IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 22-0155

GREG ALLEN BALL,

Petitioner,

v.

Certified Question from the United States Court of Appeals for the Fourth Circuit (No. 20-1452)

UNITED FINANCIAL CASUALTY COMPANY, MILTON HARDWARE, LLC, BUILDERS DISCOUNT, LLC, and RODNEY PERRY,

Respondents.

PETITIONER'S BRIEF

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This matter is before the Court on a certified question from the United States Court of Appeals for the Fourth Circuit. The certified question formulated by the Fourth Circuit is:

> When an exclusion in an automobile liability insurance policy violates West Virginia Code § 33-6-31(a) because it would deny coverage to a permissive user of an insured automobile, must the insurance company provide the permissive user with the full liability coverage available under the policy or the minimum liability coverage required by the Motor Vehicle Safety Responsibility Law, W.Va. Code § 17D-1-1, *et seq.*?

See United Fin. Cas. Co. v. Ball, 31 F.4th 164, 2022 U.S. App. LEXIS 4893 *1 (4th Cir. 2022); JA 579. Pursuant to W.Va. Code §§ 51-1A-4 and 51-1A-6(a)(3), the Fourth Circuit acknowledged that this Court may reformulate the question. *Id.* at *1-2. As set forth in the Order of Certification by the Fourth Circuit, the certified question presented in this matter remains unresolved by the Fourth Circuit.[1] Accordingly, the Petitioner requests this Honorable Court to exercise its jurisdiction pursuant to W.Va. Code §§ 51-1A-1, *et seq.* to resolve the certified question presented by the Fourth Circuit.

STATEMENT OF THE CASE

The facts relevant to the Court's determination of the certified question are not in dispute. On October 25, 2016, Petitioner Greg Allen Ball ("Mr. Ball") was injured at Rodney Perry's home. *United Financial Cas. Co. v. Ball*, 941 F.3d 710, 712 (4th Cir. 2019). Milton Hardware was performing work for Mr. Perry and Mr. Ball was employed by Milton Hardware. *Id.* Mr. Perry was

[1] In the case below, the United States District Court for the Southern District of West Virginia erred in concluding that even though the exclusion violates the omnibus clause of West Virginia Code § 33-6-31(a), the exclusion is still valid and enforceable above the minimum financial responsibility requirements set forth in West Virginia Code § 17D-4-1, *et seq.* *See* JA 483.

a customer– and not an employee – of Milton Hardware. *Id.* Mr. Ball was not an employee of Mr. Perry. *Id.* During the course of the work on Mr. Perry's property, Milton Hardware's owner gave Mr. Perry (who was not an employee) permission to move a company truck. *Id.* While moving the truck, Mr. Perry struck Mr. Ball and pinned him between the truck Mr. Perry was driving and another Milton Hardware truck, causing Mr. Ball to suffer severe injuries. *Id.*

At the time of the incident, Milton Hardware had a commercial automobile liability insurance policy ("Policy") issued by Respondent United Financial Casualty Company ("United Financial"). *Ball*, 941 F.3d at 713. The Policy provided liability coverage to Milton Hardware and to any person using Milton Hardware's vehicles with its permission. *Id.* Mr. Perry, as a permissive user of the Milton Hardware vehicle, is an insured under the Policy, even though he was not an employee of Milton Hardware. The Policy provides $1 million in liability coverage. JA 12, 22.

The Policy exclusion pertinent to the Court's determination of the certified question is:

> **PART I - LIABILITY TO OTHERS**
>
> * * *
>
> **EXCLUSIONS**
>
> * * *
>
> Coverage under this Part I, including **our** duty to defend, does not apply to:
>
> * * *
>
> 5. **Employee Indemnification and Employer's Liability Bodily Injury** to:
>
> a. An employee of any **insured** arising out of or within the course of:
>
> (i) That employee's employment by any **insured**; or
>
> (ii) Performing duties related to the conduct of any **insured's** business; or
>
> * * *
>
> This exclusion applies:

a. Whether the **insured** may be liable as an employer or in any other capacity . . . .

JA 25, 156 (emphasis in original).

United Financial initiated this matter by filing a Complaint for Declaratory Judgment originally requesting that the United States District for the Southern District of West Virginia ("District Court") determine as a matter of law that the Policy affords no coverage for Mr. Ball's claims based on two policy exclusions– a worker's compensation exclusion and the Employer's Liability exclusion. JA 1-10. In its Complaint, United Financial did not argue, as an alternative position, that its exclusions are operable above the mandatory minimum limits required by West Virginia law. Mr. Ball has consistently argued the exclusions violate the mandatory omnibus clause of W.Va. Code § 33-6-31(a), W.Va. Code § 33-6-31(h), and West Virginia common law. JA78-80, 214, 221-233. As such, Mr. Ball argued the exclusions are void and unenforceable as a matter of law–even above the mandatory minimum limits.[2] *Id.*

After initial motions for summary judgment, on May 14, 2018, the District Court entered its first Memorandum Opinion and Order granting United Financial's motion for summary judgment and denying Mr. Ball's motion for summary judgment. JA 323-333, 334. In its first opinion, the District Court concluded as a matter of law that the worker's compensation exclusions in the Policy

[2] In response to United Financial's first motion for summary judgment before the District Court, Mr. Ball also argued that the Employer's Liability exclusion was ambiguous because it contains both the phrases "any insured" and "the insured," as there is split among jurisdictions about the use of each on the effect of exclusions in insurance policies. *See* JA 229-230, 232; *See also Am. Nat'l Prop. & Cas. Co. v. Clendenen*, 238 W.Va. 249, 258, 793 S.E.2d 899, 908 (2016).

excluded all coverage for Mr. Ball's claims. JA 327-3321.[3] The District Court did not address the Employer's Liability exclusion in its first opinion and order. JA 331.

Mr. Ball appealed the District Court's first opinion and order to the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"). After briefing and oral argument, the Fourth Circuit held the workers' compensation exclusion in the Policy was not applicable to the facts of this case and did not bar Mr. Ball's claims against Mr. Perry, a third-party permissive user. *Ball*, 941 F.3d at 715. The Fourth Circuit also determined the Employer's Liability exclusion violates the omnibus clause requirements of W.Va. Code § 33-6-31 and was therefore, inoperable and unenforceable. *Id.* at 712, 717.[4] The Fourth Circuit vacated the District Court's first opinion and order and remanded the case to the District Court for further proceedings "consistent with [its] opinion" and "as to any unresolved issues."[5] *Id.*

United Financial then filed a Motion for Summary Judgment on Remaining Coverage Issue in the District Court. JA 423-425. United Financial argued, for the first time, the Employer's Liability exclusion is valid and enforceable above the West Virginia mandatory minimum liability limits set forth in W.Va. Code § 17D-4-2. *See* JA 1-10, 423-425, 426-432. Consistent with his prior arguments, Mr. Ball argued West Virginia law and West Virginia public policy dictate the exclusion is totally unenforceable and the full amount of the liability limits under the Policy should be available. *See* JA 78-80, 442-443, 445-463.

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[3] Based on its initial ruling, the District Court declined to exercise supplemental jurisdiction over Mr. Ball's tort claims against Mr. Perry and dismissed the action. JA 331.

[4] United Financial did not appeal the Fourth Circuit's opinion and order.

[5] Mr. Ball also sought money damages from United Financial, alleging breach of contract, breach of the covenants of good faith and fair dealing, unfair trade practices, and common law bad faith, which still need to be litigated following this Court's opinion. *Ball*, 941 F.3d at 713.

On March 31, 2020, the District Court entered its second Memorandum Opinion and Order, along with a Judgment Order entered on April 16, 2020, granting United Financial's motion for summary judgment and declaring the Employer's Liability exclusion is enforceable to exclude coverage above the West Virginia minimum liability limits set forth in W.Va. Code § 17D-4-2. JA 483-484. Mr. Ball appealed the District Court's second memorandum opinion and order to the Fourth Circuit. Mr. Ball argued that the Employer's Liability exclusion is void and unenforceable–even above the West Virginia mandatory minimum liability limits– as the exclusion is contrary to West Virginia statutory law, West Virginia common law, and West Virginia public policy regarding exclusions that attempt to limit or exclude coverage for permissive users. United Financial argued that the Employer's Liability exclusion–which on its face would operate to exclude coverage for Mr. Ball's claims against Mr. Perry, a permissive user under the Policy–is nevertheless enforceable above the mandatory minimum liability limits. After briefing and oral argument, on February 23, 2022, the Fourth Circuit certified the question as to the effect of the Employer's Liability exclusion on the amount of liability coverage available under the Policy, where the exclusion violates W.Va. Code § 33-6-31(a). *See United Fin. Cas. Co.,* 31 F.4th 164, 2022 U.S. App. LEXIS 4893 *1.

SUMMARY OF ARGUMENT

Under W.Va. Code § 33-6-31(a), when issuing a motor vehicle liability policy, an insurer is required to provided liability coverage for both the named insured and any permissive user against liability for bodily injury sustained and occasioned within the coverage of the policy. *See* W.Va. Code § 33-6-31 (a). In the insuring agreement of the Policy, United Financial agreed to provide $1 million of liability coverage for the named insured (Milton Hardware) and any permissive user (Mr.

Perry). JA 12, 22. Therefore, the liability coverage "occasioned within the coverage of policy" for the liability of Mr. Perry (a permissive user under the Policy) for Mr. Ball's bodily injury claim is $1 million or up to the limits of the policy, not the statutory minimum amount required to be provided under W.Va. Code § 17D-4-2. *See* W.Va. Code § 33-6-31(a); *Gibson v. Northfield Ins. Co.*, 219 W.Va. 40, 631 S.E.2d 598 (2005).

The Employer's Liability exclusion does not affect the amount of liability coverage available under the Policy because when applied to the facts of this case, the exclusion violates the omnibus provisions of W.Va. Code § 33-6-31(a), as it would operate to deny liability coverage "occasioned within the coverage of the policy" to a permissive user merely because the person the permissive user injured was an employee of the named insured under the Policy. *See* W.Va. Code § 33-6-31(a). To enforce the exclusion above the West Virginia mandatory minimum liability limits would be directly contrary to West Virginia statutory law, West Virginia common law, and West Virginia public policy. There is no statutory authority that permits an insurer to limit liability coverage afforded to a non-employee permissive user (Mr. Perry), merely because the person the permissive user injured was an employee (Mr. Ball) of the named insured (Milton Hardware). The statutory exception to the omnibus clause requirements of W.Va. Code § 33-6-31(a) regarding where an employee is injured, only apples where the employer is liable, not a third-party permissive user. *See* W.Va. Code § 33-6-31(h); *Ball*, 941 F.3d at 716-717; *Miralles v. Snoderly*, 216 W.Va. 91, 97-98, 602 S.E.2d 534, 540-541 (2004).[6] Thus, applying the Employer's Liability exclusion to the facts of this case would expand the allowed exclusion set forth in W.Va. Code §§ 33-6-31(h) and 17D-4-12(e) to apply

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[6] W.Va. Code § 17D-4-12(e) allows an exception to the omnibus clause where liability arises "under any workers' compensation law" or "on account of bodily injury to or death of an employee of the insured while engaged in the employment." W.Va. Code § 17D-4-12(e).

where the employee's injuries were not caused by the employer (and/or a co-worker), but by a third-party permissive user–who is not the employer. *See* W.Va. Code § 33-6-31(h); W.Va. Code § 17D-4-12(e); *Miralles*, 216 W.Va. at 97-98, 602 S.E.2d at 540-541.

In certain instances, this Court has allowed certain exclusions to operate to exclude coverage for permissive users above the required minimum liability limits. However, in such cases and unlike the situation in this case, there existed statutory authority allowing the exclusion (named driver exclusion), a strong public policy in favor of allowing the type of exclusion (intentional tort exclusion), or a situation in which the insured presumably paid no premium for the coverage sought (owned, but not insured exclusion). *See Jones v. Motorists Mut. Ins. Co.*, 177 W.Va.763, 356 S.E.2d 634 (1987)(abrogated by statute); *Dotts v. Taressa J.A.*, 182 W.Va. 586, 390 S.E.2d 568 (1990); and *Imgrund v. Yarborough*, 199 W.Va. 187, 483 S.E.2d 533 (1997). Conversely, this Court has not permitted exclusions to apply above the minimum financial responsibility limits where no affirmative statutory authority allows an exclusion or public policy favors coverage. *See Jenkins v. City of Elkins*, 230 W.Va. 335, 738 S.E.2d 1 (2012); *Gibson v. Northfield Ins. Co.*, 219 W.Va. 40, 631 S.E.2d 598 (2005); *Universal Underwriters Ins. Co. v. Taylor*, 185 W.Va. 606, 408 S.E.2d 358, 363 (1991); and *Burr v. Nationwide Mut. Ins. Co.*, 178 W.Va. 398, 359 S.E.2d 626 (1987).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate under Rule 19 of the *West Virginia Rules of Appellate Procedure* as this case presents a question of the application of well-settled law and involves a narrow issue of law regarding the effect of an insurance policy exclusion that violates the omnibus clause of West Virginia Code § 33-6-31, where on the facts of this case, there is no statutory or

common law exception to allow the exclusion to operate above the mandatory minimum financial responsibility limits set forth in West Virginia Code § 17D-4-1, *et seq.*

ARGUMENT

A. Standard of Review

In deciding a certified question, the Court applies a de novo standard when addressing legal issues presented by a certified question from a federal appellate court. Syl. Pt. 1, *Valentine v. Sugar Rock, Inc.*, 234 W.Va 526, 766 S.E.2d 785 (2014). Further, this Court "will give the question plenary review, and may consider any portions of the federal court's record that are relevant to the question of law to be answered." *Id.*

B. The Employer's Liability exclusion violates W.Va. Code § 33-6-31(a) and enforcing the exclusion above the West Virginia mandatory minimum liability limits is contrary to West Virginia law.

The Employer's Liability exclusion violates the omnibus clause of W.Va. Code § 33-6-31(a). Thus, enforcement of the Employer's Liability exclusion above the West Virginia mandatory minimum liability limits strikes at the very purpose of the omnibus clause. By enacting the omnibus requirements, the West Virginia Legislature mandated that W.Va. Code § 33-6-31(a) "should be liberally construed to effect coverage" and demonstrated a clear intent to afford coverage to a permissive user as a means to give greater protection to those who are involved in automobile accidents. Syl. Pt. 3, *Burr,* 178 W.Va. 398, 359 S.E.2d 626. The omnibus statute, W.Va. Code § 33-6-31(a), requires all motor vehicle insurance policies to insure permissive users of insured vehicles against liability for bodily injury "occasioned within the coverage of the policy" as a result of negligence in the operation or use of such vehicle by the permissive user. W.Va. Code § 33-6-31(a). United Financial agreed to provide $1 million of liability coverage to the named insured and any

permissive user of an insured vehicle under the Policy. *See* JA 12, 22. Thus, the liability coverage "occasioned within the coverage of the policy" for Mr. Perry (a permissive user) is $1 million, not the mandatory minimum limits.

The omnibus statute "evinces an unmistakable intent [of the Legislature] to **maximize** insurance for the greater protection of the public and that effectuation of such intent requires a broad interpretation of [W.Va. Code 33-6-31(a)] ...." *Universal Underwriters*, 185 W.Va. 606, 611-612, 408 S.E.2d 358, 363-364 (emphasis added). The mandate of the omnibus statute is so strong that this Court has held that "any provision in an insurance policy which attempts to contravene W.Va. Code § 33-6-31(a), is of **no effect**." Syl. Pt. 2, *Burr*, 178 W.Va. 398, 359 S.E.2d 626 (emphasis added).

United Financial argues that it may incorporate an exclusion into its Policy that violates the mandatory omnibus provision of W.Va. Code § 33-6-31(a) and the public policy behind the provision, as long as the exclusion is enforced only above the minimum liability limits set forth in W.Va. Code § 17D-4-2. JA 424. The flaw with United Financial's argument is that it completely ignores the most recent holdings by this Court and controlling West Virginia statutory law, which distinguish between those exclusions that can apply above the minimum financial responsibility limits and those, like the Employer's Liability exclusion, that cannot.

1. An exclusion that violates West Virginia Code § 33-6-31 is only enforceable above the West Virginia mandatory minimum liability limits where there is other affirmative statutory authority or public policy that allows the exclusion.

Where an exclusion is violates W.Va. § 33-6-31 and there is no statutory authority or public policy to allow the exclusion, the exclusion is unenforceable–even above the mandatory minimum limits. In a 2005 decision, this Court held:

> *W.Va. Code*, 33–6–31(a) expressly requires that a motor vehicle insurance policy contain a provision insuring the named insured and any other person responsible for the use of or using the motor vehicle against liability to another for death, bodily injury, loss or damage sustained as a result of negligence in the operation or use of such vehicle. Any additional provision in a motor vehicle insurance policy which tends to **limit, reduce or nullify that statutorily-mandated liability coverage,...** is **void** and **ineffective** as against public policy.

Syl. Pt. 3, *Gibson*, 219 W.Va. 40, 631 S.E.2d 598 (emphasis added). Based upon a "defense within limits" provision in its policy, the insurer in *Gibson* tried to reduce the amount of liability coverage available under its policy ($1 million) by the cost the insurer paid to defend the claim ($311,638.14). 219 W.Va. at 43-44, 631 S.E.2d at 601-602.

In examining the validity of the "defense within limits" provision, the *Gibson* Court began by considering whether the provision was in accord with West Virginia law. *Gibson,* 219 W.Va. at 46, 631 S.E.2d at 604 (citing *Adkins v. Meador*, 201 W.Va.148, 153, 494 S.E.2d 915, 920 (1997)). The *Gibson* Court noted the absence of any language in W.Va. Code § 33-6-31(a) allowing the reduction of the statutorily mandated liability limits by the costs to defend a claim against the tortfeasor. *Id.* at 47-48, 605-606 (stating "[e]xplicit direction for something in one provision, implies an intent to negate it in the second context." (citations omitted)). As stated by the Court in *Gibson*:

> The terms of the policy should be construed in light of the language, purpose and intent of the applicable statute. **Provisions in an insurance policy that are more restrictive than statutory requirements are void and ineffective as against public policy.**

Id. at 46-47, 604-605 (citations omitted) (emphasis added). Further, "when the language of an insurance policy is contrary to statute and therefore void, the policy should be reformed and construed to contain the coverage required by West Virginia law." *Id.* at 46, 605 (citing W.Va. Code § 33-6-17). Applying these principles, the *Gibson* Court held the "defense within limits" provision

violated W.Va. Code § 33-6-31(a) and was void and ineffective as against public policy. *Id.* at 48, 606. As a result, the full amount of the liability limits under the policy at issue ($1 million) was available. *See Progressive Max Ins. Co. v. Brehm*, No. 20-0851, 2022 W.Va. LEXIS 242, *11, 2022 WL 1115060 (W.Va. April 14, 2022)(citing to *Gibson* for the proposition that if a term in a motor vehicle policy conflicts with the statute or the policy behind the statute, then the conflicting portion of the policy is void, and the policy must be construed to have the coverage required by West Virginia law).

Under W.Va. Code § 33-6-31(a), the amount of coverage required by West Virginia law is the $1 million of liability coverage United Financial agreed to provide for the named insured and any permissive user of an insured vehicle, as that is the amount of liability coverage "occasioned within the coverage of the policy." *See* W.Va. § 33-6-31(a); *Gibson*, 219 W.Va. at 46, 631 S.E.2d at 604. The Employer's Liability exclusion violates the omnibus clause and has no effect on the liability coverage "occasioned within the coverage of the policy"–which under the Policy is $1 million.

United Financial argues the holding in *Gibson* is inapplicable because the statutory minimum limits and the policy limits were both $1,000,000. JA 468-469; *Gibson*, 219 W.Va. at 45, 631 S.E.2d at 603. However, the *Gibson* Court did not premise its holding on the required minimum limits. The driving force behind the decision was that the exclusion violated the omnibus clause. *Gibson*, 219 W.Va. at 47-48, 631 S.E.2d at 605-606. Further, the *Gibson* Court did not state that the defense within limits provision would be valid above the statutory minimum limits. Instead, the Court stated that the full liability limits of the policy were available, which happened to equal the statutory minimum limits. This distinction supports the Petitioner's position that the Employer's Liability exclusion is of no effect–even above the mandatory minimum limits.

Similar to the analysis utilized in *Gibson*, in 2012, this Court determined where an exclusion violates W.Va. Code § 33-6-31 and there is no statutory authority or public policy reason to allow the exclusion, the exclusion is void and unenforceable, **even above the mandatory minimum limits of coverage**. *See Jenkins v. City of Elkins*, 230 W.Va. 335, 738 S.E.2d 1 (2012) (emphasis added). In *Jenkins*, this Court examined whether a government-owned vehicle exclusion contained within the uninsured motorist coverage provisions of an employer's automobile policy violated W.Va. Code § 33-6-31(b) and the public policy of West Virginia. *Jenkins*, 230 W.Va. at 348, 738 S.E.2d at 14. The circuit court below concluded that the government-owned vehicle exclusion was valid above the mandatory limits of uninsured motorist coverage. *Id.* The circuit court's ruling meant the insurers were only liable to the plaintiffs for up to $20,000.00.[7] *Id.*, n.18.

In its examination of the validity of the government-owned vehicle exclusion, this Court examined W.Va. Code § 33-6-31(b), which states that every automobile policy must contain an endorsement or provision undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle. *Jenkins*, 230 W.Va. at 351, 738 S.E.2d at 17.[8] Reiterating its previous holdings, this Court stated that the uninsured motorist statute is "remedial in nature and therefore, must be construed liberally in order to effect its purpose." *Id.* (citations omitted). In construing an exclusion, the "terms of the policy should be construed in light of the language, purpose and intent of the applicable statute." *Id.* (citing *Adkins*,

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[7] W.Va. Code § 17D-4-2 has since been amended to require minimum uninsured limits of $25,000.00 per person and $50,000.00 per occurrence.

[8] In 2015 the West Virginia Legislature amended and re-enacted W.Va. Code § 33-6-31. However, the new version contains the same mandate that every automobile policy issued in West Virginia must contain provisions to provide uninsured motorist coverage (and liability coverage for permissive users). *See* W.Va. Code § 33-6-31 (2015).

201 W.Va. at 153, 494 S.E.2d at 920); *Gibson*, 219 W.Va. at 46-47, 631 S.E.2d at 605-606. Importantly, this Court found no language in the uninsured motorist statute or **any motor vehicle statute or regulation** that affirmatively allows an insurer to deny uninsured motorist coverage merely because a vehicle involved in an accident is government owned (i.e. class of uninsured vehicle). *Id.* (emphasis added).

As reiterated by this Court in *Jenkins*, when examining exclusions this Court "will be vigilant in holding the insurers' feet to the fire in instances where ... exclusions or denials strike at the heart of the purposes of the uninsured ... motorist statutes [sic] provisions." *Jenkins*, 230 W.Va. at 351, 738 S.E.2d at 17 (citing *Cunningham v. Hill*, 226 W.Va. 180, 186, 698 S.E.2d 944, 950 (2010)(quoting *Deel v. Sweeney*, 181 W.Va. 460, 463, 383 S.E.2d 92, 95 (1989). If a policy exclusion does not comply with the broad terms of the statute, then the exclusion is void. *Jenkins*, 230 W.Va. at 351, 738 S.E.2d at 17 (citing *Adkins*, 201 W.Va. at 153, 494 S.E.2d at 920). Applying these principles, the Court in *Jenkins* held that a government-owned exclusion for uninsured motorist coverage is against the public policy of West Virginia, and thus, is **void** and **unenforceable**. *Id.* (emphasis added). Most importantly and precisely relevant to this case, this Court held that it was clear the circuit court erred by enforcing the government-owned vehicle exclusions above the mandatory limits for uninsured coverage. As a result, the full uninsured limits of $1 million and $500,000 under the two polices at issue were available to the insureds. *Id.* United Financial has refused to acknowledge this key distinction in West Virginia law as to when exclusions are enforced (despite violating the omnibus clause) and when exclusions are of no effect, even above the minimum financial responsibility limits.

United Financial erroneously argued below that *Jenkins* is inapplicable to the Employer's Liability exclusion, based on the fact that this court in *Jenkins* examined an exclusion for uninsured motorist coverage and the intent behind the uninsured motorist coverage statute. JA 546-547. Specifically, the *Jenkins* court explained:

> 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 uninsured .... motorist coverage.

230 W.Va. at 351, 738 S.E.2d at 17 (citing *State Automobile Mutual Insurance Co. v. Youler*, 183 W.Va. 556, 396 S.E.2d 737 (1990)). United Financial latches onto the language that an injured person be "fully compensated" for damages not compensated by an uninsured tortfeasor, to support its conclusion that the holding in *Jenkins* is not broad enough to conclude that the Employer's Liability exclusion is completely unenforceable. JA 546-547. However, United Financial fails to recognize prior holdings of this Court which allowed exclusions for uninsured coverage to operate above the minimum financial limits– resulting in the injured person not being "fully compensated"– where the exclusion was supported by public policy. *See Imgrund*, 199 W.Va. 187, 483 S.E.2d 533 (holding an "owned, but not insured" exclusion for uninsured coverage is valid above the minimum limits); *Erie Insurance Company v. Dolly*, 240 W.Va. 345, 811 S.E.2d 875 (2018)(holding that insurer was only required to provide insured with statutory minimum of uninsured property damage coverage, based on an "owned, but not insured" exclusion).

Further, like the uninsured motorist statute at issue in *Jenkins*, W.Va. Code § 33-6-31(a) mandates that every automobile policy issued in West Virginia must contain a provision insuring the named insured and any other person using the motor vehicle with the consent of the named insured. W.Va. Code § 33-6-31(a)(2015). Like the uninsured statute, the omnibus clause is "remedial in

nature and must be construed liberally so as to provide coverage where possible." *Burr*, 178 W.Va. at 404, 359 S.E.2d at 632; *Jenkins*, 230 W.Va. at 351, 738 S.E.2d at 17. The clear intent of the omnibus clause is to maximize insurance for permissive users for the greater protection of the public and accordingly, to afford coverage to a permissive user as a means to give greater protection to those who are involved in automobile accidents. *See* Syl. Pt. 3, *Burr,* 178 W.Va. 398, 359 S.E.2d 626; *Universal Underwriters*, 185 W.Va. 606, 611-612, 408 S.E.2d 358, 363-364.

As was the case in both *Gibson* and *Jenkins*, there is no applicable statutory language that affirmatively allows the Employer's Liability exclusion to limit liability coverage afforded to a non-employee permissive user, Mr. Perry, merely because the person he injured was Mr. Ball, an employee of the named insured, Milton Hardware. The only exception to the omnibus clause that relates to where an employee is injured in the course of his employment is W.Va. Code § 33-6-31(h). However, the exception found in subsection (h) does not apply in this case. Mr. Ball's claims are not against his employer, but against a third-party, Mr. Perry. *Ball*, 941 F.3d at 716; *Henry v. Benyo*, 203 W.Va. 172, 177-178, 506 S.E.2d 615, 620-621 (1998). Thus, the Employer's Liability exclusion is more restrictive than the omnibus statute and is void and ineffective as against public policy–even above the mandatory minium limits. Syl. Pt. 2, *Universal Underwriters*, 185 W.Va. 606, 408 S.E.2d 358; Syl. Pt. 3, *Gibson,* 219 W.Va. 40, 631 S.E.2d 598; Syl. Pt. 2, *Burr*, 178 W.Va. 398, 359 S.E.2d 626. Therefore, the liability coverage "occasioned within the coverage of the [United Financial] policy" for Mr. Ball's claims against Mr. Perry (a third-party permissive user) is the $1 million of liability coverage provided in the Policy. *See* W.Va. Code § 33-6-31(a); JA143, 153.

Consistent with prior precedent of this Court, since no exception to the omnibus clause applies, the Employer's Liability exclusion does not comply with the broad terms of W.Va. Code

§ 33-6-31(a) and must be given no effect. *See Jenkins*, 230 W.Va. at 351, 738 S.E.2d at 17 (citing *Adkins*, 201 W.Va. at 153, 494 S.E.2d at 920); *Gibson,* 219 W.Va. 40, 631 S.E.2d 598. Accordingly, Mr. Ball requests that the Court answer the certified question to hold that the Employer's Liability exclusion is unenforceable–even above the mandatory minium limits– and that the full $1 million of liability limits under the Policy are available for Mr. Ball's claim against Mr. Perry.

2. Where construed to comply with West Virginia Code § 33-6-17, the Employer's Liability exclusion does not limit the amount of coverage for a third party permissive user.

The Employer's Liability exclusion contravenes W.Va. Code § 33-6-31(a) and thus, is unenforceable and of no effect. *Ball*, 941 F.3d at 717 (citing *Universal Underwriters*, 185 W.Va. at 611, 408 S.E.2d at 363 and *Burr*, 178 W.Va. at 403, 359 S.E.2d at 631) . Under such circumstances, W.Va. Code § 33-6-17 provides:

> [a]ny insurance policy, rider, or endorsement hereafter issued and otherwise valid which contains any condition or provision not in compliance with the requirements of this chapter, shall not be thereby rendered invalid **but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider, or endorsement been in full compliance with this chapter**.

W.Va. Code § 33-6-17 (1957)(emphasis added).[9] Since the Employer's Liability exclusion is not in compliance with the requirements of W.Va. Code § 33-6-31, it must "be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider, or endorsement been in full compliance with [Chapter 33]." W.Va. Code § 33-6-17. This means the

[9] In applying W.Va. Code § 33-6-17, this Court stated: "[w]hen the language of an insurance policy is contrary to statute and therefore void, the policy should be construed to contain the coverage required by West Virginia law." *Adkins*, 201 W.Va. at 153, 494 S.E.2d at 920 (citing W.Va. Code § 33-6-17 (1957)); *Gibson,* 219 W.Va. at 46, 631 S.E.2d at 605.

exclusion must comply with W.Va. Code § 33-6-31(h) which states: "[t]he provisions of subsections (a) and (b) of this section shall not apply to any policy of insurance to the extent that it covers the liability of any employer to his employees under any workers' compensation law."

The Employer's Liability exclusion attempts to exclude coverage as follows:

> **Bodily Injury** to:
> a. An employee of any **insured** arising out of or within the course of:
> (i) That employee's employment by any **insured**; or
> (ii) Performing duties related to the conduct of any **insured's** business; or
>
> * * *
>
> This exclusion applies:
> a. Whether the **insured** may be liable as an employer or in any other capacity . . . .

JA 25, 156 (emphasis in original).

As written, the exclusion excludes coverage if Mr. Ball is an employee of either Milton Hardware (the named insured) or Mr. Perry (a permissive user, additional insured). This is broader than the statutory exception to the omnibus requirements allowed by W.Va. Code § 33-6-31(h) and ineffective as against public policy. *See Ball*, 941 F.3d at 716; Syl. Pt. 2, *Universal Underwriters*, 185 W.Va. 606, 408 S.E.2d 358; Syl. Pt. 3, *Gibson,* 219 W.Va. 40, 631 S.E.2d 598; Syl. Pt. 2, *Burr*, 178 W.Va. 398, 359 S.E.2d 626. There is no statutory authority to allow United Financial to limit coverage for Mr. Perry. As such, the exclusion must be construed and applied only to those instances where the employer is liable, not where, as in this case, a third party permissive user is liable. The exclusion is therefore completely unenforceable. *See Jenkins,* 230 W.Va. at 351, 738 S.E.2d at 17; *Gibson,* 219 W.Va. 40, 631 S.E.2d 598.[10]

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[10] In its second opinion, the District Court failed to directly address the effect of W.Va. Code § 33-6-17 on the validity of the Employer's Liability exclusion. *See* JA 475-483.

3. West Virginia case law where exclusions have been enforced above the West Virginia mandatory minimum limits is distinguishable from the Employer's Liability exclusion at issue in this matter.

In limited instances, this Court has permitted exclusions that violate the omnibus clause to operate above the minimum coverage requirements. However, the policy exclusions at issue in those limited instances are easily distinguishable from the Employer's Liability exclusion.

In *Jones v. Motorists Mut. Ins. Co.*, this Court held that a named driver exclusion was valid above the mandatory minimum limits in W.Va. Code § 17D-4-2. *Jones Motorists Mut. Ins. Co.*, 177 W.Va. 763, 766, 356 S.E.2d 634, 637 (1987)(abrogated by statute).[11] On its face, the holding in *Jones* seems to support United Financial's argument. However, it is this Court's analysis used to arrive at its holding in *Jones* that actually supports the Petitioner's argument that the Employer's Liability exclusion should not be enforced above the mandatory minimum liability limits. In *Jones*, this Court found that W.Va. Code § 33-6-31(a) expressly authorizes an insurer and an insured to agree to a "named driver exclusion" endorsement that would operate to exclude coverage above the minimum liability limits to a permissive user if that permissive user was specifically excluded from coverage in the policy. *Jones,* 177 W.Va. at 766, 356 S.E.2d at 637. Specifically, W.Va. Code § 33-6-31(a) allows an exception to the mandate of liability coverage for a permissive user "for any persons specifically excluded by any restrictive endorsement to the policy." *Id.*; *see* W.Va. Code § 33-6-31(a). Thus, the omnibus statute expressly authorizes a named driver exclusion and in *Jones*,

[11] The insured in *Jones* agreed to exclude her teenage son from coverage under the policy, and thus, presumably paid no premium to cover him. *Id.* at 764, 635.

this Court merely followed the statute by allowing the exclusion to operate above the minimum coverage limits.[12]

Unlike the exclusion in *Jones*, the omnibus statute does not expressly authorize an insured to exclude coverage for a third-party permissive user based on who is injured, which is the effect of Employer's Liability exclusion in this case. *See* W.Va. Code § 33-6-31(a). The only applicable exception to the omnibus clause is where the injured party is an employee of the insured and the employer is liable. *See* W.Va. Code §§ 17D-4-12(e) and 33-6-31(h). This exception does not apply. *See Ball*, 941 F.3d at 716; *Miralles*, 216 W.Va. at 97-98, 602 S.E.2d at 540-541. Thus, the *Jones* decision does not support enforcing the Employer's Liability exclusion above the minimum financial responsibility limits, as unlike in *Jones*, there is no statutory authority to allow the Employer's Liability exclusion to exclude coverage for a third-party permissive user, merely because the injured party was an employee of the named insured.

Other instances where this Court has allowed exclusions to operate above the minimum financial responsibility limits involved an intentional tort exclusion and an "owned, but not insured" exclusion. In *Dotts*, this Court held that an intentional tort exclusion was only valid above the minium insurance limits. *Dotts*, 182 W.Va. 586, 390 S.E.2d 568. Further, in *Imgrund*, this Court held that an "owned, but not insured exclusion to uninsured motorist coverage is valid and enforceable above the mandatory limits of uninsured motorist coverage...." Syl. Pt. 4, *Imgrund*, 199 W.Va. 187, 483 S.E.2d 533 (internal citations omitted). Unlike exclusions for permissive users

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[12] The *Jones* Court determined that in order to harmonize the statutory minimum limit requirements with the omnibus statute's specific provision for allowing named driver exclusions, the exclusion would be permitted to operate above the minimum limits. *Jones*, 177 W.Va. at 766, 356 S.E.2d at 637. Unlike the situation in *Jones*, there is no affirmative statutory authority for the type of exclusion that United Financial relies upon to deny coverage in this case and, therefore, the Employer's Liability exclusion should not be permitted to operate above the minimum limits.

where the injured party is an employee of the named insured, but not the permissive user, both intentional tort and "owned, but not insured" exclusions are supported by West Virginia public policy.

Allowing an insurer to exclude coverage for intentional acts is consistent with public policy. *See American National Property and Casualty Company v. Clendenen*, 238 W.Va. 249, 261, 793 S.E.2d 899, 911 (2016). In fact, allowing insurance coverage for a purposeful or intentional act is viewed as against public policy. *Id.* at 262, 912 (citing *Horace Mann Ins. Co. v. Leeber*, 180 W.Va. 375, 380-81, 376 S.E.2d 581, 586-87 (1988)). The exact opposite situation arises with permissive users - in West Virginia the strong public policy favors providing coverage for permissive users. *See Universal Underwriters*, 185 W.Va. at 611-612, 408 S.E.2d at 363-364 (the omnibus clause "evinces an unmistakable intent [of the Legislature] to maximize insurance for the **greater protection** of the public and that effectuation of such intent requires a broad interpretation of [W.Va. Code § 33-6-31(a)] ....") (emphasis added). Thus, any reliance on *Dotts* to support applying the Employer's Liability exclusion above the minimum limits is misplaced as it completely ignores the stark difference in the public policy behind allowing intentional tort exclusions versus the strong public policy of providing coverage for permissive users.

An "owned, but not insured" exclusion is also easily distinguishable from the Employer's Liability exclusion. An "owned, but not insured" exclusion prevents an insured from seeking coverage for a vehicle the insured owned, but did not insure under the policy–i.e. did not pay a premium to insure. The exclusion prevents an insured from receiving coverage for which the insured did not pay a premium. Here, Milton Hardware obviously paid a premium to cover the vehicle it permitted Mr. Perry to drive and to cover permissive users of its vehicle. In exchange, Mr. Perry is

entitled to the full liability limits of the policy, without regard to the Employer's Liability exclusion of the policy which violates the omnibus clause of W.Va. Code § 33-6-31(a). [13]

In more recent West Virginia cases, this Court has held certain exclusions that lack statutory authority or public policy support are void and completely unenforceable–even above the minimum financial responsibility limits. *See Gibson,* 219 W.Va. 40, 631 S.E.2d 598 (examining a defense within limits provision); *Jenkins*, 230 W.Va. 335, 738 S.E.2d 1 (examining a government-owned vehicle exclusion in an employer's insurance policy). Thus, exclusions that violate the omnibus clause of W.Va. Code § 33-6-31(a) are not automatically enforceable above the West Virginia mandatory minimum liability limits. Such exclusions are enforced above the minimum liability limits only if there is statutory authority (*Jones*) or a strong public policy (*Dotts* and *Imgrund*) allowing the exclusion to operate above the mandatory minimum liability limits. There is no statutory or public policy to support enforcement of the Employer's Liability exclusion above the mandatory minimum limits and in fact, West Virginia statutory law, common law and public policy dictate that the Employer's Liability exclusion should be of no effect–even above the mandatory minimum limits. *See* W.Va. Code § 33-6-31(a); W.Va. Code § 33-6-31(h); *Miralles*, 216 W.Va. 91, 602 S.E.2d 534; *Burr*, 178 W.Va. 398, 359 S.E.2d 626 (1987); *Gibson,* 219 W.Va. 40, 631 S.E.2d

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[13] In its second opinion and order, the District Court cites to an unpublished opinion of the Fourth Circuit for the proposition that each time the Supreme Court of Appeals of West Virginia has found that an exclusion violated state law, it has permitted the exclusion to operate above limits. JA 488-489; *See Nationwide Mutual Insurance Company v. Continental Insurance Company*, Nos. 90-1785, 90-1786, 1991 WL 181130 (4th Cir. 1991)(per curiam)(unpublished). This proposition is not accurate. In *Continental*, the policy at issue expressly provided that coverage was limited to the minimum limits of the state in which the vehicle was being used. *Id.* at *2. Since the provision in *Continental* provided coverage up to the minimum limits of the jurisdiction where the vehicle was being used, the explicit restriction of coverage for the permissive user customer above the minimum limits was valid. *Id.* *3. Unlike the policy at issue in *Continental*, no such provision is contained within the liability coverage provisions of the United Financial policy. *See* JA 11-61.

598; *Universal Underwriters*, 185 W.Va. 606, 408 S.E.2d 358, 363; *Jenkins*, 230 W.Va. 335, 738 S.E.2d 1.

In its contract of insurance, United Financial agreed to pay for bodily injury damages for which an insured becomes legally responsible because of an accident arising out of the use of the insured auto, **"subject to the limits of liability**." JA 162 (emphasis added). The stated liability limits in the United Financial policy are $1 million. JA 152. United Financial relies on an exclusion that violates the omnibus clause to argue that it should only be responsible for paying the West Virginia minimum liability limits ($25,000.00) required by W.Va. Code § 17D-4-2. However, once you remove the exclusion from the Policy you are left with the liability coverage "occasioned within the policy" for the claims against Mr. Perry (a third party permissive user) by Mr. Ball– which is $1 million. *See* W.Va. Code § 33-6-31(a). Applying the Employer's Liability exclusion above the minimum limits absolutely strikes at the heart of the purpose of the omnibus provisions – to **maximize** insurance for the greater protection of the public – and therefore, is contrary to public policy. *See Universal Underwriters*, 185 W.Va. at 611-612, 408 S.E.2d at 363-364 (emphasis added).[14]

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[14] In its second opinion and order, the District Court determined that the principal of maximizing insurance coverage, as set forth in *Universal Underwriters,* did not refer to applying exclusions to exclude coverage above the minimum financial responsibility limits. JA 482. However, this Court's holding in *Universal* was not premised upon any minimum financial responsibility requirements in W.Va. Code § 17D-4-2, but on the basis that the omnibus statutes require insurers to provide liability coverage to any person using an insured vehicle with the permission of the insured. Further and importantly, this Court did not state that if a permissive user deviates from the scope of the permission that an insurer may exclude coverage for the permissive user above the minimum financial responsibility limits. *Universal Underwriters*, 185 W.Va. at 612, 408 S.E.2d at 364. To the contrary, this Court in *Universal Underwriters* held that a limitation to liability coverage for permissive users based on the scope of permission contravenes W.Va. Code § 33-6-31, and is thus, unenforceable. *Id.*

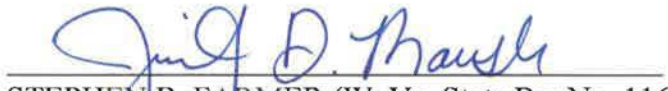
CONCLUSION

For the foregoing reasons, the Petitioner, Greg Allen Ball, respectfully requests this Court determine that the Employer's Liability exclusion, as applied to the facts of this case, is void and unenforceable –even above the West Virginia minimum financial responsibility limits –and the full liability coverage under the United Financial Policy be afforded for the Petitioner's claim against a third-party permissive user under the Policy.

GREG ALLEN BALL,

Petitioner,

By Counsel:



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