INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NATIONWIDE INSURANCE COMPANY OF AMERICA,
DEFENDANT BELOW, PETITIONER

v **NO. 23-ICA-491**

BRITTNEY DUTY, GREGORY DUTY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF BEVERLY DUTY,
PLAINTIFFS BELOW, RESPONDENTS

and

PAUL CONLEY AND LULA CONLEY,
DEFENDANTS BELOW, RESPONDENTS

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred in concluding that liability insurance coverage exists for the September 19, 2019, fatal collision caused by Paul Conley, which is contrary to the plain and unambiguous language of the New Policy, and wholly inconsistent with the plain intent of the parties to that Policy, that Paul Conley was an excluded driver.

2. The Circuit Court erred in concluding that, to the extent it found that ambiguity results from the New Policy's Endorsement language and the listing of Paul Conley as an excluded driver in the New Policy Declarations, liability insurance coverage exists for the September 12, 2019 fatal collision caused by him in contravention of undisputed extrinsic evidence demonstrating the plain intent of the parties.

3. The Circuit Court erred by granting the Plaintiffs' motion for summary judgment.

4. The Circuit Court erred by denying Nationwide's motion for summary judgment.

STATEMENT OF THE CASE

A. Procedural History.

On April 1, 2021, Respondents Brittany Duty and Gregory Duty, individually and as administrator of the Estate of Beverly Duty (collectively "the Dutys"), initiated this action against Respondents Paul Conley and Lula Conley (collectively "the Conleys") , and Petitioner Nationwide Insurance Company of America ("Nationwide"), in the Circuit Court of Logan County, West Virginia. The Dutys assert a declaratory judgment action against Nationwide, seeking an Order declaring that it failed to properly execute a restrictive endorsement of liability coverage for an insurance policy covering automobiles owned by its then insureds, Shelvey Conley and Lula Conley, and therefore owes liability coverage in connection with a September 2019 fatal collision caused by

their son, Paul Conley. The Conleys thereafter filed a first party bad faith claim against Nationwide. By Agreed Order entered on May 11, 2022, the coverage issues raised by the Dutys' declaratory judgment action were bifurcated from all other claims, and only those coverage issues have been addressed by the Circuit Court.

The Dutys and Nationwide both filed motions for summary judgment and corresponding supporting and opposing memoranda of law relating to the Dutys' declaratory judgment action against Nationwide, and a hearing on said Motions was held by the Circuit Court on January 11, 2023. By Order dated October 3, 2023, the Circuit Court granted the Dutys' motion for summary judgment and denied Nationwide's motion for summary judgment, concluding that the restrictive endorsement in Nationwide's Policy failed to specifically and with particularity identify Paul Conley as an excluded driver, and thus coverage for the September 2019 accident exists under the Policy. It is from that Order that Nationwide has filed the instant appeal.[1]

B. Factual Background.

1. The Old Policy with Nationwide.

Prior to May 23, 2016, automobiles owned by Shelvey and Lula Conley were insured by Nationwide under Policy No. 9247H 035583 ("the Old Policy"). [Joint Appendix, at 193].[2] Their adult son, Respondent Paul Conley, also was an insured driver under the Old Policy. [JA 198].

On April 18, 2016, Nationwide issued to Shelvey Conley a written "Notice of Cancellation" advising him that that it would be cancelling the Old Policy as a result of revocation of Paul Conley's

[1] Pursuant to the Stipulation of Final Judgment Order as to Count V, entered on October 16, 2023, the parties have stipulated and agreed that the Circuit Court's Order is a "final judgment" of the coverage issue within the meaning of *W. Va. R. Civ. P.* 54, and is therefore ripe for appeal. [JA 629-634].

[2] Citations to the Joint Appendix will hereinafter be referenced as "JA ___".

driver's license, as well as invalid license information for Paul Conley's wife, Marie Conley. [JA 193-194, 202-203]. That Notice of Cancellation was issued as required by Nationwide's West Virginia Insurability Guidelines, which prohibit issuance of insurance coverage for any driver in an insured's household with a revoked or suspended license.[3]

In an effort to avoid cancellation of the Old Policy, Shelvey and Lula Conley executed "Authorization to Exclude a Driver" forms seeking to exclude both Paul and Marie Conley from coverage while operating the insureds' automobiles. [JA 205-207]. Paul Conley also executed the form pertaining to his exclusion. [*Id*.]. Both signed forms were forwarded to Nationwide by Shelvey and Lula Conleys' local insurance agent on or about May 17, 2016. [*Id*.]. However, pursuant to the prior written notice, the Old Policy nonetheless was cancelled.

2. The New Policy with Nationwide and Paul Conley's Agreed Status as an Excluded Driver.

Following cancellation of the Old Policy, Shelvey and Lula Conley applied to Nationwide for a new motor vehicle policy, specifically designating in the application that both Paul and Marie Conley would be excluded drivers. [JA 208-215]. On May 27, 2016, Nationwide issued to them a new Policy, No. 9247K 900148, covering the period from May 25, 2016 through November 25, 2016 ("the New Policy"). [JA 194, 216-228].

The New Policy included a restrictive endorsement, titled "Endorsement 3239A – Voiding Automobile Insurance While A Certain Person is Operating Car (West Virginia)" ("the Endorsement"), which provided:

With this endorsement, the coverages provided in this policy are not in effect while:

[3] By Order entered on September 1, 2022, the Circuit Court determined that Nationwide's West Virginia Insurability Guidelines constituted confidential, proprietary and trade secret information and that there existed good cause to file the exhibit including those Guidelines under seal. [JA 654-658]. In accordance with *W.Va. R. App. P.* 7(c), the Joint Appendix states "Contains Confidential Materials."

[Blank]

is/are operating any motor vehicle to which the policy applies.

* * *

This endorsement applies as stated in the policy Declarations.

[JA 228] [emphasis added].

Correspondingly, the New Policy's Declarations expressly stated as follows:

The following driver(s) are excluded from all coverages and all vehicles on the Policy

Marie Conley ***Paul Conley***

[JA 217 (emphasis added); JA 236-237, ¶¶ 55-56, 60; JA 284].

The Declarations specified that "[t]hese Declarations are a part of the policy," and, under the heading "Policy Form and Endorsements," incorporated the Endorsement with particularity. [JA 216, 218]. The Endorsement became effective on May 25, 2016, the same effective date of the New Policy generally. [JA 228].

On July 5, 2016, Nationwide issued to Shelvey Conley a "Notice of Cancellation," explaining that the New Policy was being cancelled effective August 9, 2016 because Nationwide still had "not receive[d] valid driver exclusions for Marie and Paul Conley." [JA 194, 239-240]. Following further communication with Shelvey and Lula Conley, Nationwide agreed to reinstate the New Policy only under the condition that it receive valid driver exclusions for both Marie and Paul Conley. [JA 195].

In response, Shelvey and Lula Conley again evidenced their intent that Marie and Paul Conley be excluded from coverage by signing "Authorization to Exclude a Driver" forms and

submitting them to Nationwide on or about July 25, 2016. [JA 195, 241-242]. As to both Paul and Marie Conley, those Authorizations provided as follow:

> With my authorization, Nationwide has agreed to issue or continue coverage under the Policy provided that coverage is excluded while Paul Conley is operating any of the vehicles to which this policy applies. I understand that this exclusion will apply to any subsequent transfer, reinstatement or renewal of the policy. My signature below acknowledges my acceptance of the exclusion, and authorizes Nationwide Insurance to issue the appropriate endorsement to this policy.

[JA 241-242].

Nationwide accepted those signed authorizations, and on that basis reinstated the New Policy effective August 8, 2016. [JA 195, 243-245]. As provided in the authorizations, the reinstated New Policy again included the Endorsement specifying that coverages provided in the Policy were not in effect while a vehicle was being driven by excluded drivers "as stated in the policy Declarations," and the Declarations expressly listed Paul and Marie Conley as excluded drivers. [JA 195-196, 243]. As before, the Declarations specified that "[t]hese Declarations are a part of the policy," and, under the heading "Policy Form and Endorsements," incorporated the Endorsement with particularity. [JA 243, 245].

The New Policy subsequently was renewed, unchanged, over a series of six-month policy terms through the date of the collision that gives rise to Plaintiffs' underlying claims. [JA 247-281]. Each renewal likewise incorporated within the Policy the Endorsement and Declarations plainly and unambiguously naming Paul Conley and Marie Conley as excluded drivers, specified that the Declarations are a part of the policy, and incorporated the Endorsement with particularity. [*Id*.].

3. Paul Conley's September 12, 2019 Collision and Resulting Claims.

On September 12, 2019, Paul Conley caused a collision with Respondent Brittney Duty and her mother-in-law, Beverly Duty, in which Brittney Duty was severely injured and Beverly Duty

was killed. Paul Conley was driving one of his parents' vehicles insured by Nationwide—for which by then he had been an excluded driver for over three years—while drunk and still with a revoked driver's license. His alcohol level was at least three times the legal limit. [JA 287-305]. He thereafter pled guilty to two related criminal offenses for which he was sentenced to indeterminate terms of three to 15 years for driving while in an impaired state, and two to 10 years for driving while in an impaired state causing bodily injury, with those terms to run consecutively. [*Id*.].

SUMMARY OF THE ARGUMENT

The Circuit Court's October 3, 2023 Order granting summary judgment to the Dutys is reviewed *de novo*, and this Court's determination of whether Paul Conley was an excluded diver under the New Policy is a question of law.

In its Order, the Circuit Court erroneously concluded that, under the relevant provisions of West Virginia's so-called "omnibus statute, *W.Va. Code* § 33-6-31(a) and § 33-6-31h, "the one and only method of excluding coverage for a specific driver is through a restrictive endorsement attached to the policy," and that, "when interpreting the requirements of the West Virginia omnibus statute with the purpose of extending coverage and affording greater protection to the public, a named driver exclusion in West Virginia must be effectuated through a restrictive endorsement which specifically, and with particularity, identifies the name of the driver to be excluded." Wholly discounting the relevance of both the Endorsement's language also plainly and unambiguously excluding those drivers "as stated in the Policy Declarations" and the corresponding Declarations naming Paul Conley as an excluded driver with particularity, the Circuit Court wrongly concluded that "[f]rom the face of Nationwide's restrictive endorsement, it clearly and unambiguously fails to specifically,

or with any particularity, identify any driver for which coverage is excluded." According to the Circuit Court, it would therefore not be "appropriate" to even consider the Policy Declarations. [*Id*.].

The Circuit Court turns long-established West Virginia law governing application of insurance contracts on its head. The specific wording of an insurance policy determines whether it provides coverage for a particular claim, and the provisions of an insurance contract are construed as written and its language must be given its plain, ordinary meaning. "Our primary concern is to give effect to the plain meaning of the policy and, in doing so, we construe all parts of the document together. We will not rewrite the terms of the policy; instead, we enforce it as written." *Payne v. Weston*, 466 S.E.2d 161, 166 (W. Va. 1995). Thus, it is axiomatic that the entire insurance policy, and each section of the policy, must be read together, and it is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them. A policy should never be interpreted so as to create an absurd result, but instead should receive a reasonable interpretation, consistent with the intent of the parties.

The Circuit Court's Order turns a blind eye to those clear rules governing insurance contracts by improperly isolating only a single component of the Endorsement, thereby ignoring the entirety of the New Policy, and each provision of that Policy, which as a matter of law govern this Court's coverage analysis. Specifically, it failed to consider and apply the full language of the Endorsement and Declarations, as written and read together as a whole, which plainly and unambiguously exclude those drivers "as stated in the policy Declarations" and name Paul Conley with particularity as being among those excluded drivers. By impermissibly declining to apply all relevant driver exclusion language, the Circuit Court obliterated the plain meaning and intent of the parties as expressed in

unambiguous language in their written contract, and made a new contract for them. Stated differently, rather than enforcing the New Policy as written, it effectively wrote Paul Conley's driver exclusion language out of the New Policy altogether, unquestionably in contravention of the parties' undisputed intent. Beginning with Shelvey and Lula Conley's application to Nationwide, issuance of the New Policy by Nationwide, as well as all its subsequent renewals, were specifically contingent on the parties' undisputed understanding and agreement that Paul Conley was intended to be excluded driver. By granting summary judgment to the Dutys, the Circuit Court has completely ignored that intent and thus created the very type of "absurd result" our Supreme Court strictly prohibits.

Contrary to the Circuit Court's reasoning, the relevant statutory provisions governing driver exclusions do not serve as a mechanism to ignore the entirety of the New Policy's plain and unambiguous language excluding Paul Conley from coverage.

Conspicuously absent from the Circuit Court's Order is any reference to, much less discussion of, *W.Va. Code* § 33-6-31h(b)(1) and how it affects application of the New Policy's driver exclusions. In 2015, the West Virginia Legislature amended the omnibus statute through its adoption of § 33-6-31h, titled "Excluded drivers; definitions; legislative findings; restrictive endorsements." Under § 33-6-31h, "[t]he explicit, plain language of a motor vehicle liability policy between an insurer and its insureds should control its effect." *W.Va. Code* § 33-6-31h(b)(1). On its face, § 33-6-31h does not limit the scope of a court's inquiry to only a portion of a driver exclusion endorsement. It prescribes no specific manner in which a driver exclusion endorsement must be structured, prepared or worded, nor does it preclude incorporation into the endorsement of related exclusionary language through policy declarations or elsewhere in a policy. Rather, consistent with

the common law, the Legislature has plainly mandated that it is the "explicit, plain language of a motor vehicle liability policy"—in its entirety—which "should control its effect." *W.Va. Code* § 33-6-31h(b)(1).

Our Supreme Court has made it clear that the common law continues as the law of this State unless it is altered or changed by the Legislature. Indeed, the common law is not to be construed as altered or changed by statute unless the legislative intent to do so is plainly manifested. Where there is any doubt about the meaning or intent of a statute in derogation of common law, the statute is to be interpreted in the manner that makes the least rather than the most changes in the common law.

Instead of manifesting legislative intent to supersede application of the common law rules governing the application of insurance contracts in the driver exclusion context, § 33-6-31h(b)(1) fully embraces it. The Legislature's finding that "[t]he explicit, plain language of a motor vehicle liability policy between an insurer and its insureds should control its effects" fully affirms its intent to bring the statute into harmony with West Virginia's long-established rule that, in determining coverage, a court must read an entire policy, and each section of a policy, together.

The language of § 33-6-31h(b)(1) thus neither requires nor permits a court to limit application of a driver exclusion to a blank space on an endorsement, thereby ignoring the parties' intent as manifested through other relevant contractual language set forth elsewhere in that endorsement, in corresponding policy declarations, or otherwise. Had the Legislature intended to limit review and application of a policy's driver exclusion to a single space in a single policy section, it would have said so expressly. It did not. Rather, the statute evinces the opposite conclusion.

The Circuit Court's erroneous reasoning that Paul Conley was not an excluded driver under the New Policy also rests in the Supreme Court's 1987 decision in *Burr v. Nationwide Mut. Ins. Co.*,

359 S.E.2d 626 (W.Va. 1987). First, the New Policy did not reach Paul Conley's exclusion as a covered driver by "[a]rtificially defining groups or classes of persons," as was the case is *Burr*. Rather, The New Policy includes the very type of language evidencing the parties' intent to exclude Paul Conley that the Court found lacking in *Burr*. From May 25, 2016 through the date of the accident over three years later, the Endorsement included plain and unambiguous language excluding drivers "as stated in the policy Declarations," and all Policy Declarations throughout that period expressly incorporated that endorsement and particularly named Paul Conley as an excluded driver. The Endorsement's blank space loses all significance when, as required by West Virginia law, it is read together with the other key language in the New Policy specifically naming Paul Conley as an excluded driver.

Second, to the extent *Burr* can be read to have ever required that an excluded driver must specifically be identified by name on an excluded driver endorsement itself, it has been superseded by § 33-6-31h(b)(1). *Burr* was decided nearly 30 years before the Legislature's adoption in 2015 of § 33-6-31h, including the statute's express finding that it is the plain language of a motor vehicle liability policy, as a whole, that governs driver exclusions under a motor vehicle liability policy. *W.Va. Code* § 33-6-31h(b)(1). Stated simply, *Burr* is not dispositive of this appeal.

Finally, to the extent the language in the Endorsement excluding drivers "as stated in the policy Declarations" and the relating Declarations can be deemed to have created a contractual ambiguity, the Circuit Court's conclusions rest on yet another erroneous interpretation of West Virginia law. "Ambiguous provisions of an insurance policy should be construed strictly against the insurer and liberally in favor of the insured, although such construction should not be unreasonably applied to contravene the object and plain intent of the parties." Syl. Pt. 4, *Glen Falls*

Ins. Co. v. Smith, 617 S.E.2d 760 (W.Va. 2005). "It is only when the document has been found to be ambiguous does the determination of intent through extrinsic evidence become a question of fact." *Erie Ins. Prop. v. Chaber*, 801 S.E.2d 207, 211 (W.Va. 2017) (quoting *Payne*, 466 S.E.2d at 166).

Here, the extrinsic evidence demonstrating the plain intent of the parties to exclude Paul Conley as a covered driver under the New Policy is both undisputed and overwhelming. Issuance of the New Policy and all of its subsequent renewals were specifically contingent on the parties' understanding and agreement that Paul Conley was an excluded driver. In the absence of that agreement, the New Policy never would have been issued and/or renewed in the first place, and there would have been no coverage for Shelvey and Lula Conley at all for at least three years preceding the collision at the center of this case.

Nationwide thus correctly denied coverage in connection with Paul Conley's September 12, 2019 collision. Pursuant to the plain and unambiguous language of the New Policy, the Dutys' motion for summary judgment should have been denied, and Nationwide's motion for summary judgment granted. The Circuit Court's Order must be reversed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This appeal presents no novel questions of West Virginia law, or unique factual or procedural issues. The dispositive issues in this case have previously been authoritatively decided by this Court, and the Circuit Court's Order represents a straightforward misapplication of West Virginia law governing the application and interpretation of insurance contracts. The facts and legal arguments are adequately presented in the briefs

and record on appeal, and the decisional process will not be significantly aided by oral argument. Accordingly, Nationwide does not believe this appeal merits oral argument.

ARGUMENT

A. Summary Judgment and the *De Novo* Standard of Review.

Pursuant to Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law." Under Rule 56(c), summary judgment should be entered when, as here, the record could not lead a rational trier of fact to find for the non-moving party, such as where the non-moving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. *Costilow v. Elkay Mining Co.,* 488 S.E.2d 406 (W.Va. 1997); *Williams v. Precision Coil, Inc.,* 459 S.E.2d 329 (W.Va. 1995); *Painter v. Peavy,* 451 S.E.2d 755 (W.Va. 1994). Ultimately, summary judgment "is 'designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,' if there essentially 'is no real dispute as to salient facts' or if it only involves questions of law." *Williams,* 459 S.E.2d at 335.

By both filing motions for summary judgment below, the parties are in agreement that there exist no genuine issues of material fact. "A circuit court's entry of summary judgment is reviewed *de novo*." *Painter*, at Syl. Pt. 1.

B. The Circuit Court Erred in Concluding that Liability Insurance Coverage Exists for the September 12, 2019 Fatal Collision caused by Paul Conley, Contrary to the Plain and Unambiguous Language of the New Policy, and Wholly Inconsistent with the Intent of the Parties to that Policy, that Paul Conley was an Excluded Driver.

The Dutys bring their declaratory judgment action under the Uniform Declaratory Judgments Act, *W.Va. Code* §§ 55-13-1 *et seq.* "An injured plaintiff may bring a declaratory judgment action against the defendant's insurance carrier to determine if there is policy coverage before obtaining a judgment against the defendant in the personal injury action where the defendant's insurer has denied coverage." Syl. Pt. 3, *Christian v. Sizemore*, 383 S.E.2d 810 (W. Va. 1989). A declaratory judgment action "provides a prompt means of resolving policy coverage disputes so that the parties may know in advance of the personal injury trial whether coverage exists. This facilitates the possibility of settlements and avoids potential future litigation as to whether the insurer was acting improperly in denying coverage." *Id.*, 383 S.E.2d at 814.

This Court's determination of whether Paul Conley was an excluded driver under the New Policy is a question of law. *Farmers & Mechs. Mut. Ins. Co. v. Cook*, 557 S.E.2d 801, 806 (W.Va. 2001) (quoting *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 6 (W. Va. 1998)) ("Determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law"); Syl. Pt. 2, *Riffe v. Home Finders Associates. Inc.*, 517 S.E.2d 313 (W.Va. 1999) ("[T]he interpretation of an insurance contract . . . is a legal determination").

In its Order granting summary judgment to the Dutys, the Circuit Court erroneously concluded that, under the relevant provisions of West Virginia's so-called "omnibus statute, *W.Va. Code* § 33-6-31(a) and § 33-6-31h, "the one and only method of excluding coverage for a specific driver is through a restrictive endorsement attached to the policy," and that, "when interpreting the requirements of the West Virginia omnibus statute with the purpose of extending coverage and affording greater protection to the public, a named driver exclusion in West Virginia must be effectuated through a restrictive endorsement which specifically, and with particularity, identifies

the name of the driver to be excluded." [JA 591-592]. Wholly discounting the relevance of both the Endorsement's language also plainly and unambiguously excluding those drivers "as stated in the Policy Declarations" and the corresponding Declarations naming Paul Conley as an excluded driver with particularity, the Circuit Court further wrongly concluded that "[f]rom the face of Nationwide's restrictive endorsement, it clearly and unambiguously fails to specifically, or with any particularity, identify any driver for which coverage is excluded." [JA 592]. According to the Circuit Court, it would therefore not be "appropriate" to even consider the Policy Declarations. [*Id*.].

1. The Circuit Court's Failure to Apply Long-Established West Virginia Law Governing the Application of Insurance Contracts.

The Circuit Court's Order turns long-established West Virginia law governing application of insurance contracts on its head. In West Virginia, "[t]he specific wording of an insurance policy determines whether it provides coverage for a particular claim." *Grand China Buffet & Grill, Inc. v. State Auto Prop. & Cas. Co.,* 260 F. Supp.3d 616, 621 (N.D. W.Va. 2017). "The policy language should be given its plain, ordinary meaning." *Soliva v. Shand, Morahan & Co.,* 345 S.E.2d 33, 35 (W. Va. 1986). As summarized by the Court in *Payne v. Weston*, 466 S.E.2d 161 (W. Va. 1995):

> In West Virginia, insurance policies are controlled by the rules of construction that are applicable to contracts generally. We recognize the well-settled principle of law that this Court will apply, and not interpret, the plain and ordinary meaning of an insurance contract in the absence of ambiguity or some other compelling reason. ***Our primary concern is to give effect to the plain meaning of the policy and, in doing so, we construe all parts of the document together***. ***We will not rewrite the terms of the policy; instead, we enforce it as written.*** Syllabus Point 1 of *Russell v. State Automobile Mutual Insurance Company*, 188 W. Va. 81, 422 S.E.2d 803 (1992), states: "Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." Syllabus, *Keffer v. Prudential Ins. Co.*, 153 W. Va. 813, 172 S.E.2d 714 (1970)."

Id., at 166. (Emphasis added).

It is therefore "axiomatic that the entire insurance policy, and each section of the policy, must be read together." *Tastee Treats. Inc. v. United States Fid. & Guar. Co.*, 2010 U.S. Dist. LEXIS 125499, *10-11 (S.D. W.Va. Nov. 29, 2010) (citing *Blake v. State Farm Mut. Auto. Ins. Co.*, 685 S.E.2d 895, 900 (W. Va. 2009) (emphasis added). "The contract should be read as a whole with all policy provisions given effect." *Soliva*, 345 S.E.2d at 35.

Moreover, "[i]t is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." Syl. Pt. 5, *Auto Club Prop. Cas. Ins. Co. v. Moser*, 874 S.E.2d 295 (W. Va. 2022). Rather, it is the specific wording of the New Policy, "read as a whole with all policy provisions given effect," *Soliva*, 345 S.E.2d at 35, "that determines whether it provides coverage for [this] particular claim." *Grand China Buffet & Grill, Inc.,* 260 F. Supp.3d at 621. "A policy should never be interpreted so as to create an absurd result, but instead should receive a reasonable interpretation, consistent with the intent of the parties." *Soliva*, 345 S.E.2d at 435 (quoting *Thompson v. State Auto Mut. Ins.*, 11 S.E.2d 849, 850 (W.Va. 1940)).

The Circuit Court's Order turns a blind eye to those clear rules governing construction of insurance contracts by improperly isolating only a single blank space in the Endorsement, thereby ignoring the remainder of the relevant sections of the New Policy. Specifically, it failed to consider and apply the full language of the Endorsement, and expressly refused to even consider the corresponding language in the Declarations, which plainly and unambiguously exclude those drivers "as stated in the policy Declarations" and name Paul Conley with particularity as being among those excluded drivers. By impermissibly refusing to apply all of the New Policy's relevant driver exclusion language, the Circuit Court both failed to "read the Policy as a whole, with all policy

provisions given effect," *Soliva*, 345 S.E.2d at 35, and obliterated the clear intent of the parties "as expressed in unambiguous language in their written contract." *Auto Club Prop. Cas. Ins. Co.*, at Syl. Pt. 5. Stated differently, rather than applying the New Policy as written, the Circuit Court inexplicably wrote Paul Conley's driver exclusion language out of the New Policy altogether and "[made] a new or different contract for them."

Beginning with Shelvey and Lula Conley's application to Nationwide and continuing through the date of Paul Conley's collision, issuance of the New Policy, as well as all subsequent renewals, were specifically contingent on the parties' undisputed understanding and agreement that Paul Conley was intended to be excluded driver.[4] That joint intent is plainly manifested in both the Endorsement and the Declarations. By granting summary judgment to the Dutys, the Circuit Court has acted in direct contravention of the parties' undisputed intent, and thus created the very type of "absurd result . . . [in]consistent with the intent of the parties," that our Supreme Court strictly prohibits. *Soliva*, 345 S.E.2d at 35.

2. The Circuit Court's Misapplication of *W.Va. Code* § 33-6-31(a) and § 33-6-31h, which Embrace and are in Harmony with the Common Law Rule that all Provisions of the New Policy be read Together.

The Circuit Court's failure to correctly apply the required rules of construction lies primarily in its gross misapplication of the omnibus statute, as amended. The statutory provisions governing driver exclusions do not serve as a mechanism to engage in a wholesale refusal to apply the entirety

[4] The Dutys do not dispute that the intent of the parties was to exclude Paul Conley. Rather, throughout the hearing on the parties' motions for summary judgment, the Duty's counsel repeatedly mischaracterized the absence of Paul Conley's name on the endorsement as a "mistake" by Nationwide to fill out the form; "they done screwed up." JA 542-543].

of the New Policy's plain and unambiguous language excluding Paul Conley from coverage in a manner consistent with the parties' intent. To the contrary, the omnibus statute is wholly consistent with, and incorporates, West Virginia law common law governing construction of insurance contracts.

The omnibus clause of *W.Va. Code* § 33-6-31(a) provides in relevant part as follows:

> No policy or contract of bodily injury liability insurance, or of property damage liability insurance, covering liability arising from the ownership, maintenance or use of any motor vehicle, may be issued or delivered in this state to the owner of such vehicle, or may be issued or delivered by any insurer licensed in this state upon any motor vehicle for which a certificate of title has been issued by the Division of Motor Vehicles of this state, unless it contains a provision insuring the named insured and any other person, except a bailee for hire ***and any persons specifically excluded by any restrictive endorsement attached to the policy***, 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. . . . Notwithstanding any other provision of this code, if the owner of a policy receives a notice of cancellation pursuant to article six-a [§§ 33-6A-1 et seq.] of this chapter and the reason for the cancellation is a violation of law by a person insured under the policy, said owner ***may by restrictive endorsement specifically exclude the person who violated the law and the restrictive endorsement shall be effective in regard to the total liability coverage provided under the policy . . . .***

[Emphasis added].

In 2015, the West Virginia Legislature amended the omnibus statute through *W.Va. Code* § 33-6-31h, titled "Excluded drivers; definitions; legislative findings; restrictive endorsements." Under § 33-6-31h(c), "[w]hen any person is specifically excluded from coverage under the provisions of a motor vehicle liability policy by any restrictive endorsement to the policy, the insurer is not required to provide any coverage, including both the duty to indemnify and the duty to defend, for damages arising out of the operation, maintenance or use of any motor vehicle by the excluded

driver, notwithstanding the provisions of chapter seventeen-d of this code" *W.Va. Code* § 33-6-31h(c).

Importantly, § 33-6-31h further includes an accompanying legislative finding clearly outlining the intended scope of any court inquiry relating to application of driver exclusions, as follows:

> (b) ***The Legislature finds that:***
>
> (1) ***The explicit, plain language of a motor vehicle liability policy between an insurer and its insureds should control its effect***.

W.Va. Code § 33-6-31h(b)(1). (Emphasis added).

Conspicuously absent from the Circuit Court's Order is any reference to, much less discussion of, § 33-6-31h(b)(1) and how it affects application of the New Policy's driver exclusions. On its face, § 33-6-31h does not limit the scope of a court's inquiry to only a single portion of a driver exclusion endorsement. It prescribes no specific manner in which a driver exclusion endorsement must be structured, prepared or worded, nor does it preclude an endorsement's incorporation of related exclusionary language through policy declarations or elsewhere in a policy. Rather, consistent with the common law, the Legislature has plainly mandated that it is the "explicit, plain language of a motor vehicle liability policy"—in its entirety—which "should control its effect." *W.Va. Code* § 33-6-31h(b)(1).

"A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute." Syl. Pt. 7, *Thomas v. McDermitt*, 751 S.E.2d 264 (W.Va. 2013). "[E]very word used is presumed to have meaning and purpose, for the Legislature is thought by the courts not to have used language idly." *Bullman v. D & R Lumber Co.,* 464 S.E.2d 771, 775 (W.Va. 1995). Section 33-6-31h(b)(1) was included in the body of a new

amendment to the omnibus statute specifically as it pertains to application of excluded driver endorsements.

Our Supreme Court has further made it clear that "[t]he common law . . . continues as the law of this State unless it is altered or changed by the Legislature." Syl. Pt. 8, *Thomas v, McDermitt*, 751 S.E.2d 264 (W.Va. 2013) (internal quotations and citations omitted). Indeed, "[t]he common law is not to be construed as altered or changed by statute, unless the legislative intent to do so is plainly manifested." *Id.*, at Syl. Pt. 9 (internal quotations and citations omitted). "'Where there is any doubt about the meaning or intent of a statute in derogation of common law, the statute is to be interpreted in the manner that makes the least rather than the most changes in the common law.'" Syl. Pt 4, *State ex rel Morgantown Operating Co. v. Gaugot*, 859 S.E.2d 358 (W.Va. 2021) (quoting Syl. Pt. 4, *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 647 S.E.2d 920 (W.Va. 2007)).

Rather than manifesting legislative intent to alter or supersede application of the common law rules governing the application of insurance contracts, § 33-6-31h(b)(1) fully embraces it for driver exclusions.[5] The Legislature's finding that "[t]he explicit, plain language of a motor vehicle liability policy between an insurer and its insureds should control its effects" clearly reflects its intent to bring the statute into harmony with West Virginia's long-established rule that the plain and unambiguous language of a policy, and each section of a policy, must be read together. The continuing vitality of that principle was just recently reaffirmed by this Court. *Scafella v. Erie Ins. Co.* 2023 W.Va. App. LEXIS 321, *16 (W.Va. Int. Ct. of App. Nov. 14, 2023) ("Our primary

[5] *Cf. Martinez v. Asplundh Tree Expert, Co*., 893 S.E.2d 802, 587 (W.Va. 2017 (concluding that W.Va. Code § 55-7E-3 abrogates common law relating to damages available in employment law cases); *Bell v. Vecellio & Grogan, Inc.*, 475 S.E.2d 138, 144 (W.Va. 1996) finding that the provisions of W. Va. Code 23-4-2(c)(2)(i)-(ii) define with specificity what is meant by "deliberate intention" and supersede prior common law cases establishing cause of action).

concern is to give effect to the plain meaning of the policy and, in doing so, we construe all parts of the document together").

The language of § 33-6-31h(b)(1) thus neither requires nor permits a court to limit application of a driver exclusion to only a blank space on an endorsement, thereby destroying the parties' intent as manifested through other relevant contractual language set forth in that endorsement, in corresponding policy declarations, or elsewhere. Had the Legislature intended to strictly limit review and application of a policy's driver exclusion to a single section of an endorsement, it would have said so expressly. It did not. Rather, the statute directly evinces the Legislature's opposite intent.

Accordingly, the Circuit Court's misreading of the omnibus statute, and particularly it failure to even address the governing effects of § 33-6-31h(b)(1), to support its failure to give effect to the plain and unambiguous language of the New Policy's Endorsement and Declarations is wrong. It has impermissibly created a new insurance contract for Nationwide and its insureds contrary to their plain intent.

3. The Circuit Court's Misplaced Reliance on, and Application of, the *Burr* Decision.

The Circuit Court's erroneous reasoning that Paul Conley was not an excluded driver under the New Policy also rests on the Supreme Court's 1987 decision in *Burr v. Nationwide Mut. Ins. Co.*, 359 S.E.2d 626 (W.Va. 1987),[6] which is both factually and legally inapposite to the case *sub judice*. In *Burr,* the Court reviewed a directed verdict entered by the Circuit Court finding that "coverage was not afforded under the policy where the use of an insured vehicle was for an avowedly

[6] JA 591.

nonbusiness purpose." *Id.*, 339 S.E.2d at 629. The insurer argued, *inter alia*, "that if coverage for nonbusiness uses is provided under the policy, either the 'dealer plates' endorsement exclusion or the bailee for hire exclusion operates to present coverage" for an accident involving a specific employee named nowhere in the policy, Mr. Burr. *Id.*, 339 S.E.2d at 631. Focusing on the broad "dealer plates" exclusion, it contended that Mr. Burr "was a member of a class of 'persons' who were excluded by the endorsement, namely, those operating insured vehicles equipped with dealer plates." *Id.*, 339 S.E.2d at 632. Under the limited facts of that case the Court concluded that, under *W.Va. Code* § 33-6-31(a):

> To "specifically exclude" a person, it follows that it must be done with particularity. If the legislature had intended to allow insurers to artificially define ***groups or classes of persons***, for purposes of exclusion, it could have done so expressly. Absent evidence of such an intention, we must supply an interpretation with the words used.

Burr, 339 S.E.2d at 632. [Emphasis added].

Burr has no application here for at least two reasons. First, the New Policy did not reach Paul Conley's exclusion as a covered driver by "artificially defin[ing] groups or classes of persons." *Id.* Rather, The New Policy includes the very type of language revealing the parties' intent to exclude Paul Conley that the Court found lacking in *Burr*. From May 25, 2016 through the date of the accident over three years later, the Endorsement included plain and unambiguous language excluding drivers "as stated in the policy Declarations," and all Policy Declarations throughout that period expressly incorporated that endorsement and particularly named Paul Conley as an excluded driver. The Endorsement's blank space loses all significance when, as required by West Virginia law, it is read together with the other key language in the New Policy specifically excluding Paul Conley from coverage.

Second, to the extent *Burr* can be read to have ever required, without exception, that an excluded driver must specifically be identified by name on an excluded driver endorsement form itself, it has been superseded by the amendment of the omnibus statute through § 33-6-31h(b)(1). *Burr* was decided nearly 30 years before the Legislature's adoption in 2015 of § 33-6-31h, including the statute's express finding that it is the plain language of a motor vehicle liability policy, as a whole, that governs driver exclusions under a motor vehicle liability policy. *W.Va. Code* § 33-6-31h(b)(1). Stated simply, *Burr* is not dispositive of the parties' motions for summary judgment or this appeal.

Nationwide correctly denied coverage in connection with the September 12, 2019 collision. Pursuant to the plain and unambiguous language of the New Policy, Respondents' motion for summary judgment should have been denied, and Nationwide's motion for summary judgment should have been granted. The Circuit Court's Order must be reversed.

C. The Circuit Court Erred in Concluding that, to the Extent it Found that Ambiguity results from the New Policy's Endorsement Language and the Listing of Paul Conley as an Excluded Driver in the New Policy Declarations, Liability Insurance Coverage exists for the September 12, 2019 Fatal Collision caused by Him in Contravention of Undisputed Extrinsic Evidence Demonstrating the Plain Intent of the Parties.

The Circuit Court further erroneously concluded (1) that "even if the Court were to find that an ambiguity results from Nationwide's failing to fill out the restrictive endorsement, but listing Mr. Conley in the Policy Declarations, any interpretation of the insurance provisions would have to be construed against Nationwide," and (2) that "even if the Court were to find that Nationwide's policy and restrictive endorsement were ambiguous, when construing the policy against Nationwide and in favor of finding coverage, and when avoiding any interpretation of the insurance contract in a way

that removes requirements or contravenes the omnibus statute, the Court must conclude that the Nationwide policy failed to effectively exclude coverage for Paul Conley." [JA 593-594].

For the reasons outlined above, Nationwide contends that the provisions of the New Policy, read together as the law requires, plainly and unambiguously exclude Paul Conley from coverage under the New Policy. However, to the extent the language in the endorsement excluding drivers "as stated in the policy Declarations" and the relating Declarations can be deemed by this Court to have created a contractual ambiguity, the Circuit Court's conclusions rest on yet another erroneous interpretation of West Virginia law.

The Circuit Court correctly cited Syllabus Point 4 of *Nat. Mut. Ins. Co. v. McMahon & Sons*, 356 S.E.2d 488 (W.Va. 1987), for the proposition that, as a general rule, any ambiguity in the policy is to be construed against Nationwide. [JA 593]. However, the Circuit Court ignored an important caveat to that general rule that has particular application here: Under West Virginia law, "[a]mbiguous . . . provisions of an insurance policy should be construed strictly against the insurer and liberally in favor of the insured, ***although such construction should not be unreasonably applied to contravene the object and plain intent of the parties***." Syl. Pt. 4, *Glen Falls Ins. Co. v. Smith*, 617 S.E.2d 760 (W.Va. 2005) (quoting Syl. Pt. 6, *Hamric v. Doe*, 499 S.E.2d 619 (W.Va. 1997)) (emphasis added). *See also Soliva*, 345 S.E.2d at 432-33 ("Any ambiguity in an insurance contract will be interpreted against the insurer ***unless it would contravene the plain intent of the parties***"). (Emphasis added). For the reasons discussed above, the Circuit Court's Order flies in the face of the parties' intent under the New Policy.

Further, "[i]t is only when the document has been found to be ambiguous does the determination of intent through extrinsic evidence become a question of fact." *Erie Ins. Prop. v.*

Chaber, 801 S.E.2d 207, 211 (W.Va. 2017) (quoting *Payne*, 466 S.E.2d at 166). The extrinsic evidence demonstrating the plain intent of the parties to exclude Paul Conley as a covered driver under the New Policy is both undisputed and overwhelming.

Nationwide's Insurability Guidelines prohibit insurance coverage for any driver in an insured's household with a revoked or suspended license. As a result, in May 2016, Nationwide cancelled the Old Policy specifically as a result of revocation of Paul Conley's driver's license, as well as invalid license information for Marie Conley. In an effort to avoid cancellation of that Policy, Shelvy and Lula Conley executed "Authorization to Exclude a Driver" forms seeking to exclude both Paul and Marie Conley from coverage while operating any of the covered automobiles.

Following cancellation of the Old Policy, Shelvy and Lula Conley applied to Nationwide for the New Policy, designating in the application that both Paul and Marie Conley would be excluded drivers. Nationwide thereafter issued to them the New Policy, which included within its Declarations that Paul and Marie Conley both were excluded drivers. Nationwide then issued a "Notice of Cancellation" of the New Policy expressly because it had not received valid driver exclusions for Paul and Marie Conley, but agreed to reinstate it only if it received such valid driver exclusions. Shelvy and Marie Conley thereafter signed the "Authorization to Exclude a Driver" form specifically naming Paul Conley, "acknowledg[ing] [their] acceptance of the exclusion." Nationwide accepted those signed authorizations and reinstated the New Policy effective August 8, 2016. Under the language of those authorizations, "this exclusion will apply to any subsequent transfer, reinstatement or renewal of the policy." The New Policy was renewed, and its excluded driver provisions remained unchanged, for a series of multiple six-month terms through the date of the collision.

Again, issuance of the New Policy and all of its subsequent renewals were specifically contingent on the parties' undisputed understanding and agreement throughout the existence of that Policy that Paul Conley was an excluded driver. In the absence of that agreement, the New Policy never would have been issued and/or renewed in the first place, and there would have been no coverage for Shelvey and Lula Conley at all for at least three years preceding the collision at the center of this case.

Construing the extrinsic evidence with the intent of the parties, Nationwide correctly denied coverage in connection with the September 12, 2019 collision.

CONCLUSION

Based on the foregoing, Nationwide respectfully submits that the Circuit Court erred in granting Respondents' motion for summary judgment, and in denying Nationwide's motion for summary judgment. The Order of the Circuit Court must be reversed.

Respectfully submitted,

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INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NATIONWIDE INSURANCE COMPANY OF AMERICA, DEFENDANT BELOW, PETITIONER

v. **NO. 23-ICA-491**

BRITTNEY DUTY, GREGORY DUTY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF BEVERLY DUTY, PLAINTIFFS BELOW, RESPONDENTS

and

PAUL CONLEY AND LULA CONLEY, DEFENDANTS BELOW, RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that a copy of ***"Petitioner's Brief"*** was filed with the Supreme Court of Appeals of West Virginia on January 29, 2024 by using the West Virginia E-Filing System, which System will send notification of such filing to the following E-filing participants:

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