicle on account of harm to any guest passenger in such motor vehicle, conflicts with the protection afforded under Code 1931, 33—6—29, as amended. Where such conflict exists and the policy was issued subsequent to the enactment of the statute, the offending provision of the policy must

yield to the statute. Code 1931, 33—6—17, as amended.”). As such, strong public policies support a finding of UIM coverage for the benefit of Ms. Hess under the subject Progressive policy.

In the instant matter, it is clear that the Circuit Court of Monongalia County properly granted summary judgment and/or declaratory judgment in favor of the Respondent, Amber R. Hess, on the issue of UIM coverage. As such, the Order of the Circuit Court of Monongalia County should be upheld by this Court and the UIM coverage should remain applicable to Ms. Hess.

**2. Despite the Petitioner’s contentions, W.Va. Code § 33-12-32 is not applicable to the instant insurance coverage dispute as the UIM coverage at issue is not part of a motor vehicle rental policy, but a standard automobile insurance policy.**

The Petitioner, Progressive Max Insurance Company, asserts that the Circuit Court of Monongalia County erred in concluding that **W.Va. Code § 33-6-31** applied to the subject Progressive policy insofar as it suggests that **W.Va. Code § 33-12-32** controls the outcome of this dispute. However, **W.Va. Code § 33-12-32** has no bearing on the outcome of the instant case as this matter does not regard the application of *a rental insurance policy*, but *a standard motor vehicle insurance policy*. The Petitioner essentially asserts that, since **W.Va. Code § 33-12-32** permits renters of motor vehicles a limited license to sell motor vehicle insurance covering rental vehicles, this somehow implies that there is no coverage for rental vehicles under the UIM coverages of standard motor vehicle insurance policies. However, the statute does not support Petitioner’s contention and its reliance upon **W.Va. Code § 33-12-32** is entirely misplaced.

**W.Va. Code § 33-12-32** states, in relevant part:

(c) The commissioner may issue a limited license for the sale of automobile rental coverage to an employee of a rental company, who has satisfied the requirements of this section.

....

(h) No automobile rental coverage insurance may be issued by a limited licensee pursuant to this section unless:

....

(4) The limited licensee to sell automobile rental coverage may offer or sell insurance only in connection with and incidental to the rental of vehicles, whether at the rental office or by

preselection of coverage in a master, corporate, group rental or individual agreements in any of the following general categories:

(A) Personal accident insurance covering the risks of travel, including, but not limited to, accident and health insurance that provides coverage, as applicable, to renters and other rental vehicle occupants for accidental death or dismemberment and reimbursement for medical expenses resulting from an accident that occurs during the rental period;

(B) Liability insurance (which may include uninsured and underinsured motorist coverage whether offered separately or in combination with other liability insurance) that provides coverage, as applicable, to renters and other authorized drivers of rental vehicles for liability arising from the operation of the rental vehicle;

(C) Personal effects insurance that provides coverage, applicable to renters and other vehicle occupants of the loss of, or damage to, personal effects that occurs during the rental period;

(D) Roadside assistance and emergency sickness protection programs; and

(E) Any other travel or auto-related coverage that a rental company offers in connection with and incidental to the rental of vehicles.

**W.Va. Code § 33-12-32** provides only a mechanism by which motor vehicle rental companies can obtain a limited license from the State to sell motor vehicle insurance coverages and other coverages to their renters at the time of rental. Nothing in **W.Va. Code § 33-12-32** requires insurance coverage on rental vehicles to be purchased exclusively from the motor vehicle rental company. Similarly, the statute does not render standard motor vehicle insurance policy coverages inapplicable to rental vehicles. Furthermore, nothing contained in **W.Va. Code § 33-12-32** controls the scope of coverage of standard motor vehicle insurance policies for vehicles rented by insureds. It simply has no application to the issues at bar.

Motor vehicle rental companies routinely require their renters to carry motor vehicle liability insurance and/or other coverages to operate a rented vehicle. Some rental customers may not own a motor vehicle or may not be properly insured. As such, motor vehicle rental companies, not wanting to lose a rental deal, have a substantial business interest in the immediate sale of insurance to a prospective renter. Otherwise, the prospective renter may have to leave the premises to obtain a proper policy from a local licensed agent or, alternatively, the rental company would have to have a licensed agency in or near their rental office. Turning away rental customers who are uninsured or inadequately insured is not good for the rental business. As such, the Legislature vested the Insurance Commissioner with the authority to issue limited licenses to motor vehicle

rental companies permitting them the convenience of issuing short-term auto insurance coverages on their rental vehicles.

The Petitioner attempts to assert that the existence of **subsection (h)(4)(B)** of the statute infers that UM/UIM coverage for a rental vehicle must be purchased solely from a rental company to be applicable. However, the statute provides motor vehicle rental companies the limited authority to sell more than just UM/UIM coverage, but also personal accident or travel insurance, liability insurance coverage, personal effects coverage, roadside assistance, emergency sickness protection, and other travel or auto-related coverage. **See W.Va. Code § 33-12-32(h)**. Certainly, the Petitioner would not assert that these other types of coverages are inapplicable to rental vehicles when not purchased from the rental company. The statute does not supplant standard-issued motor vehicle insurance policies, nor does it speak to the applicability (or inapplicability) of those policies to rented motor vehicles.

The Petitioner's reliance upon the decision in **Wang-Yu Lin v. Shin Yi Lin, 224 W.Va. 620, 687 S.E.2d 403 (2009)** is also unavailing. The Petitioner cites to this decision for its statement *in dicta* that "[t]his Court believes 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." **Id. at 624, 687 S.E.2d at 407.** The Petitioner would like the Court to believe that this somehow means that there is doubt regarding the Circuit Court's application of § 33-6-31 to Ms. Bindernagel's policy. However, the **Lin** decision had nothing to do with the interplay of a standard motor vehicle insurance policy's UIM coverage and a guest passenger in a rental vehicle. Instead, the **Lin** Court was confronted with the issue of whether a permissive user of a rental vehicle was afforded UIM coverage under *a rental insurance policy*. Even if **Lin** were factually on point, the **Lin** Court never decided the

issue of the propriety of interplay of § 33–6–31 and rental vehicle UIM coverage because it found the argument not to have been preserved on appeal. See *Id.* at 624-625, 687 S.E.2d at 407-408. As such, Lin provides no supportive to Progressive’s positions on appeal and does nothing to render the decision of the Circuit Court erroneous.

In the instant matter, it is clear that the Circuit Court of Monongalia County properly granted summary judgment and/or declaratory judgment in favor of the Respondent, Amber R. Hess, on the issue of UIM coverage. Progressive’s reliance upon **W.Va. Code § 33-12-32** and **Wang-Yu Lin v. Shin Yi Lin, supra.**, provide no support to its efforts on appeal. As such, the September 18, 2020 *Order Granting Plaintiff’s Motion for Summary Judgment* of the Circuit Court of Monongalia County should be upheld by this Court and the UIM coverage should remain applicable to Ms. Hess.

**V. CONCLUSION AND RELIEF REQUESTED**

The Circuit Court of Monongalia County’s September 18, 2020 *Order Granting Plaintiff’s Motion for Summary Judgment* was not made in error. The Circuit Court correctly concluded that the Respondent, Amber R. Hess, was an “insured” under the UIM coverage of Ms. Bindernagel’s Progressive insurance policy pursuant to the application of **W.Va. Code § 33-6-31(c)** and **W. Va. Code § 33-6-29**. The Circuit Court further correctly held that the provisions of the Progressive policy defining an UIM “insured” were in conflict with the statutory definition of an UIM “insured” provided by **W.Va. Code § 33-6-31(c)** and that the policy must cede to the statutory definition. The Circuit Court’s September 18, 2020 decision was in accord with the dictates of the **Code** and the substantial public policies of the State of West Virginia. Progressive’s reliance upon **W.Va. Code § 33-12-32** and **Wang-Yu Lin v. Shin Yi Lin, supra.**, provide no support to its efforts on appeal. As such, the September 18, 2020 *Order Granting Plaintiff’s Motion for*

*Summary Judgment* should be upheld on appeal and UIM coverage to Ms. Hess should remain applicable as there is no basis in law or fact to disturb that *Order*.

Respectfully Submitted,

AMBER R. HESS, Respondent,

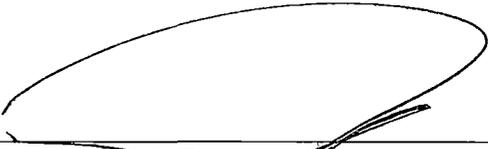
BY: 

John R. Angotti, Esquire  
W.Va. State Bar No. 5068  
David J. Straface, Esquire  
W.Va. State Bar No. 3634  
Chad C. Groome, Esquire  
W.Va. State Bar No. 9810  
ANGOTTI & STRAFACE, L.C.  
274 Spruce Street  
Morgantown, WV 26505  
Telephone: (304) 292-4381  
Facsimile: (304) 263-7110  
[chadgroome@angottistrafacelaw.com](mailto:chadgroome@angottistrafacelaw.com)  
[johnangotti@angottistrafacelaw.com](mailto:johnangotti@angottistrafacelaw.com)  
*Of Counsel for Respondent, Amber R. Hess*

**CERTIFICATE OF SERVICE**

Undersigned counsel hereby certifies that a true and accurate copy of the **BRIEF OF RESPONDENT, AMBER R. HESS** was served upon all counsel of record this 4<sup>th</sup> day of March, 2021, by email and U.S. Mail, First Class Postage Prepaid, as follows:

Susan R. Snowden, Esquire  
JACKSON KELLY, PLLC  
310 West Burke Street  
Martinsburg, WV 25401  
Email: [susan.snowden@jacksonkelly.com](mailto:susan.snowden@jacksonkelly.com)  
*Counsel for Petitioner, Progressive Max Insurance Company*



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John R. Angotti, Esquire  
W.Va. State Bar No. 5068  
David J. Straface, Esquire  
W.Va. State Bar No. 3634  
Chad C. Groome, Esquire  
W.Va. State Bar No. 9810  
ANGOTTI & STRAFACE, L.C.  
274 Spruce Street  
Morgantown, WV 26505  
Telephone: (304) 292-4381  
Facsimile: (304) 263-7110  
[chadgroome@angottistrafacelaw.com](mailto:chadgroome@angottistrafacelaw.com)  
[johnangotti@angottistrafacelaw.com](mailto:johnangotti@angottistrafacelaw.com)  
*Of Counsel for Respondent, Amber R. Hess*