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 REPLY BRIEF

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A. West Virginia law supports the Petitioner's argument that where an exclusion violates the omnibus clause of W.Va. Code § 33-6-31(a) and there is no statutory authority or public policy to allow the exclusion, then the exclusion is unenforceable, even above the minimum financial responsibility limits.

The parties agree that W.Va. Code § 33-6-31(a) requires liability coverage for permissive users. However, the parties disagree as to whether West Virginia law permits an insurer to limit coverage for permissive users where the policy provides coverage in excess of the minimum liability limits required by W.Va. Code § 17D-4-2. More specifically, United Financial claims that West Virginia law permits it to sell a $1 million liability policy, but then exclude coverage for permissive users above the mandatory minimum liability limits of $25,000 / $50,000 / $25,000. *See generally*, Resp. Brief. For the Court to adopt United Financial's position, it must ignore longstanding precedent and the clear language of W.Va. Code § 33-6-31(a) and rule, for the first time, that an exclusion that violates the omnibus provisions of W.Va. Code § 33-6-31(a) is nonetheless effective above the mandatory minimum limits. This has never been the law in West Virginia and cannot be the law if W.Va. Code § 33-6-31(a) is applied as it is written.

1. Application of the clear language of W.Va. Code § 33-6-31(a) dictates that the Employer's Liability Exclusion in the United Financial Policy is totally unenforceable – even above the mandatory minimum financial responsibility limits.

United Financial argues that W.Va. Code §§ 33-6-31(a) and 17D-4-12 "work together to define minimum motor vehicle insurance coverage requirements in West Virginia." *See* Resp. Brief, 8. While it is true that both of these statutes dictate requirements as to what motor vehicle liability policies must contain, W.Va. Code § 17D-4-2 simply sets the floor for coverage (i.e. the provisions

of W.Va. Code § 17D-4-2 come into play if a policy fails to provide at least the minimum coverage required by the statute). The omnibus provisions of W.Va. Code § 33-6-31(a), on the other hand, are broader, in that once the policy provides the minimum coverage required by W.Va. Code § 17D-4-2, then the liability coverage provided to a permissive user must be the liability coverage occasioned within the coverage of policy that was issued. The exact language of the two omnibus statutes, which United Financial ignores. The only way to reach the result United Financial asks the Court to reach is to ignore the statutory differences and, instead, superimpose language from W.Va. Code § 17D-4-12 overtop the clear language of W.Va. Code § 33-6-31(a). This is improper. West Virginia Code § 33-6-31(a) must be applied as it is written.

Contrary to United Financial's position, the requirement in W.Va. Code § 33-6-31(a) that permissive users be afforded liability coverage is **not** tied to the minimum coverage required by W.Va. Code §17D-4-2. Rather, the actual language of W.Va. Code § 33-6-31(a) requires that all liability policies provide coverage to permissive users "**occasioned within the coverage of the policy**[:]"

> (a) No policy or contract of bodily injury liability insurance . . . may be issued or delivered in this state . . . unless it contains a provision insuring the named insured and any other person . . . responsible for the use of or using the motor vehicle with the consent, expressed or implied, of the named insured or his or her spouse against liability for death or bodily injury sustained or loss or damage **occasioned within the coverage of the policy or contract** as a result of negligence in the operation or use of such vehicle by the named insured or by such person[.]

W.Va. Code § 33-6-31(a), in pertinent part (emphasis added). The use of the phrase "occasioned within the coverage of the policy or contract" is a critical distinction that United Financial ignores. The omnibus requirements of W.Va. Code § 33-6-31(a) are not tethered to W.Va. Code § 17D-4-2.

Instead, W.Va. Code § 33-6-31(a) provides that once the policy or contract is issued to insure the permissive user, the amount of liability coverage for the permissive user is the actual coverage provide by the policy. 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. West Virginia Code § 33-6-31(a) dictates that the permissive user be provided that coverage.

United Financial could have issued a policy that only provided the minimum liability coverage required under W.Va. Code § 17D-4-2. However, once United Financial agreed to provide greater liability coverage than required, W.Va. Code § 17D-4-2 was satisfied. Still yet, the insurance policy has to also comply with W.Va. Code § 33-6-31(a), which dictates that the amount of liability coverage for a permissive user is the amount of liability coverage occasioned within the coverage of the policy. West Virginia Code § 17D-4-2 simply provides the floor of liability coverage, not the ceiling. Thus, for a permissive user like Mr. Perry, the liability coverage "occasioned within the coverage of the policy" is $1 million, not the mandatory minimum limits.

2. West Virginia case law applying W.Va. Code § 33-6-31(a) supports that the Employer's Liability Exclusion is totally unenforceable–even above the mandatory minimum financial responsibility limits.

This Court's prior decisions as to when exclusions can apply above the minimum limits and when they cannot is consistent with simply applying the plain language of W.Va. Code § 33-6-31(a). For example, 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). The analysis this Court used to arrive at its holding in *Jones* supports the Petitioner's argument that the Employer's Liability exclusion should not be enforced above the mandatory minimum liability limits. Specifically, in

Jones, this Court found that W.Va. Code § 33-6-31(a) **expressly authorizes** a "named driver exclusion" through a restrictive endorsement. *See Jones,* 177 W.Va. at 766, 356 S.E.2d at 637 (emphasis added). To harmonize the exclusion allowed by W.Va. Code § 33-6-31(a) with the mandatory minimum limits required by W.Va. Code § 17D-4-2, this Court in *Jones* held the exclusion is only enforceable above the mandatory minimum limits. *Id.* Thus, because W.Va. Code § 33-6-31(a) permits such an exclusion, it can operate above the mandatory minimum limits and is not subject to the requirement that the coverage be occasioned by the coverage of the policy.

This Court's holding in *Jones* is completely consistent with the Petitioner's position here, but the opposite result is required because unlike the named driver exclusion, W.Va. Code § 33-6-31(a) does not permit coverage for permissive users to be stepped down to the minimum limits, rather the statute requires that they be afforded the coverage occasioned by the policy.[1] Thus, consistent with the language of W.Va. Code § 33-6-31(a) and *Jones*, this Court should apply the statute as it is written and prohibit the Employer's Liability Exclusion to operate above the mandatory minimum liability limits. Otherwise, this Court must ignore its precedent and rule, for the first time, that an exclusion that violates the omnibus clause can be effective above the statutory minimum coverage.

Consistent with *Jones*, this Court in *Burr v. Nationwide*, held that a "dealer's plate" endorsement exclusion in a garage operations policy that attempted to limit coverage for a

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[1] 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, as correctly determined by the Fourth Circuit, the exception found in subsection (h) does not apply in this case, where Mr. Ball's claims are not against his employer, but against a third-party, Mr. Perry. *United Financial Cas. Co. v. Ball*, 941 F.3d 710, 716 (4th Cir. 2019); *Henry v. Benyo*, 203 W.Va. 172, 177-178, 506 S.E.2d 615, 620-621 (1998); *Miralles v. Snoderly*, 216 W.Va. 91, 602 S.E.2d 534 (2004).

permissive user of a covered vehicle was unenforceable and void because it violated the omnibus provisions of W.Va. Code § 33-6-31(a). *See* Syl. pts. 1 and 2, *Burr v. Nationwide Mut. Ins. Co.*, 178 W.Va. 398, 359 S.E.2d 626 (1987). Specifically, in *Burr*, this Court looked at the language of W.Va. Code § 33-6-31(a) and determined that "to be effective under W.Va. Code § 33-6-31(a), an exclusion must specifically designate by name the individual or individuals to be excluded." *Burr*, 178 W. Va. at 404-05, 359 S.E.2d at 633. The policy in *Burr* did not specifically designate by name the driver to be excluded from coverage; thus, it was held "null and void." *Id.* Importantly, and consistent with the Petitioner's position in this case, this Court noted in *Burr* that because it determined the "dealer's plate" endorsement invalid under W.Va. Code § 33-6-31(a), the Court did not need to address the minimum limits requirements of W.Va. Code § 17D-4-1, *et seq*. *Burr*, 178 W.Va. at 405, n. 10, 359 S.E.2d at 633 n. 10. This Court in *Burr* did not need to address the minimum limits requirements because as soon as this Court determined the exclusion was invalid under W.Va. Code § 33-6-31(a), it was deemed null and void and therefore, could not be enforced–even above the minimum limits.[2] Therefore, the *Burr* decision supports the Petitioner's argument that the Employer's Liability exclusion cannot be enforced above the mandatory minimum limits because, like the exclusion in *Burr*, it violates W.Va. Code § 33-6-31(a). *Compare Jones*, *supra* (where exclusion complied with and was allowed by W.Va. Code § 33-6-31(a), it was allowed to operate above the mandatory minimum limits).

To support its position, United Financial cites to a case involving an intentional tort exclusion, in which this Court held the exclusion is enforceable above the mandatory minimum

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[2] In *Jones*, the exclusion was affirmatively authorized by the omnibus statute and thus, was permitted to be effective above the minimum limits. Whereas the exclusion in *Burr* violated the omnibus statute and thus, was held of no effect, even above the minimum financial responsibility limits.

financial responsibility limits. *See* Resp. Brief, 13-14; Syl. pt. 4, *Dotts v. Taressa J.A.*, 182 W.Va. 586, 390 S.E.2d 568 (1990). However, this Court's holding in *Dotts* is also consistent with the Petitioner's position in this case, because the omnibus statute does not require coverage for intentional torts. West Virginia Code § 33-6-31(a) specifically limits its mandate to provide liability coverage for permissive users occasioned within the coverage of the policy resulting from **negligence** in the operation or use of such vehicle by the permissive user. W.Va. Code § 33-6-31(a)(emphasis added). It does not require coverage for intentional acts. Thus, excluding coverage for intentional acts is consistent with and permitted by W.Va. Code § 33-6-31(a). Therefore, the exclusion can be applied above the minimum limits. *See Jones, Burr, supra.*[3]

This Court's 2005 decision in *Gibson v. Northfield Ins. Co.*, 219 W.Va. 40, 631 S.E.2d 598 (2005) is also consistent with the Petitioner's position that the full policy limits occasioned by the United Financial policy should be afforded. In *Gibson*, 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 v. Northfield Ins. Co.*, 219 W.Va. 40, 631 S.E.2d 598 (emphasis added). In *Gibson*, this Court examined a "defense within limits" provision in an insurance policy where the insurer tried to reduce the amount of liability coverage available under its policy ($1 million) by the cost the

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[3] Further, unlike excluding coverage for the negligent acts of a third-party permissive user, excluding coverage for an intentional tort is actually in harmony with West Virginia public policy. *See American National Property and Casualty Company v. Clendenen*, 238 W.Va. 249, 261, 793 S.E.2d 899, 911 (2016); *Horace Mann Ins. Co. v. Leeber*, 180 W.Va. 375, 380-81, 376 S.E.2d 581, 586-87 (1988).

insurer paid to defend the claim ($311,638.14). *Gibson*, 219 W.Va. at 43-44, 631 S.E.2d at 601-602. This 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.

United Financial argues that this Court's holding in *Gibson* has no applicability here because the required statutory liability limits for the policy at issue in *Gibson* were the same as the liability limits under the policy ($1 million). However, in *Gibson*, this 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 because there was nothing in the omnibus clause that allowed an insurer to limit the amount of coverage provided in the Policy by the cost to defend the claim. *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 policy's full liability limits were available, which happened to equal the statutory minimum limits required of the policy at issue in *Gibson*. Again, this holding is consistent with the requirement in W.Va. Code §33-6-31(a) that permissive users be afforded the coverage provided by the policy.

West Virginia Code § 33-6-31(a) clearly provides that any liability policy must provide coverage to a permissive user "occasioned within the coverage of the policy"– not occasioned within the mandatory minimum limits set forth in W.Va. Code § 17D-4-2. *See* W.Va. Code § 33-6-31(a). The only exception to the omnibus clause where an employee is injured in the course of his employment does not apply in this case.[4]

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[4] *See* W.Va. Code § 33-6-31(h); *Ball*, 941 F.3d 710, 716 (4th Cir. 2019); *Henry* , 203 W.Va. at 177-178, 506 S.E.2d at 620-621; *Miralles*, 216 W.Va. 91, 602 S.E.2d 534.

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 (emphasis added). To effectuate the intent of W.Va. Code § 33-6-31(a) and harmonize it with the mandatory minimum financial responsibility requirements of W.Va. Code § 17D-4-2, this Court has consistently held that where an exclusion is authorized by W.Va. Code § 33-6-1(a) to exclude coverage for a permissive user, it can operate above the mandatory minimum liability limits set forth in W.Va. Code § 17D-4-2. *See Jones,* 177 W.Va. at 766, 356 S.E.2d at 637; Syl. pt. 4, *Dotts,* 182 W.Va. 586, 390 S.E.2d 568. However, in instances where an exclusion violates the omnibus requirements of W.Va. Code § 33-6-31(a) and W.Va. Code § 33-6-31(a) does not allow the exclusion, then the exclusion is null and void–even above the mandatory minimum limits. *See Burr,* 178 W.Va. at 404-05, 359 S.E.2d at 633; *Gibson*, 219 W.Va. at 47-48, 631 S.E.2d at 605-606; *see also Jenkins*, 230 W.Va. 335, 738 S.E.2d 1. Thus, when applying the plain language of W.Va. Code § 33-6-31(a), the Employer's Liability Exclusion is totally unenforceable–even above the mandatory minimum liability limits.

3. Case law from other jurisdictions with similar omnibus provisions supports applying W.Va. Code § 33-6-31(a) as it is written.

Applying W.Va. Code § 33-6-31(a) as it is written is consistent with how other states with similar omnibus provisions apply the law.[5] For instance, South Carolina has an omnibus statute

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[5] The amicus curiae brief filed by the Defense Trial Counsel of West Virginia purports to include an analysis of how all the other states handle the issue and concludes that "most states allow another [sic] otherwise ineffective policy exclusion to remain effective above mandatory minimum

which is very similar to W.Va. Code § 33-6-31(a)[6] in that it requires permissive users be provided coverage "within the coverage of the policy or contract":

> (A) **No policy or contract of bodily injury or property damage liability insurance** covering liability arising from the ownership, maintenance, or use of a motor vehicle **may be issued** or delivered in this State to the owner of the vehicle or may be issued or delivered by an insurer licensed in this State upon a motor vehicle that is principally garaged, docked, or used in this State **unless the policy contains a provision insuring** the named insured and **any other person using or responsible for the use of the motor vehicle with the expressed or implied consent of the named insured** against liability for death or injury sustained or loss or damage incurred **within the coverage of the policy or contract** as a result of negligence in the operation or use of the vehicle by the named insured or by any such person[.]

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coverage." *See* Amicus Brief, p. 11. This "analysis" is hardly reliable as the amicus brief alleges that South Carolina is one of those states that always applies exclusions above the minimums. *See* Amicus Brief, p. 14. However, as indicated by the Supreme Court of South Carolina's decision in *Williams* (discussed below), South Carolina does not always allow policy exclusions to apply above the minimums. Specifically, if the policy exclusion violates the omnibus, it will be held ineffective, even above the policy limits. *See Williams v. Government Employees Insurance Company*, 409 S.C. 586, 762 S.E.2d 705 (2014).

[6] The "analysis" presented in the amicus brief is also flawed as it does not take into account that in several of the states that it claims to be in support of United Financial's position, the omnibus statute is completely different from that of West Virginia (and South Carolina). More specifically, in many states that the amicus brief refers to as being in the majority, the omnibus statutes in those states do not require coverage for permissive users in the amount provided by the policy, but specifically require coverage for permissive users in the amount of the mandatory minimum limits. *See Arizona Rev. Stat.* § 28-4009 ("the policy shall insure...any other person...with the express or implied permission...subject to limits...as follows); *Louisiana Rev. Stat. Ann.* 32:900 ("shall insure...any other person...with the express or implied permission...subject to limits...as follows[.]"); *Nebraska Rev. Stat. Ann.* § 60-534 ("Such motor vehicle liability shall...insure...any other person...with the express or implied permission ... subject to limits...as follows:[.]"); *New Hampshire Rev. Stat. Ann.* § 259:61 (requiring coverage for permissive users, but specifying the mandatory minimum not the coverage occasioned or provided by the policy); *Nevada Rev. Stat. Ann.* §485.3091 (requiring policies to insure permissive users, but specifying the coverage as the mandatory minimum, not that coverage which is provided by the policy). It is disingenuous to claim that these and other states support United Financial's position where the statute is completely different from the West Virginia omnibus statute and provides a basis for why an exclusion could be applicable above the mandatory minimums — in those states the omnibus only requires minimum coverage, not the coverage occasioned within the policy. Without looking at the differences in each's state's omnibus statute, it is impossible to present any meaningful analysis.

S.C. Code Ann. § 38-77-142(a), in part. Just like the West Virginia statute, the South Carolina statute requires coverage be provided "within the coverage of the policy or contract." *Compare S.C. Code Ann.* § 38-77-142(a) to W.Va. Code § 33-6-31(a).

South Carolina's application of the omnibus statute is consistent with the Petitioner's request that the West Virginia statute be applied as written. In 2014, the Supreme Court of South Carolina was confronted with a step-down provision that reduced liability coverage for bodily injury to family members from the policy limits of $100,000, down to the statutory minimum of $15,000. *See Williams v. Government Employees Insurance Company*, 409 S.C. 586, 762 S.E.2d 705, 708 (2014). While acknowledging that insurers and insureds have freedom of contract, the Court noted that insurers cannot limit coverage in contravention of the law. *Williams*, 762 S.E.2d at 712. The South Carolina Supreme Court found the exclusion was in direct contravention of the omnibus statute where the statute (like the West Virginia statute) does not reference the minimum coverage, but instead specifically requires permissive users be afforded the liability coverage "within the coverage of the policy." *Id.* at 713, 717.[7] Thus, the step down provision was held to be void and incapable of being enforced, even above the mandatory minimum coverage required by South Carolina law. *Id.* at 717.[8]

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[7] A few years after *Williams*, the Court of Appeals of South Carolina was presented with another exclusion which it permitted to apply above the statutory minimums. *See Nationwide Mut. Fire Ins. Co. v. Walls*, 427 S.C. 348, 831 S.E.2d 131 (Ct. App. 2019). In that case, the policy attempted to reduce or step down coverage from the policy limit to the statutory minimum where the accident occurred while committing a felony or fleeing from law enforcement. *Walls*, 831 S.E.2d 131, 133-134. The reason the exclusion was permitted to operate above the minimums was that the exclusion in *Walls,* like the exclusion in *Dotts* and unlike the exclusion in *Williams,* did not conflict with the omnibus statute because the South Carolina omnibus statute (like the West Virginia omnibus statute) only requires coverage for negligent acts, not intentional acts. *Walls*, at 136. *See Dotts*, 182 W.Va. 586, 390 S.E.2d 568.

[8] Virginia and New York are two other states with similar omnibus statutes. Virginia requires permissive users be provided coverage "within the coverage of the policy," and New York requires

If United Financial and the Defense Trial Counsel of West Virginia want to limit coverage for permissive users to the mandatory minimum coverage, they should lobby the Legislature to make the West Virginia omnibus statute like that of other states that do not require permissive users be afforded the coverage of the policy, but only the mandatory limits. Until then, this Court should apply the statute as written, adhere to its prior decisions, and require permissive users to be afforded the coverage occasioned by the policy, not just mandatory minimum coverage.

B. An exclusion that violates W.Va. Code § 33-6-31(a) cannot be enforced above the mandatory minimum financial responsibility requirements no matter how "otherwise valid and unambiguous" the exclusion may be.

United Financial argues that an "otherwise valid and unambiguous exclusion" that violates state law is always valid and enforceable above minimum financial responsibility requirements. *See* Resp. Brief, 11-15. As demonstrated above, that is not the law in West Virginia[9] and to claim that it is demonstrates United Financial does not understand the distinction this Court has made regarding when exclusions are allowed to operate above the minimum limits and where an exclusion is not applicable above the minimum limits.

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coverage "occasioned within the coverage of the policy." *See Va. Code Ann.* § 38.2-2204; *see also, N.Y. Ins. Law* § 3420. Like South Carolina, when the Supreme Court of Virginia analyzed the statutory language in the face of a policy that attempted to limit coverage for permissive users, the Court held that the statute "requires each policy of automobile liability insurance to furnish a permissive user the same coverage as is afforded the named insured." *American Motorists Ins. Co. v. Kaplan*, 209 Va. 53, 58, 161 S.E.2d 675, 679 (1968); *see also Rosado v. Eveready Ins. Co.*, 34 N.Y.2d 43,312 N.E.2d 153, 155 (1974) (holding that based on the omnibus language in New York, the permissive user must be provided liability insurance as broad as the insured owner's liability). The Defense Trial Counsel and United Financial fail to understand what various courts have already determined – the language of the omnibus statute is determinative of this issue. If the statute requires coverage within the limits of the policy, insurers cannot limit coverage to the mandatory minimums. If the omnibus statute only requires the mandatory minimum coverage, then insurers are permitted to limit the coverage for permissive users.

[9] Just like the flawed analysis of what other states allow exclusions to apply above the minimums, the amicus brief acts as if West Virginia is one of the states that has always applied exclusions above the mandatory minimums. This is simply not the case, as demonstrated above.

In 2012, this Court held where an exclusion violates W.Va. Code § 33-6-31 and there is no statutory authority or public policy allowing the type of exclusion, then the full uninsured coverage under a policy will be available. *See* Syl. Pt. 4, *Jenkins v. City of Elkins*, 230 W.Va. 335, 738 S.E.2d 1 (2012)(holding that a government owned vehicle exclusion violated West Virginia public policy and is void and unenforceable, and the insured should be afforded the full limits of uninsured coverage under a policy). The effect of the holding in *Jenkins* was that the full amount of the uninsured limits under each policy were available, not just the statutory required minimum coverage. *Jenkins*, 230 W.Va. at 351, 738 S.E.2d at 17.

In examining the "government owned vehicle" exclusion, this Court in *Jenkins* specifically stated that the "exclusion found in both policies is not ambiguous and plainly denies uninsured motorist coverage when an accident involved a government owned vehicle." *Jenkins*, 230 W.Va. at 348, 738 S.E.2d at 14. This Court further stated that "[w]here provisions in an insurance policy are plain and unambiguous and **where such provisions are not contrary to a statute, regulation, or public policy**, the provisions will be applied and not construed." *Id.* (internal citations omitted)(emphasis added). Despite finding the exclusion to be plain and unambiguous, this Court held that the exclusion was completely unenforceable–even above the minimum required uninsured limits– because it was contrary to the statute and the public policy behind uninsured coverage. *Jenkins*, 230 W.Va. at 351, 738 S.E.2d at 17.

Like United Financial here, both insurers in *Jenkins* relied upon this Court's decision in *Deel v. Sweeney*, 181. W.Va. 460, 383 S.E.2d 92 (1989) to argue that the government owned vehicle exclusion should be upheld (i.e. enforced above the minimum limits) because "insurers 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 to not conflict with the spirit and intent of the uninsured and underinsured motorists statutes." *Jenkins*, 230 W.Va. at 348-349, 738 S.E.2d at 14-15 (quoting Syl. pt. 3, *Deel, id.*); *See* Resp. Brief, 14. Also, like United Financial argues here, an insurer in *Jones* argued that the exclusions at issue in *Jenkins* should be upheld because they were approved by Insurance Commissioner. *Id.; See* Resp. Brief, 15. In *Jenkins*, this Court rejected both arguments. Instead, this Court found no statutory authority in any of the motor vehicle statutes or regulations that affirmatively permit an insurer to deny uninsured coverage because a vehicle involved in an accident was government owed. *Id.* Thus, consistent with the Petitioner's position, this Court held that a government owned exclusion for uninsured motorist coverage is against the public policy of West Virginia, and thus, is **void** and **unenforceable**–even above the mandatory minimum limits–despite the exclusion being unambiguous and approved by the Insurance Commissioner. *Jenkins*, 230 W.Va. at 351, 738 S.E.2d at 17. Therefore, to hold that the Employer's Liability exclusion is enforceable above the minimum financial responsibility limits, despite the lack of statutory authority for the exclusion and that it is against public policy, would require this Court to completely ignore the prior precedent set forth in *Jenkins*.

United Financial argues *Jenkins* has no applicability because the certified question involves liability coverage, not uninsured coverage. *See* Resp. Brief, 10. However, United Financial fails to recognize the similarities of the statutes and public policies governing both liability and uninsured motorist coverage in West Virginia.

Uninsured coverage and liability coverage are governed by similar statutory provisions and public policies, making the holding in *Jenkins* applicable to this case. Both the uninsured statute at issue in *Jenkins* and W.Va. Code § 33-6-31(a) mandate 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). Also, both liability coverage and uninsured coverage are required coverages in every automobile policy issued in West Virginia and every policy must have at least a statutorily mandated minimum amount of both liability and uninsured coverages. *See* W.Va. Code § 33-6-31(a)-(b); W.Va. Code § 17D-4-2. Further, 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. Thus, the holding in *Jenkins* is absolutely applicable to this case and supports the Petitioner's argument that the Employer's Liability Exclusion is totally unenforceable–even above the minimum financial responsibility limits—and the full $1 million of liability limits under the Policy are available for Mr. Ball's claim against Mr. Perry.

Another case relied upon by United Financial is *Imgrund v. Yarborough*, 199 W.Va. 187, 483 S.E.2d 533 (1997), which involved an "owned, but not insured" vehicle exclusion in relation to uninsured motorist coverage. *See* Resp. Brief, 14. In *Imgrund*, this Court held that an "owned, but not insured" exclusion for uninsured motorist coverage is enforceable above the mandatory minimum required uninsured limits. Syl. pt. 4, *Imgrund v. Yarborough*, 199 W.Va. 187, 483 S.E.2d 533 (1997). *Imgrund* is consistent with this Court's precedent of simply applying W.Va. Code § 33-6-31, as written. In *Imgrund*, an insured was seeking coverage under a policy for a vehicle that was not insured under the policy–i.e. no premium was paid by the insured for the owned, but not insured vehicle. Excluding coverage for a vehicle not covered under the insurance policy is allowed by W.Va. Code § 33-6-31(a) and (b), because the statutes only require the policy to cover the vehicle insured under the policy issued. *See* W.Va. Code § 33-6-31(a) and (b). Since the exclusion did not

violate the omnibus statute, the exclusion was allowed to operate above mandatory minimum uninsured limits. The exclusion was not operable below the mandatory minimum uninsured limits, because like the limits prescribed by W.Va. Code § 17D-4-2, the mandatory minimum uninsured limits are the floor of coverage required, regardless of any exclusions to the contrary. *See* Syl. pts. 2 and 3, *Imgrund*, 199 W.Va. 187, 488 S.E.2d 533. Again, the *Imgrund* decision is consistent with the Petitioner's position and the way this Court has always analyzed policy exclusions and the omnibus statutes.

United Financial also cites to *Deel*, where the Court examined an exclusion for optional underinsured motorist coverage and observed that terms, conditions, and exclusions can be included in the policy for underinsured coverage as may be consistent with the premiums charged. *See* Resp. Brief, 14; *Deel*, 181 W.Va. 460, 383 S.E.2d 92. However, *Deel* involved **optional** underinsured coverage, not mandatory liability coverage for permissive users. (emphasis added). Unlike with the mandatory minimum liability and uninsured limits, there is no floor of underinsured coverage required in West Virginia, the optional coverage just must be offered by insurer. *See* W.Va. Code 33-6-31(b); *Deel v. Sweeney*, 181 W. Va. at 463, 383 S.E.2d at 95; *Thomas v. State Farm Mut. Auto. Ins. Co.*, No. 11-0750 (W.Va. Supreme Court, October 19, 2012)(memorandum decision). Further, as discussed above, this Court in *Jenkins* rejected any reliance on *Deel* to allow an exclusion to operate above the minimum mandatory uninsured coverage, where no statute allowed the exclusion and public policy disfavored the exclusion. *Jenkins*, 230 W.Va. at 348-349, 738 S.E.2d at 14-15.

Finally, United Financial also cites to an unpublished opinion of the United States Court of Appeals for the Fourth Circuit for the proposition that each time this Court has found that an exclusion violated state law, it has permitted the exclusion to operate above limits. *See* Resp. Brief,

11; *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, as it completely ignores the statutory and public policy distinctions where this Court has allowed exclusions to apply above the minimum financial responsibility limits and where it is has not. To support its over-reaching proposition, the *Continental* Court cited to *Jones* and *Dotts*. *Id.* at *3. However, as set forth above, the exclusions at issue in *Jones* (named driver exclusion) and *Dotts* (intentional tort exclusion) are both specifically allowed by the clear language of W.Va. Code § 33-6-31(a) and thus, were permitted to operate above the mandatory minimum limits. *See Jones,* 177 W.Va. at 766, 356 S.E.2d at 637; Syl. pt. 4, *Dotts,* 182 W.Va. 586, 390 S.E.2d 568.

No such statutory authority exists to allow the operation of the Employer's Liability Exclusion above the mandatory minimum limits. Therefore, the amount of coverage owed for Mr. Ball's claims against the permissive user (Mr. Perry) is the amount of liability coverage occasioned within the United Financial Policy–which is $1 million. *See* W.Va. Code § 33-6-31(a) –specifically allowed by statute) and the exclusion in *Dotts* (intentional tort- allowed by statute and favored by public policy) are distinguishable from the Employer's Liability exclusion in the United Financial policy. Further, 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; *Jenkins*, 230 W.Va. 335, 738 S.E.2d 1.

C. West Virginia public policy dictates that the Employer's Liability Exclusion be held unenforceable–even above the minimum financial responsibility 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 the Supreme Court of Appeals of West Virginia 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). Despite the strong public policy to maximize insurance for permissive users, United Financial cites to W.Va. Code § 33-6-31(k) to support the conclusion that the Employer's Liability exclusion is enforceable above the minimum financial responsibility limits. W.Va. Code § 33-6-31(k) permits insurers to incorporate "such terms, conditions and exclusions as may be consistent with the premium charged." W.Va. Code § 33-6-31(k). In this case, the declarations state the Policy provides $1 million of liability coverage. JA 12, 22. United Financial has not presented any evidence that the premiums were appropriately adjusted for reducing the liability limits from $1 million to the mandatory minimum limits ($25,000).

Further, W.Va. Code § 33-6-31(k) does not give insurers carte blanche authority to incorporate exclusions that violate the motor vehicle statutes and West Virginia public policy. *See* Syl. Pt. 2, *Burr,* 178 W.Va. 398, 359 S.E.2d 626 (holding "[a]ny provision in an insurance policy which attempts to contravene W.Va. Code, 33–6–31(a), is of no effect"); *Universal Underwriters Ins. Co.*, 185 W.Va. 606, 408 S.E.2d 358; *Jenkins*, 230 W.Va. 335, 738 S.E.2d (stating "[t]his Court will 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 ... motorist statutes provisions")(citations omitted). In fact, where an exclusion violates public policy and there is no statutory authority to allow the exclusion, this Court has held that such an exclusion is

unenforceable–even above statutory required coverage limits.[10] *See Jenkins*, 230 W.Va. at 351, 738 S.E.2d at 17; *Burr*, 178 W. Va. at 404-05, 359 S.E.2d at 633.

Finally, United Financial argues that this Court's decision in *Universal Underwriters* support its argument that the Employer's Liability Exclusion can operate above the minimum limits, or, at least does not support the Petitioner's position. *See* Resp. Brief, 16-17. However, in *Universal Underwriters*, this Court addressed whether, in light of the omnibus statutes, an insurer could deny coverage to a permissive user because the permissive user deviated from the scope of permission. *Universal Underwriters*, 185 W.Va. at 608-609, 408 S.E.2d at 360-361. This Court determined that neither of the omnibus statutes allow a denial or limitation of liability coverage based on the scope of permission. *Universal Underwriters*, 185 W.Va. at 612, 408 S.E.2d at 364. Thus, this Court held in *Universal* that the policy provided liability coverage to a permissive user who had initial permission to use the vehicle, despite later deviating from the scope of the initial permission. *Id.* at 613, 365. In doing so, this Court adopted the "initial permission" rule for permissive users. *Id.* 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.

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[10] United Financial also argues a court's ability to refuse to enforce a contract on public policy grounds is limited to only those instances in which the contract violates "some explicit public policy" that is "well defined and dominant, ..." *See* Resp. Brief, 15 (citing *CAMICO Mut. Ins. Co. v. Hess, Stewart & Campbell, P.L.L.C.*, 240 F. Supp. 3d 476, 485-486 (S.D. W.Va. 2017). However, what United Financial fails to recognize is West Virginia's well defined, dominant, and explicit public policy that 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). *See Universal Underwriters*, 185 W.Va. at 611-612, 408 S.E.2d at 363-364; Syl. Pt. 2, *Burr*, 178 W.Va. 398, 359 S.E.2d 626. Thus, to the extent the *CAMICO* decision is persuasive authority, it actually supports the Petitioner's argument that the Employer's Liability Exclusion is completely unenforceable–even above the minimum financial responsibility limits.

As this Court determined in *Universal Underwriters*, neither of the omnibus statutes allow a denial or limitation of liability coverage based on who is injured by the permissive user–in this case an employee of the named insured. The only exception to the omnibus requirements 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, because Mr. Ball's claims are not against his employer, but against a third-party, Mr. Perry. *Ball*, 941 F.3d 710, 716 (4th Cir. 2019); *Henry*, 203 W.Va. at 177-178, 506 S.E.2d at 620-621; *Miralles*, 216 W.Va. 91, 602 S.E.2d 534. Therefore, because the Employer's Liability Exclusion violates the omnibus requirements and there is no statutory or public policy exception to allow the exclusion, the exclusion is unenforceable–even above the minimum financial responsibility requirements.

United Financial agreed to pay for bodily injury damages for which an insured (like Mr. Perry) becomes legally responsible because of an accident arising out of the use of insured auto, "subject to the limits of liability," which are $1 million. JA 22, 153. Thus, the amount of coverage for a third-party permissive user (Mr. Perry) "occasioned with the coverage of the policy" is $1 million. *See* W.Va. Code § 33-6-31(a). The Employer's Liability Exclusion violates the omnibus provisions of W.Va. Code § 33-6-31(a). There is no statutory exception to allow the exclusion and the exclusion violates public policy in West Virginia to **maximize** insurance for permissive users as a means to provide greater protection for the public. Accordingly, the Employer's Liability Exclusion is unenforceable–even above the West Virginia minimum financial responsibility limits. *See Jones*, 177 W.Va. at 766, 356 S.E.2d at 637; *Burr*, 178 W.Va. at 404-405, 359 S.E.2d at 633; *Dotts*, 182 W.Va. 586, 390 S.E.2d 568; *Universal Underwriters*, 185 W.Va. at 611-612, 408 S.E.2d at 363-364; *Jenkins*, 230 W.Va. 763, 356 S.E.2d 634.

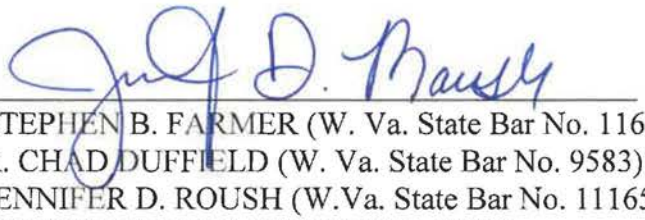
CONCLUSION

For the reasons set forth above and in the initial Petitioner's Brief, the Petitioner, Greg Allen Ball, respectfully requests this Court determine that the Employer's Liability Exclusion is void and unenforceable–even above the minimum financial responsibility limits–and the full liability coverage under the United Financial Policy ($1 million) 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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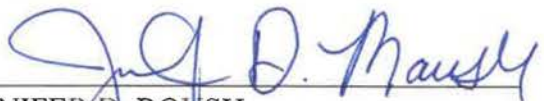

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