

INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NATIONWIDE INSURANCE COMPANY  
OF AMERICA,

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Defendant Below, Petitioner

NO. 23-ICA-491

v.

BRITTNEY DUTY, GREGORY DUTY,  
Individually and as Administrator of  
THE ESTATE OF BEVERLY DUTY,

and

SHELVY CONLEY, (NOW DECEASED),  
LULA CONLEY and PAUL CONLEY

Plaintiffs below, Respondents

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SUMMARY RESPONSE TO PETITION FOR APPEAL TO THE  
INTERMEDIATE COURT OF APPEALS

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Lula Conley and Paul Conley

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## SUMMARY STATEMENT OF THE CASE

On September 12, 2019, Paul Conley was allegedly driving his parents' truck when he crossed the centerline of County Route 701/25 in Logan County and crashed into a vehicle driven by Brittney Duty ("Brittney"). [Joint Appendix ("JA") 3-000471 - 000482]. Brittney's mother-in-law, Beverly Duty ("Beverly"), was a front-seat passenger in Brittney's vehicle at the time of the crash. *Id.* As a result of the head-on collision, the vehicles caught fire. *Id.* Brittney was severely injured and unable to escape on her own. However, first responders were able to rescue her and Paul Conley from the vehicles. *Id.* Tragically, Beverly was not rescued and died at the scene. *Id.*

Paul Conley was arrested and convicted of causing Brittney's injuries and Beverly's death while driving under the influence of alcohol ("DUI"). [JA 2-000301-302, JA 3-000471-482]. He was sentenced to consecutive sentences of three-to-fifteen years for DUI causing death and two-to-ten years for DUI causing injury. [JA 2-000301-302].

At the time of the collision, Paul Conley lived with his parents, Shelvy and Lula Conley ("the Conleys"). [JA 3-0004 71- 482].<sup>1</sup> For several years leading up to the collision, the Conleys had automobile insurance through Nationwide Insurance Company of America ("Nationwide"). Prior to May 23, 2016, the Conleys' Nationwide policy specifically included Paul Conley as an insured driver. [JA 2-000198]. In April 2016, Nationwide notified the Conleys that it was canceling the policy as of May 23, 2016, because Paul Conley's driver's license had been revoked.<sup>2</sup> [JA 2-000202].

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<sup>1</sup> Shelvy Conley, now deceased, Lula Conley and Paul Conley filed First Party Bad Faith Cross-Claims against Nationwide Insurance Company of America.

<sup>2</sup> The letter also noted invalid license information for Marie Conley (Paul Conley's wife) as a reason the policy was being canceled. [JA 2-000202].

On May 17, 2016, and prior to the planned cancellation date, the Conleys' Nationwide agent faxed to Nationwide a form entitled "Authorization to Exclude a Driver" (Form V-8037-A) in an apparent attempt to try to keep Nationwide from canceling the policy [JA 2-000205-207]. That form indicated that Nationwide had agreed to continue coverage, while excluding coverage for Paul Conley and Marie Conley, and that the Conleys were authorizing Nationwide to "issue the appropriate endorsement to the policy." *Id.* Despite these forms being signed and faxed to Nationwide by one of its insurance agents, Nationwide opted not to continue the coverage as the policy was canceled. [JA 3-000609].

The Conleys then sought their insurance agent's assistance in obtaining a new Nationwide policy which was issued on May 27, 2016. [JA 2-000216-218].<sup>3</sup> However, on July 5, 2016, Nationwide notified the Conleys it was going to cancel the new policy on August 9, 2016, because Nationwide claimed it had not received valid driver exclusions for Paul and Marie Conley. [JA 2-000239-240]. The Conleys signed another form (this one entitled "Authorization to Exclude a Driver (West Virginia)" and identified as Form V-8112-8),<sup>4</sup> which authorized Nationwide, again, to "issue the appropriate endorsement to this policy." [JA 2-000241]. As discussed below, Nationwide never executed the endorsement.

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<sup>3</sup> Nationwide asserts that the Conleys' "applied" for new coverage with the specific request that coverage for Paul and Marie Conley be excluded. However, the form application that was produced is not signed by the Conleys or their agent. [JA 2-000208-213].

<sup>4</sup> The July 2016 form (Form V-8112-B) differs somewhat from the May 2016 form (Form V-8037) in that the July form: (1) specifically references West Virginia at the top; (2) does not include a space for the excluded driver to sign, but includes a space for the authorized Nationwide representative to sign; and (3) does not include the language from the May 2016 form about the requirement that all named insureds sign the form. [JA 2-000206, JA 2-000241].

Nationwide has a restrictive endorsement form for the purpose of excluding driver. The form is "Endorsement 3239A" and entitled "*Voiding Automobile Insurance While a Certain Person is Operating a Car (West Virginia)*." [JA 2-000228]. This restrictive endorsement provides a space for Nationwide to insert the name of the excluded driver, the policy number to which the endorsement relates, and the effective date of the restrictive endorsement:

Despite the Conleys' authorization allowing Nationwide to "issue the appropriate endorsement to the policy," Nationwide never executed the form by listing Paul Conley as the driver being excluded by the restrictive endorsement, never filled in the policy number, and never filled in the effective date. Instead, Nationwide began issuing Policy Declarations which listed the blank form as an endorsement to the policy. [JA 2-000243-

282]. From August 2016 through May 2019, Nationwide renewed the policy every six months, listing form Endorsement 3239A as being part of the policy. However, Nationwide continually failed to execute the form. *Id.*

The authorization form the Conleys signed in 2016 was never made part of the insurance contract - the Policy Declarations from 2016 through 2019 never reference the authorization form (V-8112-B) as being part of the policy or an endorsement to the policy. [JA 2-000243-282]. Thus, the only restrictive endorsement that was ever made part of the Conleys' Nationwide policy is the blank restrictive endorsement form that Nationwide had three years of opportunities to execute (after receiving the Conleys' permission) but never did. [JA 20999281].

Following the crash, the Respondents filed claims with Nationwide which denied coverage due to a named driver exclusion. When it was discovered that Nationwide had failed to execute the endorsement, the Respondents filed a declaratory judgment action seeking a declaration that Paul Conley was entitled to liability coverage under the policy. The Respondents and Nationwide filed opposing motions for summary judgment. By order entered October 3, 2023, Judge Codispoti of the Circuit Court of Logan County granted summary judgment in favor of the Respondents. The Circuit Court held that the restrictive endorsement fails to specifically and particularly exclude Paul Conley and, therefore, he was entitled to liability coverage under the policy. It is that decision from which the Petitioner now appeals. Simply put, this argument is the crux of the case.

## **STANDARD OF REVIEW**

Appellate review of a Circuit Court's entry of summary judgment is *de novo*. See Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451S.E.2d755 (1994).



## **SUMMARY OF THE ARGUMENT**

The omnibus provisions of *West Virginia Code* §33-6-31 require that all liability insurance policies in this state cover the named insured's operation and use of the vehicle, but also operation and use by others who have the named insured's permission. The limited exception to this rule is where an insurance company executes a restrictive endorsement which specifically identifies the name of a driver for whom coverage is excluded. The West Virginia Legislature has set forth the exclusive manner in which this can be done: a restrictive endorsement.

In this case, Nationwide has a restrictive endorsement form for the purpose of excluding coverage but failed to execute it for the Conleys' policy. Under West Virginia law, the terms of an insurance policy are to be construed against Nationwide and in favor of finding coverage as the purpose of the omnibus statute is to extend coverage and afford greater protection to the public. When viewing the facts of this case with the applicable law, Nationwide failed to effectively exclude coverage for Paul Conley. Thus, Judge Codispoti was correct to grant the Respondents' motion for summary judgment and deny the Petitioner's motion for summary judgment.

To the extent that the Court determines that further interpretation and construction is necessary, this matter should be remanded for additional factual discovery and for the Circuit Court to determine if the ambiguities that exist in the entirety of the policy documents would result in a different conclusion than the Court already reached. The Respondents submit that this is not necessary because Nationwide failed to utilize the one and only way to exclude a driver, and even if further construction and interpretation is done, the result will be the same.

### **STATEMENT REGARDING ORAL ARGUMENT**

Respondents do not waive oral argument and submit that the decisional process will be significantly aided as this case involves an issue of fundamental importance as to the requirements that must be met in order for an insurer to exclude coverage for a named driver under the statutory framework of the West Virginia omnibus provisions contained within *West Virginia Code* §33-6-31 and 33-6-31 h.

## LEGAL ARGUMENT

### I. THE CIRCUIT COURT DID NOT ERR BY GRANTING SUMMARY JUDGMENT TO RESPONDENTS WHERE NATIONWIDE FAILED TO EXECUTE THE LEGALLY REQUIRED RESTRICTIVE ENDORSEMENT.

The West Virginia omnibus statute requires that all motor vehicle liability policies provide coverage for not only the named insured, but also for any other person responsible for the use of the motor vehicle, so long as that person had permission to use the vehicle. See *W. Va. Code* §33-6-31 (a). This requirement "is automatically engrafted onto all policies issued in this State." *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co.*, 181W.Va.609, 611, 383 S.E.2d 791, 793 (1989).

Accordingly, West Virginia law requires that all policies cover operation and use. Therefore, if there is to be an exception to that rule, that exception needs to alter or amend the language covering operation and use. It is widely understood in the insurance industry (and by Nationwide specifically) that an endorsement is something added to an insurance policy which alters or changes the policy's terms.<sup>5</sup>

Thus, when the West Virginia Legislature carved out the limited exceptions to the omnibus provisions, it is significant that the Legislature used the term "restrictive endorsement" over and over again, as opposed to any other means of limiting coverage. Specifically, *West Virginia Code* §33-6-31, in relevant part, states:

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<sup>5</sup> See National Association of Insurance Company's definition of endorsement: <https://content.naic.org/article/consumer-insight-do-you-know-how-use-insurance-rider-or-endorsement> <last accessed on March 10, 2024>; see also Nationwide's definition of an endorsement: <https://www.nationwide.com/lc/resources/auto-insurance/articles/understanding-insurance#:~:text=from%20further%20damage.-.Endorsements.clarify%20policy%20terms%20and%201anguage> <last accessed March 10, 2024>, and <https://www.nationwide.com/lc/resources/home/articles/insurance-glossary> <last accessed March 10, 2024>.

(a) 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 ... unless it contains a provision insuring the named insured and any other person, except ... any persons specifically excluded by any **restrictive endorsement** attached to the policy . . . Notwithstanding any other provision of this code, if the owner of a policy receives a notice of cancellation . . . 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, including coverage provided pursuant to the mandatory liability requirements . . . but nothing in such **restrictive endorsement** may be construed to abrogate the "family purpose doctrine".

*W Va. Code §33-6-31(a)*, in part (emphasis added). Further, when the West Virginia Legislature later codified the named driver exclusion statute - *West Virginia Code §33-6-31 h* - the Legislature again used the term "restrictive endorsement" exclusively:

When **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.

In this case, Nationwide has a restrictive endorsement form specifically for this purpose - Endorsement 3239A. Nationwide even identified this form on the Policy Declarations. The problem for Nationwide is it failed to fill out the restrictive endorsement such that when you read the endorsement, no specific driver is identified as being exempt.

In order for a named driver endorsement to be effective in West Virginia, it must "specifically designate by name the individual or individuals to be excluded." Syl. Pt. 4, *Burr v. Nationwide Mut. Ins. Co.*, 178 W.Va. 398, 359 S.E.2d 626 (1987). With regard to this requirement, the Supreme Court of Appeals of West Virginia reasoned that when the omnibus statute references specifically excluding a person, "it follows that it must be done with particularity." *Burr*, 178 W.Va. at 404, 359 S.E.2d at 632. While the issue in *Burr* related to a restrictive endorsement that attempted to exclude coverage for a class of persons rather than a specific person, failure to include any name whatsoever on the restrictive endorsement (as Nationwide did here) is even less specific than attempting to exclude a class of persons like in *Burr*. Thus, just like the Supreme Court in *Burr*, and just as determined by Judge Codispoti below, this Court should find that the restrictive endorsement fails to specifically exclude anyone and, therefore, is not effective to deny coverage.

Nationwide attempts to rely on the authorization forms they obtained from the Conleys in 2016. However, neither of those authorization forms were listed as a policy form on Nationwide's Policy Declarations and, thus, they never became part of the policy. [JA 1-000116]. Nationwide also relies on the Policy Declarations where it refers to Paul Conley as an excluded driver. However, as noted below, that language conflicts with the restrictive endorsement form and with the policy language which indicates that relatives, like Paul Conley, would be covered for liability purposes. [JA 1- 000130].

The West Virginia cases in which a named driver exclusion has been upheld include situations, unlike the situation here, where the insurer followed the law and effectuated a restrictive endorsement which specifically excluded a driver. For instance,

in *McKenzie v. Federal Mutual Insurance Company*, the Southern District Court upheld a restrictive endorsement which specifically excluded coverage for the owner's son, finding that the form was clear and unambiguous and, therefore, no judicial interpretation or construction was appropriate. *McKenzie v. Federal Mut. Ins. Co.*, 393 F. Supp. 295, 298 (S.D. W.Va. 1975).

Nationwide has not cited to any case involving the West Virginia omnibus statute where a named driver exclusion was upheld without a restrictive endorsement that specifically excluded coverage for an identified person. This may be because the statutes are very clear in requiring a restrictive endorsement. It may also be because for more than fifty years, this State has recognized that the purpose of the omnibus statute is to extend coverage and afford greater protection to the public, such that the statutes should be given a liberal construction so as to afford coverage. See *State Farm Mut. Auto. Ins. Co., v. Allstate Ins. Co.*, 154 W.Va. 448, 175 S.E.2d 478 (1970). The statute clearly and unambiguously requires a restrictive endorsement and Nationwide clearly failed to execute the required endorsement. Thus, the Circuit Court correctly determined that Nationwide failed to comply with the statute and the attempt to exclude coverage for Paul Conley fails. See Syl. Pt. 2, *Johnson v. Continental Gas. Co.*, 167 W.Va. 572, 201 S.E.2d 292 (1973) (when the provisions of an insurance policy conflict with the omnibus statute, they are deemed void and ineffective).



## CONCLUSION

The Circuit Court's decision to grant summary judgment in favor of the Respondents and against Nationwide was not in error. West Virginia law only permits named driver exclusions when an insurance company executes a restrictive endorsement which specifically lists the name of the excluded driver. Nationwide clearly failed to do this where the restrictive endorsement form remained blank for years with no specified driver and no applicable date. No interpretation is necessary. The form clearly and unambiguously fails to specifically identify any driver who is excluded and fails to indicate the date the endorsement became effective. It should be applied as written in light of the omnibus statute's requirement that a restrictive endorsement is the only method by which coverage may be excluded for a specific driver.

On the other hand, if the Court determines that a restrictive endorsement is not required such that further interpretation and construction is necessary, then this matter should be remanded. An analysis of the entirety of the policy documents and testimony regarding the attempts to exclude coverage for Paul Conley requires additional discovery that was not completed. Accordingly, the Respondents ask the Court to affirm the Circuit Court's decision or, in the alternative, remand for further discovery.

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CERTIFICATE OF SERVICE

The undersigned, counsel for the Respondents, Shelvy Conley, now Deceased, Lula Conley and Paul Conley, does hereby certify that on the 26<sup>th</sup> day of April, 2024 the foregoing ***“Summary Response to Petition for Appeal to the Intermediate Court of Appeals”*** was filed electronically with the Court via West Virginia's E-Filing System which will provide an electronic copy upon counsel of record.

/s/ Mark Hobbs

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