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 REPLY BRIEF

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STATEMENT REGARDING ORAL ARGUMENT AND DECISION

On March 13, 2024, Respondents Brittany Duty and Gregory Duty, individually and as administrator of the Estate of Beverly Duty (collectively "the Dutys"), filed "Respondents' Brief" in connection with this appeal. On April 26, 2024, Respondents Shelvey Conley (now deceased), Lula Conley and Paul Conley (collectively "the Conleys") filed their "Summary Response," which is a partially abbreviated, but otherwise verbatim, recitation of the Dutys' arguments.

Petitioner Nationwide Insurance Company of America ("Nationwide") respectfully reiterates that this appeal presents no novel questions of West Virginia law, or unique factual or procedural issues, and that 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 continues to believe this appeal merits no oral argument.

ARGUMENT

A. 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.

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

The parties are in agreement on one point; in West Virginia, "[w]e 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." *Payne v.*

Weston, 466 S.E.2d 161, 166 (W. Va. 1995). [See Respondents' Brief, at 13, n. 8]. In the absence of ambiguity, "[d]etermination of the proper coverage of an insurance contract when the facts are not in dispute 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)).

Beyond that, rather than squarely responding to the merits of Nationwide's arguments as set forth in Petitioner's Brief, the Respondents instead limit their own arguments to the same myopic view that led to the Circuit Court's Order erroneously granting them summary judgment in the first instance. The overarching flaw in the Circuit Court's Order, and the continuing disconnect between Nationwide and the Respondents on appeal, remains grounded in the proper analytical framework that governs this Court's application of the relevant driver exclusion language of the New Policy issued by Nationwide to Shelvey Conley and Lula Conley.

Specifically, it is "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 v. Shand, Morahan & Co.*, 345 S.E.2d 33, 35 (W. Va. 1986). Correspondingly, "[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); *see also, Payne*, 466 S.E.2d at 166 ("We will not rewrite the terms of the policy; instead, we enforce it as written").

As did the Circuit Court, the Respondents stubbornly continue to ignore those fundamental rules as they apply to the New Policy's driver exclusion language, as written, and "read as a whole

with all policy provisions given effect." *Soliva,* 345 S.E.2d at 35. By isolating only a single blank space in that Policy's driver exclusion Endorsement, the Respondents simply eschew the remaining language of the Endorsement plainly and unambiguously excluding those drivers "as stated in the policy Declarations," and the corresponding language in those Declarations naming Paul Conley with particularity as an excluded driver.[1]

Such remains the first major error in the Circuit Court's Order. Instead of applying the entirety of the New Policy as written, the Circuit Court improperly wrote Paul Conley's driver exclusion language out of the New Policy altogether, and, contrary to the meaning and intent of the parties as expressed in plain and unambiguous language in that Policy, judicially created a new contract for them.

2. The Circuit Court's Misapplication of *W.Va. Code* § 33-6-31h(b)(1), which Embraces and is in Harmony with the Common Law Rule that all Provisions of the New Policy be read Together.

Here, the significance of West Virginia's common law rules governing the application of insurance contracts is further amplified by its harmonious relationship with a key component of West Virginia's omnibus statute, *W.Va. Code* § 33-6-31h(b)(1). In their misguided effort to counter Nationwide's argument that the Circuit Court failed to properly apply § 33-6-31h(b)(1), and in fact failed to recognize it at all, the Respondents adopt the same strategy they utilized below. They simply pretend it does not exist. Rather than addressing the statutory language head on, they cavalierly sidestep it by offering this Court a conspicuously redacted version of the statute that intentionally omits the language of § 33-6-31h(b)(1) in its entirety. Pursuant to § 33-6-31h(b)(1):

[1] The Respondents also assert that the Endorsement failed to specifically list the policy number, a supposed omission that is meaningless since it was directly attached to all six-month iterations of the New Policy itself. They also wrongly assert that Nationwide did not fill in the effective date of the Endorsement, but ignore that, in the absence of a different date, the Endorsement expressly states that if was "effective at 12:01 a.m. on policy effective date." [JA 228].

(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).

The Respondents' clumsy sleight of hand predictably misses its mark. In *Jones v. Motorists Mut. Ins. Co.*, 356 S.E.2d 634 (W.Va. 1987), the seminal West Virginia case relating to driver exclusions under the omnibus statute, the Court made clear that it reads that and related statutes "in their entirety." *Id.*, 356 S.E.2d at 637. Indeed, under West Virginia law "[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). By continuing to evade § 33-6-31h(b)(1), the Respondents only expose both the folly of their argument and the plain error committed by the Circuit Court.

Notably, the Respondents do not contest Nationwide's argument that no part of the omnibus statute limits the scope of a court's inquiry to only a single portion of a "restrictive endorsement," nor does it prescribe a specific manner in which a driver exclusion endorsement must be structured, prepared or worded. Nowhere in the statute does it preclude an endorsement's incorporation of related exclusionary language through policy declarations or elsewhere in a policy. Rather, the Legislature's mandate in § 33-6-31h(b)(1) that "[t]he explicit, plain language of ***a motor vehicle liability policy*** between an insurer and its insureds"—in its entirety—"should control its effects" clearly reflects its intent to bring the statute into harmony with West Virginia's long-established common law rule that the plain and unambiguous language of a policy must "be read as a whole with all policy provisions given effect." *Soliva*, 345 S.E.2d at 35.

The Respondents likewise turn a blind eye to our Supreme Court's admonition that "[t]he common law . . . continues as the law of this State unless it is altered or changed by the Legislature." *Thomas*, at Syl. Pt. 8 (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)).

Section 33-6-31h(b)(1) manifests no legislative intent to alter or supersede application of the common law governing application of insurance contracts. To the contrary, the language of § 33-6-31h(b)(1) statutorily embraces the common law specifically in the context of driver exclusions. Thus, the Circuit Court's paradigm shift from long-established West Virginia common law erroneously flies in the face of both the rules governing application of insurance contracts and § 33-6-31h(b)(1). The Circuit Court not only wrote the full language of the Endorsement and corresponding Declarations naming Paul Conley with particularity as an excluded driver out of the New Policy, it also impermissibly wrote § 33-6-31h(b)(1) out of the omnibus statute altogether.

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 in part on the Supreme Court's 1987 decision in *Burr v. Nationwide Mut. Ins. Co.*, 359 S.E.2d 626 (W.Va. 1987). For purposes of simplicity and brevity, Nationwide respectfully refers the Court to its argument relating to the inapplicability of *Burr* set forth at pp. 20-22 of Petitioner's Brief.

The Dutys also cite a number of other West Virginia cases, which like *Burr* (1) all were decided before the Legislature's adoption in 2015 of § 33-6-31h(b)(1), and (2) as the Dutys

acknowledge, none of which involve a factual pattern even remotely similar to the instant case. [Respondents' Brief, at 11-12]. Those cases offer the Dutys no shelter. Again, this case is to be decided under § 33-6-31h(b)(1), which expressly requires that "[t]he explicit, plain language of a motor vehicle liability policy between an insurer and its insureds should control its effects." The language of § 33-6-31h(b)(1) does not permit a court to limit application of a driver exclusion to only a blank space on an endorsement, thereby exalting form over substance to frustrate the legislative will. Had the Legislature intended to strictly limit review and application of a policy's driver exclusion to a single, specific section of an endorsement, it would have expressed that intent. It obviously intended otherwise.

Accordingly, Nationwide respectfully reiterates that the Circuit Court's misapplication of § 33-6-31h(b)(1) so as to not apply the New Policy, and each section of that Policy, read as a whole and with all policy provisions given effect, is erroneous and must be reversed. Otherwise we are left with the type of "absurd result," inconsistent with the intent of the parties, the Supreme Court prohibits. *Soliva*, 345 S.E.2d at 35.

B. 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 Dutys sarcastically assert that "Nationwide asks the Court to throw it a lifeline by resorting to construction and interpretation of the policy and all related documents." [Respondents' Brief, at 13]. Nationwide seeks no such refuge and made it clear in Petitioner's Brief that it "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" and that

no further construction of interpretation of the Policy should be necessary. [Petitioner's Brief, at 23]. That remains true today.

It is also true that it is the Dutys who now assert that such a contractual ambiguity does in fact exist:

> There is ***certainly an ambiguity*** between the Policy Declarations page, which lists excluded drivers, and the endorsement, which fails to list excluded drivers. This ambiguity is emphasized even more when considering the policy's actual insuring language which provides that Nationwide "will pay for damages for which you are legally liable as a result of an accident" and further states that "[a] relative also has this protection." [JA 1-000130]. The auto liability portion of the Policy fails to make any reference to excluded drivers listed on the Policy Declarations. [JA 1-000130-000134].
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> * * *
>
> The ambiguity that exists from the blank form and the entirety of the documentation and evidence must be construed against Nationwide and in favor of coverage.

[Respondents' Brief, at 14-16 (emphasis added)].

In further support of their assertion that the New Policy is ambiguous, the Dutys also point this Court to two out of jurisdiction cases, *Allstate Ins. Co. v. Dean*, 269 Cal. App. 2d 1 (1969), and *American Family Mut. Ins. Grp. v. Claggett*, 472 S.W.2d 669 (Mo. Ct. App. 1971) (per curiam), both decided over 50 years ago. [Respondents' Brief, at 16-17]. Again, those cases offer them no relief. Neither was decided under current West Virginia law, and neither involved application of the requirement in § 33-6-31h(b)(1) that the New Policy, and each section of that Policy, be read as a whole with all policy provisions given effect.

Further, both *Allstate Ins. Co.* and *American Family Mut. Ins. Grp.* are factually inapposite to the case *sub judice*. Neither case involves the scenario presented here, where there exists a driver exclusion endorsement that plainly and unambiguously excluded drivers "as stated in the policy declarations," coupled with corresponding declarations specifically incorporating the

endorsement and naming the excluded driver with particularity. *See Allstate Ins. Co.*, 269 Cal. App. 2d at 3 (ambiguity found where the insured "subsequently received a printed policy of insurance and a declaration sheet . . . . ***The declaration sheet did not refer to an exclusion of coverage for her husband . . . or to any endorsement to the policy. Nor did the printed policy consisting of 17 pages of double column text refer to such an exclusion***") (emphasis added); *American Family Mut. Ins. Grp.*, 472 S.W.2d at 660-70 ("On its 'facing sheet' plaintiff's policy bears the typed name and address of the insured, Virginia Claggett, and a description of her automobile. Below this is typed '***Excluded driver on End. 43: Carl L. Claggett.' Other endorsements are attached to the policy, but none bears a number 43, nor refers to an excluded driver***'). Those decisions simply have no application, persuasive or otherwise, here.

Nonetheless, to the extent this Court agrees with the Dutys that an ambiguity exists in the New Policy as to Paul Conley's status as an excluded driver, their argument, like the Circuit Court's Order, rests 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) (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). "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).

Once more, the Respondents have chosen to not even address Nationwide's argument, set forth at pp. 22-25 of Petitioner's Brief, that in the event of a finding that the New Policy's driver exclusion language was ambiguous, the extrinsic evidence developed during discovery overwhelmingly demonstrates the plain intent of the parties to exclude Paul Conley as a covered driver. They likewise offer absolutely no countervailing evidence extrinsic to the New Policy that touches on the intent of Nationwide and its insureds pertaining to the exclusion of Paul Conley as an excluded driver. Thus, it remains wholly undisputed that:

- 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.

In sum, issuance of the New Policy, and all its subsequent renewals, were specifically contingent on the parties' mutual 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 consistent with the clear intent of the parties, Nationwide correctly denied coverage in connection with the September 12, 2019 collision.

C. The Dutys are not entitled to a Remand for Additional Discovery.

1. The "Reasonable Expectations Doctrine" is not at Issue.

Finally, the Dutys alone argue that resolution of this appeal requires a remand to the Circuit Court so that the parties can belatedly take the depositions of Lula Conley and Paul Conley, "as well as the testimony of the Nationwide agents who communicated with the Conleys," as such discovery purportedly may be relevant to ***the Conleys'*** "reasonable expectations." [Respondents' Brief, at 14]. According to the Dutys, such a remand is necessary "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." [*Id*., at 5].

It must be recognized that the reasonable expectations doctrine is not at issue on appeal, nor is it relevant to this case generally.[2] As the Dutys acknowledge, if the doctrine were

[2] The doctrine of reasonable expectations is limited to instances in which the policy language is ambiguous. *See, e.g*., *National Mutual Insurance v. McMahon & Sons*, 356 S.E.2d 488, 496 (W. Va. 1987). It generally arises "when reliable and relevant evidence, extrinsic to the insurance contract, casts a reasonable doubt as to whether coverage was provided by an otherwise unambiguous policy." Syl. Pt. 2, *State ex rel. Universal Underwriters Ins. Co. v. Wilson*, 825 S.E.2d 95 (W.Va. 2019) (emphasis added). Additionally, "[t]he doctrine of reasonable expectations comes into play when there is a discrepancy between the materials provided prior to the purchase of an insurance policy and the policy that is actually issued." *Am. States Ins. Co. v. Surbaugh*, 745 S.E.2d 179, 192 (W. Va. 2013) (Benjamin, C.J., concurring) (emphasis added). The Dutys do not allege, much less demonstrate through admissible evidence, a discrepancy between materials provided by Nationwide to the Conleys prior to their purchase of the New Policy and the New Policy as issued.

theoretically to apply to this case at all, it is with the Conleys, as Nationwide's insureds, with whom such expectations surrounding the New Policy might arise. "[T]he doctrine of reasonable expectations is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." *Syl. Pt. 8, National Mutual Insurance v. McMahon & Sons*, 356 S.E.2d 488 (W. Va. 1987). Under the doctrine, an insured's belief that it has insurance must be objectively reasonable. *McMahon*, 356 S.E.2d at 495.

Notably, the Conleys do not allege in their Cross-Claim a claim that they, as the insureds, had an objectively reasonable expectation of coverage for Paul Conley. [JA 28-36]. The Dutys likewise plead no reasonable expectations in their Complaint. [JA 1-10]. The Circuit Court's Order made no findings or conclusions relating to the reasonable expectations doctrine, and the Conleys make no such argument in their Summary Response. [JA 585-606].

2. The Dutys have failed to establish any of Required Elements of Rule 56(f).

The Dutys' desired remand also is barred by the strict requirements of *W. Va. R. Civ. P.* 56(f). 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 were initially to be addressed by the parties in discovery. [JA 64-70]. To that end the parties expressly agreed that the Court should "enter a Scheduling Order whereby the parties are given a short period of time to complete discovery related to the coverage issue and then submit memoranda of law to be ruled upon." [JA 65] [emphasis added]. The Court ordered that all discovery on coverage issues be completed by August 15, 2022, with the parties to submit their respective dispositive motions on September 1, 2022. [JA 66].

As the Dutys readily acknowledge, throughout the agreed three-month discovery period they failed to depose Paul Conley, Lula Conley, or any of the so-called "Nationwide agents who communicated with the Conleys" prior to the parties' agreed discovery deadline. In compliance with the Scheduling Order, Nationwide filed its motion for summary judgment and supporting memorandum on September 1, 2022. [JA 306-440]. In response to Nationwide's motion, the Dutys asserted that additional discovery as to extrinsic evidence may be required to respond to Nationwide's Motion for Summary Judgment. [JA 466-468]. Nationwide opposed that argument in it reply memorandum. [JA 511-513]. The issue was not addressed in any way by the Circuit Court in its Order granting summary judgment to the Dutys. [JA 585-606].

Against that backdrop, the Dutys' argument falls far short of meeting the strict requirements of Rule 56(f), which provides as follows:

> **When affidavits are unavailable.** — Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Our Supreme Court has clearly set forth the burden to be met by a party seeking relief under Rule 56(f):

> An opponent of a summary judgment motion requesting a continuance for further discovery need not follow the exact letter of Rule 56(f) of the West Virginia Rules of Civil Procedure in order to obtain it. When a departure from the rule occurs, it should be made in written form and in a timely manner. The statement must be made, if not by affidavit, in some authoritative manner by the party under penalty of perjury or by written representations of counsel. *At a minimum*, the party making an informal Rule 56(f) motion must satisfy four requirements. It should (1) articulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the movant; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier.

Syl. Pt. 1, *Powderidge Unit Owners Assoc. v Highland Props.*, 474 S.E.2d 872 (W.Va. 1996) (emphasis added); *Syl. Pt. 1, Kanawha County Pub. Library Bd. v. Bd. Of Educ. of Kanawha*, 745 S.E.2d 424 (W.Va. 2013).

Importantly, while the Supreme Court somewhat loosened the formal affidavit requirement,

> "[n]oncompliance with Rule 56(f) is itself justification for rejecting a claim that the opportunity for discovery was inadequate. We, like the Fourth Circuit, place great weight on the Rule 56(f) affidavit, believing that "[a] party may not simply assert in its brief that discovery was necessary and thereby overturn summary judgment when it failed to comply with the requirement of Rule 56(f) to set out reasons for the need for discovery in the affidavit.'"

Powderidge Unit Owners Assoc., 474 S.E.2d at 882 (quoting *Nguyen v. CAN Corp.*, 44 F.3d 234, 242 (4th Cir. 1995).

Here, in direct violation of the rule that "[a] party may not simply assert in its brief that discovery was necessary," *id*., the Dutys do exactly that. Through their Brief, they offer the Court only vague and conclusory assertions that additional depositions and other discovery are required to defend a summary judgment that was actually granted in their favor. Their argument is unsupported by an affidavit, by another authoritative writing "under penalty of perjury," *id*., at Syl. Pt. 1, or by written representations of counsel separate and apart from Respondents' Brief.

Further, the Dutys' Brief fails to recognize, much less establish, any of the four mandatory Rule 56(f) factors that, "at a minimum," must be presented to this Court. *Id.* They articulate no plausible basis for a belief that specified discoverable material facts likely exist which have not yet become accessible to them, and that there exists some realistic prospect that those material facts can be obtained within a reasonable additional time period. The Dutys make no attempt to demonstrate that such material facts will, if obtained, suffice to engender an issue both genuine

and material. And, particularly in light of their complete lack of diligence in conducting any of the now sought discovery within the timeframe established by the Circuit Court, and agreed to by all parties, they make no effort whatsoever to demonstrate ***good cause for their failure to have conducted the discovery earlier.***

The Supreme Court has long recognized that "[t]he good cause standard primarily considers the diligence of the party seeking the amendment. . . . If the moving party was not diligent, the inquiry should end." *Walker v. Option One Mortg. Corp.* 649 S.E.2d 233, 246 n. 11 (W.Va. 2007) (quoting Cleckley, Davis, & Palmer, *Litigation Handbook*, § 16(b)(1)); *see also, Clark v. St. Mary's Med. Ctr., Inc.*, 205 W.Va. LEXIS 513, at *15 (W. Va. Apr. 10, 2015 (memorandum decision) (Rule 56(f) requires that "[t]he party seeking a continuance must show due diligence both in pursuing discovery before the summary judgment initiative surfaced and in pursuing an extension of time thereafter") (quoting Cleckley, Davis & Palmer, *Litigation Handbook*, § 56(f)).

> [B]y placing the burden of proving reasonable diligence on the party seeking amendment the Court avoids procrastination and delay, "recognize[ing] [that] a scheduling order . . . is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril." *Marcum v. Zimmer,* 163 F.R.D. 250, 253 (S.D. W.Va. 1995) (citing *Goewey v. United States,* 886 F.Supp. 1268, 1283 (D. S.C. 1995)) (internal quotations and brackets omitted).[1] Indeed, placing the burden on the party seeking to amend the scheduling order's deadlines confirms that [the] scheduling order is the critical path chosen by the trial judge and the parties to fulfill the mandate of *Rule 1* in secur[ing] the just, speedy, and inexpensive determination of every action.

Id. (quotation omitted)

The Dutys clearly have not demonstrated the kind of diligence in timely conducting and completing discovery that is required to satisfy the "good cause" standard, nor met any of the other requirements of Rule 56(f). They are not entitled to a remand for discovery they simply failed to

complete within the agreed timeframe established by the Circuit Court. This appeal is ripe for determination.

CONCLUSION

Based on the foregoing, Nationwide respectfully reiterates that the Circuit Court erred in granting the Dutys' motion for summary judgment, and in denying Nationwide's motion for summary judgment. Under this Court's *de novo* standard of review, the Order of the Circuit Court must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ***"Petitioner's Reply Brief"*** was filed with the Supreme Court of Appeals of West Virginia on May 7, 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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This 7th day of May, 2024

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