IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 22-0155

GREG ALLEN BALL,

Petitioner,

v.

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

Respondents.

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

RESPONDENT'S BRIEF

Susan R. Snowden
W.Va. State Bar No. 3644
Jackson Kelly PLLC
310 West Burke Street
Martinsburg, WV 25401
Telephone: (304) 260-4947
Facsimile: (304) 263-7110
E-mail: susan.snowden@jacksonkelly.com
Counsel for Respondent

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I. CERTIFIED QUESTION

This matter appears before this Court upon a question certified by the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"). The Fourth Circuit certified the question by Order dated February 23, 2022 in case number 20-1452 pursuant to Rule 17(b) of the Rules of Appellate Procedure. JA 577-590.

The Question certified from the Fourth Circuit, and accepted by this Court on April 14, 2022, is as follows:

> 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, West Virginia Code section 17D-1-1 et *seq.*?

JA 580.

II. STATEMENT OF THE CASE

As stated by the Fourth Circuit in its Order of Certification, "The facts relevant to the certified question are undisputed." JA 580.

On October 25, 2016, Milton Hardware LLC ("Milton Hardware") was performing a construction job at Rodney Perry's ("Perry") home. JA 580. At some point during construction, Milton Hardware's owner gave Perry permission to move a company truck. JA 581. As homeowner Perry backed up the truck owned by Milton Hardware, he accidentally struck Milton Hardware employee Greg Ball ("Ball"). As a result of the incident, Ball sustained serious injuries. JA 581.

At the time of the accident, Milton Hardware was issued a commercial automobile liability insurance policy with United Financial Casualty Company. JA 11-61; 142-192 and 581.

The policy at issue provided liability coverage to Milton Hardware and anyone using the company's vehicles with permission. JA 581. Based on this provision, Ball demanded United Financial indemnify him for his injuries. JA 582. United Financial denied coverage and commenced the action for declaratory judgment against the named insureds, Milton Hardware and Builders Discount, LLC, as well as Perry and Ball in the United Stated District Court for the Southern District of West Virginia. ("District Court") JA 580.

Cross motions for summary judgment were presented by the parties to the District Court concerning the aforementioned coverage issues. Upon consideration of the same the District Court concluded that because it was undisputed that Ball "sustained his injuries while he was working within the course of his employment with Milton Hardware" his injuries fell within the scope of the Worker's Compensation exclusion. JA 328. On this basis, the District Court held that Barr was "barred from liability coverage under the policy." JA 329-330. The court also rejected Ball's argument that W. Va. Code § 33-6-31(a) required United Financial to extend liability coverage to Perry as a permissive user of an insured automobile, reasoning that the exception in W. Va. Code § 33-6-31(h) applied to eliminate this requirement. JA 380. Notably, the District Court did not address the applicability of the Employee Indemnification and Employer's Liability Exclusion (hereinafter "Employer's Liability Exclusion") since it concluded that Ball was "barred from liability coverage pursuant to the workers' compensation conclusion" as found in the United Financial Policy. JA 331.

Subsequently, Ball appealed the District Court's decision to the Fourth Circuit. After hearing oral arguments on the matter, the Fourth Circuit issued its opinion on October 30, 2019. See *United Fin. Cas. Co. v. Ball*, 941 F.3d 710, 712 (4th Cir. 2019), hereinafter referred to as "United Financial 1". In United Financial 1 the Fourth Circuit concluded that United Financial

could not deny liability coverage to Perry based on the Worker's Compensation exclusion. The Fourth Circuit also concluded, even though the District Court did not address the matter in the order appealed, that Employer's Liability Exclusion could not operate as a complete denial of liability coverage for Perry because such would be in violation of West Virginia's omnibus clause (W. Va. Code § 33-6-31(a)). However, the Fourth Circuit did not address whether said exclusion was enforceable as to amounts above the mandatory minimum limits set forth in W. Va. Code § 17D-4-2. *United Fin. Cas. Co.*, 941 F.3d at 717. Based upon the foregoing, the Fourth Circuit in United Financial 1 vacated the District Court's May 14, 2018 Judgment Order and remanded the matter "for further proceedings as to any unresolved issues raised by the parties." *United Fin. Cas. Co. v. Ball* 941 F.3d at 717.

Following remand of the matter, United Financial presented the District Court with a Motion for Summary Judgment on unresolved coverage issues raised following the issuance of the Fourth Circuit's ruling concerning the Employer's Liability Exclusion. JA 423-432. In its Motion for Summary Judgment, United Financial argued to the District Court that the exclusion was unenforceable *only up to the limits of financial responsibility* required by W. Va. Code § 17D-4-2. Specifically, W. Va. Code § 17D-4-2 provides that the minimum "proof of ability to respond in damages for liability" at $25,000 for bodily injury to a person in a motor vehicle accident. United Financial argued the exclusion was enforceable beyond that minimum in reliance upon prior decisions rendered by this Court. JA 430-431 and 465-474. In response, Ball and Perry argued the exclusion was entirely unenforceable, even beyond the mandatory minimum limit. JA 433-441 and 442-464.

Upon consideration of the briefs presented and oral argument, the District Court concluded that Ball's and Perry's arguments were "without merit." JA 483. Specifically, the

District Court rejected Ball's "sweeping interpretation that any policy exclusion in violation of state law is void above the mandatory limits unless a statute or public policy affirmatively allows the exclusion." JA 482. In that regard, the District Court ruled that the Employer's Liability Exclusion in United Financial's policy was "unenforceable up to the minimum insurance coverage required by state law but operative as to any amount above the state's mandatory minimum limits." JA 483.

Following issuance of the District Court's March 31, 2020 Order, Ball once again appealed the matter to the Fourth Circuit. JA 485-486. The parties have argued the matter as to the amount of coverage to the Fourth Circuit and it is that presentation that led to the certified question to this Court. JA 577-590 which is now before this Court.

III. SUMMARY OF ARGUMENT

The District Court was correct when it held that the otherwise valid and enforceable Employer's Liability Exclusion in the United Financial Policy was void *only up to the minimum insurance coverage required* under West Virginia law, but operated as an exclusion to any amount above the statutory minimum. Moreover, prior decisions of this Court which have voided exclusions have only been found invalid for purposes of application of the amount of coverage required by West Virginia's Financial Responsibility statute.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent maintains that oral argument is necessary pursuant to the criteria outlined under Rule 18(a) of the West Virginia Rules of Appellate Procedure because: (a) the parties have not agreed to waive oral argument; (b) the dispositive issues have not previously been authoritatively decided by this Court and the decisional process would be significantly aided by oral argument. The Respondent further states that this case is suitable for oral argument

pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure because it involves: (1) assignments of error in the application of settled law; and (2) the unsustainable exercise of discretion where the law governing that discretion is settled.

V. ARGUMENT

The District Court correctly concluded that the Employer's Liability exclusion in the United Financial Policy, is unenforceable only up to the minimum insurance coverage required under West Virginia law but operates as to any amount above the statutory minimum and the Petitioner's arguments to the contrary as observed by the District Court and discussed hereinbelow are without merit.

A. Petitioner's "Affirmatively Allowed" argument is not supported by case law.

In the instant case, the Employee Indemnification and Employer's Liability exclusion of the United Financial Policy states as follows:

> 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;...
>
> This exclusion applies:
>
> a. Whether the insured may be liable as an employer or in any other capacity...

JA 25 and 156.

Petitioner argues, as it did below, that "[a]n exclusion that violates W. Va. 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." Brief of Petitioner, p. 7. This position will hereafter be referred to as the "Affirmatively Allowed" argument. However, this theory ignores the fact that W. Va. Code § 33-6-31(a) ["the omnibus

clause"] and W. Va. Code § 17D-4-2 [minimum financial responsibility law] actually work together to define minimum motor vehicle insurance coverage requirements in West Virginia.

The Affirmatively Allowed theory at issue is based upon the Petitioner's proposition that "if an exclusion violates W. Va. Code § 33-6-31 *and there is no statutory or pubic [sic] policy allowing the type of exclusion*, then the exclusion will be unenforceable and the full liability coverage under a policy will be available." JA 455. The authority relied upon by Petitioner in support of this position, which was rejected by the District Court, were the opinions of this Court in *Gibson v. Northfield Ins. Co.*, 219 W. Va. 40, 631 S.E.2d 598 (2005) and *Jenkins v. City of Elkins*, 230 W. Va. 335, 738 S.E.2d 1 (2012). Petitioners argue that since there is no applicable statutory language that *affirmatively allows* the Employer's Liability Exclusion, said exclusion cannot be used to reduce the policy's coverage to the minimum limits.

Petitioner maintains that *Gibson* supports his position that a policy exclusion which is not affirmatively allowed by statue is void, even above statutory limits. However, this Court's decision in *Gibson* does not support Petitioner's proposition. *Gibson* involved a motorcycle accident in Charleston, West Virginia. The decedent was struck by an ambulance, owned by the City of Charleston, which was responding to a request for emergency services. *Gibson,* 291 W.Va. at 43, 631 S.E.2d at 601. The decedent's estate filed a declaratory judgment action concerning the validity of a "defense within limits" provision in a municipality's insurance policy. *Id.* The Court found that the "defense within limits" provision at issue in *Gibson* was in conflict with W. Va. Code § 33-6-31, and therefore void, and "as a result, the full amount of the liability limits under the policy at issue ($1 million) was available." *Gibson,* 291 W.Va. at 51, 631 S.E.2d at 609. However, it is important to note that in *Gibson* the statutory minimum amount of coverage under the policy was also $1,000,000. **In *Gibson,* the policy at issue and**

the statutory minimum financial responsibility were identical. Commenting on this distinction, the District Court of Appeals for the Northern District of West Virginia in *W. Virginia Mut. Ins. Co. v. Vargas,* 933 F. Supp. 2d 847, 857 (N.D.W. Va. 2013) opined that "Gibson held that a defense within limits provision in a municipal ambulance service's liability policy violated W. Va. Code § 16-4C-16, which requires ambulance services to maintain $1,000,000 in liability coverage, …." Logical analysis leads to the conclusion that in *Gibson* this Court could not apply the exclusion above the minimum statutory limits, because they were the same. Recognizing this failing in Petitioner's argument, the District Court correctly observed that Petitioner's "suggestion that Gibson deviates from prior cases by voiding an exclusion above the minimum mandatory limits is unsupported." JA 487-488.

Petitioner also relies upon another case involving a municipality in support of his position, specifically this Court's prior decision in Jenkins. Petitioner argues that *Jenkins* supports his position that the Employer's Liability Exclusion cannot be enforced under West Virginia law. In *Jenkins,* this Court held that a policy exclusion (the government owned vehicle exclusion) was not enforceable, even "above the mandatory limits of uninsured motorist coverage." *Jenkins,* 230 W. Va. at 351, 738 S.E.2d at 17. As correctly noted by the District Court, the facts of *Jenkins* are unique to the law of *uninsured* motorist coverage in West Virginia, and therefore, the holding of *Jenkins* is not applicable to this case.

In Jenkins this Court held that:

> [U]nder the statutory definition of "uninsured motor vehicle," a motor vehicle as to which there is no bodily injury liability insurance and property damage liability insurance, uninsured motor vehicle coverage is triggered when a person sustains an automobile injury or loss that is caused by a tortfeasor who is immune from liability. West's Ann. W. Va. Code, 33-6-31(c).

Jenkins, 230 W. Va. at 343, 738 S.E.2d at 9.

Nonetheless, this Court specifically noted that even with uninsured coverage (a statutorily mandated coverage) that the exclusion "is only enforceable above the amount subrogated...." *Jenkins,* 230 W. Va. at 352, 738 S.E.2d at 18.

This instant certified question involves *liability* coverage, *not uninsured coverage.* The *Jenkins* Court employed an analysis "considering whether the policy language is in accord with West Virginia law" and then construing the policy provision "in light of the language, purpose and intent of the applicable statute," "to contain the coverage required by West Virginia law." *Id.. See also Adkins v. Meador,* 201 W. Va. 148, 153, 494 S.E.2d 915, 920 (1997). The key factor in this Court's decision in *Jenkins* Court's to void the exclusion even above the mandatory financial limit lies in its interpretation of the purpose and intent of the uninsured motorist statute, W. Va. Code § 33-6-31(b). In determining the legislative intent of the uninsured motorist statute, the *Jenkins* Court relied upon its decision in to *State Automobile Mutual Insurance Co. v. Youler,* 183 W.Va. 556, 396 S.E.2d 737 (1990):

> [T]he legislature has articulated a public policy of full indemnification or compensation underlying ... uninsured ... motorist coverage in the State of West Virginia. That is, the preeminent public policy of this state in uninsured ... motorist cases is that the injured person be fully compensated for his or her damages not compensated by a negligent tortfeasor, up to the limits of the uninsured ... motorist coverage.

Jenkins, 230 W. Va. at 351, 738 S.E.2d at 17.

This Court in *Jenkins* Court concluded that West Virginia law, namely the uninsured motorist statute, required injured persons to be "fully compensated" "up to the limits of the uninsured... motorist coverage." *Id.* It was that law of uninsured motorist coverage which is unique to uninsured motorist coverage that formed the basis of the Court's holding. The decision in *Jenkins* is clearly limited to the law of uninsured motorist coverage and its policy

considerations, which is inapplicable to this matter. Identifying these factors and applying the same to the matter at hand, the District Court correctly concluded that this Court's holding in Jenkins was "not broad enough to support Ball's sweeping interpretation that any policy exclusion in violation of state law is void above the mandatory limits unless a statute or public policy affirmatively allows the exclusion." JA 489.

As the foregoing demonstrates, there is no precedent in West Virginia which mandates that policy exclusions must be affirmatively allowed. While insurers are obligated to comply with the minimum financial responsibility requirements promulgated in West Virginia, beyond these minimum limits, insurers and their insureds are free to bargain for policy coverages and premiums, including placing restrictions on the scope of coverage.

B. An otherwise valid and unambiguous exclusion in a motor vehicle policy which contravenes state law, is nonetheless valid and enforceable beyond minimum financial responsibility requirements.

West Virginia precedent concerning the enforcement of an otherwise valid and unambiguous exclusion beyond mandatory minimum financial limits was favorable referenced by the Fourth Circuit in *Nationwide Mut. Ins. Co. v. Cont'l Ins. Co.*, 943 F.2d 49 (4th Cir. 1991). In this unpublished opinion, the Fourth Circuit recognized that pursuant to West Virginia law, an otherwise valid and unambiguous exclusion in a motor vehicle policy which contravenes state law, is nonetheless valid and enforceable beyond minimum financial responsibility requirements.

Acknowledging that insurers and their insureds are free to bargain for policy coverages and premiums, which includes exclusion, the Fourth Circuit in *Nationwide Mut. Ins. Co.* in specifically noted, "[w]hen West Virginia has found that an attempt to exclude or restrict coverage violated state law, it has voided the restriction or exclusion *only up to the level of minimum coverage. It has permitted it to operate above this minimum.*" *See also Howard v.*

Prop. Cas. Ins. Co. of Hartford, No. CIV.A. 2:09-1027, 2011 WL 4596715, at *3 (S.D.W. Va. Sept. 30, 2011)("Furthermore, although the West Virginia Supreme Court of Appeals has made it clear that the mandatory requirement of insurance coverage under W. Va. Code, 17D–4–2 takes precedence over any contrary or restrictive language in an automobile liability insurance policy, **it has consistently found exclusionary policy language to be enforceable above the statutorily mandated minimum limit in other contexts**.")(citations omitted and emphasis added).

In like manner, the District Court below correctly relied on existing precedent to support its ruling. The District Court's analysis was that this Court has held that policy exclusions that violate the state's minimum coverage requirements set forth in the omnibus clause and Safety Responsibility Law (W. Va. Code § 17D-1-1 *et seq.*) are void. However, the District Court appropriately observed that this Court has permitted such voided exclusions to apply above the minimum coverage requirements. JA 478-480. The District Court also recognized the Fourth Circuit's finding in United Financial 1 that "the language of the Employee Indemnification and Employer's Liability exclusion, considered alone, *is sufficiently broad to deny Perry coverage for his liability to Ball....*" *United Fin. Cas. Co. v. Ball*, 941 F.3d 710, 717 (4th Cir. 2019). In reliance upon the foregoing, the District Court followed *Nationwide Mut. Ins. Co. v. Cont'l Ins. Co.*, 943 F.2d 49 (4th Cir. 1991), and similar cases for the proposition that once the public policy concerns at the heart of the omnibus clause and minimum financial responsibility limits are satisfied, the Employer's Liability Exclusion is valid and enforceable. JA 478-480.

One particular cased relied upon by the District Court was *Jones v. Motorists Mut. Ins. Co.*, 177 W. Va. 763, 356 S.E.2d 634 (1987)(holding abrogated on other grounds by W. Va. Code § 33-6-31(h)). In this matter, this Court held that an exclusion in an insurance policy

which contravenes public policy, as stated in either the omnibus clause or minimum financial responsibility statute, is void, *but only up to the minimum financial responsibility limits in W. Va. Code § 17D-4-2.* In *Jones* the insured purchased a policy which specifically excluded her teenage son from coverage pursuant to a "named driver exclusion". *Jones*, 177 W.Va. at 764, 356 S.E.2d at 635. Upon consideration of the same, this Court held that such exclusions are void as to, *but only up to the limits of financial responsibility* required by W. Va. Code § 17D–4–2. Notably, this Court stated that "[a]bove those mandatory limits, however, ... a named driver exclusion endorsement is valid..." *Jones*, 177 W.Va. at 766, 356 S.E.2d at 637. In support of its decision, this Court further stated:

> There does, indeed, appear to be a lack of harmony between this omnibus statute and the specific requirements of Chapter 17D of the Code concerning financial responsibility and minimum levels of insurance. Nonetheless, a common sense reading of these statutes in their entirety leads us to conclude that the legislature intended in Chapter 17 to provide a minimum level of financial security to third-parties who might suffer bodily injury or property damage from negligent drivers. But beyond the mandatory twenty thousand dollar bodily injury for one person, forty thousand dollar bodily injury for two or more persons, and ten thousand dollar property damage minimum coverage requirements, Code 33–6–31(a) [1982] allows an insurer and an insured to agree to a "named driver exclusion" endorsement.

Jones, 177 W. Va. at 766, 356 S.E.2d at 637.

The District Court also relied upon the case of *Dotts v. Taressa J.A.*, 182 W. Va. 586, 390 S.E.2d 568 (1990), wherein this Court applied the same rationale to intentional tort exclusions in motor vehicle liability insurance policies. *Dotts* involved an underlying tort case for damages resulting from Mr. Dotts sexual assault of a Fairmont Marion County Transit Authority passenger. *Dotts,* 177 W.Va. at 587, 390 S.E.2d at 569. In *Dotts,* this Court stated, "[w]e, therefore, conclude that an intentional tort exclusion in a motor vehicle liability insurance policy is precluded under our Safety Responsibility Law up to the minimum insurance coverage

required therein. The policy exclusion will operate as to any amount above the statutory minimum." *Dotts,* 177 W.Va. at 574, 390 S.E.2d at 592.

Additionally, the District Court correctly relied upon the principles addressed in "owned but not insured" exclusions in motor vehicle liability insurance policies as established in the cases of *Imgrund v. Yarborough*, 199 W. Va. 187, 188, 483 S.E.2d 533, 534 (1997); *and Deel v. Sweeney*, 181 W.Va. 460, 383 S.E.2d 92 (1989) ("owned but not insured" exclusions are valid with respect to underinsured motorist coverage.").

In *Imgrund*, this Court addressed whether a motorcyclist could recover additional uninsured motorist benefits from a policy of insurance issued to his parents as a result of injuries he sustained in an accident despite the existence of an owned but not insured exclusion. *Id.* Upon consideration of the matter, this Court issued a Syllabus which stated:

> An "owned but not insured" exclusion to *uninsured* motorist coverage is valid and enforceable above the mandatory limits of *uninsured* motorist coverage required by W. Va. Code §§17D-4-2 (1979) (Repl. Vol. 1996) and 33-6-31(b)(1988) (Supp. 1991). To the extent that an "owned but not insured" exclusion attempts to preclude recovery of statutorily mandated minimum limits of *uninsured* motorist coverage, such exclusion is void and ineffective consistent with this Court's prior holding in Syllabus Point 2 *of Bell v. State Farm Mutual Automobile Insurance Company*, 157 W.Va. 623,206 S.E.2d 147 (1974).

Syllabus pt. 4, *Imgrund*, 199 W. Va. at 188, 483 S.E.2d at 534.

In *Deel*, this Court provided an analysis of exclusionary clauses in a policy of *underinsured* motorist coverage. This Court specifically noted that there is a difference in analysis of policy exclusions contained in *optional underinsured* motorist coverage, not *mandatory uninsured* motorist coverage. This Court observed:

> The insurer must offer underinsured motorist coverage; the insured has the option of taking it; and terms conditions, and exclusions can be included in the policy as may be consistent with the premiums charged.

Deel, 181 W.Va. 463, 383 S.E.2d at 95.

The District Court, having reviewed *Imgrund* and *Deel* stated that "[t]ogether, these cases support the general principle that policy exclusions violating state law are generally enforceable above the state's minimum limits." JA 486.

C. Public Policy in West Virginia does not dictate that the Employee Indemnification and Employer's Liability exclusion in the United Financial Policy is totally unenforceable.

The Petitioner's arguments that public policy is violated when a policy exclusion prevents an injured party from full recovery for their damages is an incorrect statement of West Virginia law. The West Virginia Legislature has stated that insurers should be free to incorporate exclusions in their policies "as may be consistent with the premium charged." W. Va. Code §33-6-31(k). The Policy at issue in this case, which includes the Employer's Liability Exclusion, is a form policy (Form 6912) which required pre-approval from the West Virginia Insurance Commissioner's Office for its coverages, exclusions, and corresponding premium. JA 25 and 156.

In the case of *CAMICO Mut. Ins. Co. v. Hess, Stewart & Campbell, P.L.L.C.,* 240 F. Supp. 3d 476, 485–86 (S.D.W. Va. 2017), the Southern District Court recognized and agreed that:

> ...the authority of a court to refuse to enforce a contract on public policy grounds is limited to those situations in which the contract violates "some explicit public policy" that is "well defined and dominant, and [which] is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." **The usual and most important function of the courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligations on the pretext of public policy**, unless it clearly appears that they contravene public right or the general welfare.

Id. (Internal citations omitted and emphasis added). The precedent established in the Southern District is contrary to the argument advanced by the Petitioner that policy exclusions must be "affirmatively allowed."

Petitioner's citation to and reliance upon *Universal Underwriters Ins. Co. v. Taylor,* 185 W. Va. 606, 408 S.E.2d 358 (1991), was not persuasive to the District Court. Just as the Fourth Circuit's Opinion in *United Financial I*, the *Universal Underwriters* decision did not address the question of the scope of available coverage as required by West Virginia law. *Universal Underwriters* stemmed from a declaratory judgment action brought by an insurer to determine whether coverage under a policy issued to an automobile dealership extended to a customer who stole a vehicle after receiving the dealership's permission to drive it pursuant to W. Va. Code § 33-6-31. Ultimately this Court determined that the insurance policy provided coverage to that person when he was subsequently involved in an automobile accident. Such coverage, however, was only provided since the driver had initially obtained the express permission of the owner of the vehicle to use the vehicle. In reaching this decision, this Court adopted the "initial permission" rule regarding permissive users of motor vehicles, because "the 'initial permission' rule rather than the 'minor deviation' rule best comports with" both of West Virginia's omnibus statutes, W. Va. Code § 33-6-31(a) and W. Va. Code § 17D-4-2 (minimum financial responsibility statute). 185 W. Va. at 612, 408 S.E.2d at 364.

Of particular note for the matter at hand was this Court's concern with, and discussion of, promulgated financial responsibility policies in reaching its decision. The *Universal Underwriters* Court cited favorably to the *Jensen* decision from the New Mexico Supreme Court, which stated:

> [W]e also believe that it was the intention of the legislature that permittees who are guilty of that or similar transgressions be deemed insured under the financial responsibility policies of this state.

Allstate Ins. Co. v. Jensen, 109 N.M. 584, 589 (N.M. 1990). This Court also cited favorably to *Odolecki v. Hartford Accident Indem. Co.,* 55 N.J. 542, 549, 264 A.2d 38, 42 (1970), where the Supreme Court of New Jersey stated that the initial permission rule promotes the policy of "assuring that all persons wrongfully injured have financially responsible persons to look to for damages." *Universal Underwriters* 185 W. Va. at 611-612, 408 S.E.2d 363-364. In reliance upon the foregoing in conjunction with W. Va. Code § 33-6-31(a) and W. Va. Code § 17D-4-2, this Court noted that "the legislature's enactment of the omnibus clause evinces an unmistakable intent to maximize insurance coverage for the greater protection of the public and that effectuation of such intent requires a broad interpretation of the statute . . . ." *Id.*

Contrary to Petitioner's position, which was not adopted by the District Court, the *Universal Underwriters* decision reflects the principle that interpretation of a policy exclusion must reflect the intent of both of West Virginia's omnibus statutes, to include the minimum financial responsibility statute. As the District Court aptly noted with respect to *Universal Underwriters*, "maximiz[ing] insurance coverage" refers to the court's liberal approach to defining coverage under the state's omnibus clause and minimum financial responsibility law. The court did not hold this principle governs the applicability of policy exclusions above the state's minimum coverage limits." JA 482.

VI. CONCLUSION

For the above reasons, the Certified Question should be answered in the negative and this Court should certify to the Fourth Circuit that:

> 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, the exclusion is void *only as to the minimum liability coverage required by the Motor Vehicle Safety Responsibility Law,* West Virginia Code section 17D-1-1 et *seq.* but that the exclusion is enforceable above those limits imposed by the legislature as mandatory.

Respectfully Submitted,

UNITED FINANCIAL CASUALTY COMPANY,
BY COUNSEL

JACKSON KELLY PLLC

by ERK w/permission

Susan R. Snowden
WVSB# 3644
310 West Burke Street
Martinsburg, WV 25401
Telephone: (304) 260-4947
Facsimile: (304) 263-7110
E-mail: susan.snowden@jacksonkelly.com

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July 2022, I have served the foregoing upon the following persons by electronic mail and/or by depositing a true and accurate copy of this pleading in the United States Mail, postage prepaid, addressed as follows:

Stephen B. Farmer
Jennifer D. Roush
Farmer, Cline & Campbell, PLLC
P. O. Box 3842
Charleston, WV 25338
Counsel for Appellant

Sean C. Workowski
Frith Anderson & Peake, P.C.
26 Franklin Road, SW
P.O. Box 1240
Roanoke, VA 24066-1240
Counsel for Rodney Perry

Todd A. Mount
Shaffer & Shaffer, PLLC
330 State Street
Madison, WV 25130
Counsel for Rodney Perry

Jeffrey Holmstrand
Grove, Holmstrand & Delk, PLLC
44 ½ Fifteenth Street,
Wheeling, WV 26003

Milton Hardware, LLC
1 Fair Ground Road
Milton, WV 25541

Builders Discount, LLC
1405 W. Main S.E. #A
Milton, WV 25541

Susan R. Snowden by ERK w/permission