IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Danny J. Dobbins and Jackie L. Dobbins,

Petitioners

v.

No.24-362
(Appeal from an order of the
Intermediate Court of Appeals
(23-ICA-101))

West Virginia National Auto Insurance Company,

Respondent

PETITIONERS' BRIEF

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STATEMENT OF THE CASE

The decision rendered by the Intermediate Court of Appeals ("Intermediate Court") will leave scores of innocent West Virginians without recourse if they are the victim of a negligent, financially irresponsible hit-and-run driver. In reality, the Intermediate Court's decision enables West Virginia National Auto Insurance Company ("WV National") to "have its cake and eat it to" (i.e., it is allowed to keep the Petitioners' insurance premium payments and, then, permitted to avoid its obligation under the insurance contract to pay for the damages and injures caused by a negligent, financially irresponsible hit-and-run driver all because the collision occurred on a holiday week-end and the government was closed). This Court should correct this injustice and declare that WV National must afford uninsured motorist coverage ("UM") to its insureds (the

Petitioners) in the amount of $25,000/$50,000/$25,000 under the Auto Policy[1] to protect against the loss and hardships caused by a hit-and-run driver on 02/15/19.

A. The Hit-And-Run Collision Occurred At The Close Of Business On The Friday Of President's Day Weekend

On Friday, 02/15/19, at approximately 3:30 p.m. (being the close of business on Friday of the upcoming President's Day weekend), petitioner Danny Dobbins was operating his 2001 Dodge Dakota at or near Loraine Street in the City of Logan, Logan County, West Virginia. A.R. 25-33, 91, 93-94. At this date, time and location, the said plaintiff encountered an unknown person driving a black Toyota truck who failed to maintain control of his/her vehicle and struck the said Dodge in the rear passenger side. A.R. 25-33, 76, 91, 93-94, 130-132. The driver of the black Toyota truck then fled the scene. Id. Fortunately, there were multiple independent witnesses (Alexis Hainer, Heather Neace, Kevin Fisher, Misty Elkins and Anthony Tiller) who **all** confirm the driver of the black Toyota truck caused the collision and then fled the scene. A.R. 140, 141.

The subject collision occurred at the end of business on Friday, 02/15/19. A.R. 25-33, 91, 93-94. Monday, 02/18/19 was President's Day, a legal holiday as set forth in W.Va. Code §2-2-1. A.R. 144-149. Since many businesses and government (local, county and state) are closed on Saturday, Sunday and President's Day (Monday), the Petitioners reported the hit-and-run collision to their automobile insurance carrier, WV National, on Tuesday, 02/19/19 (the first business day following the holiday weekend). A.R. at 137-140. The Petitioners also travelled on this same day (being February 19, 2019) to Logan City Hall to report the hit-and-run collision to the Logan City Police Department[2]. A.R. 133-134 and 151-152. The Logan City Police Department, however,

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[1] WV National's automobile policy issued to Petitioner Jackie L. Dobbins bears policy number WV 1186521, which will be referred to as the "Auto Policy".

[2] The said collision was reported within twenty-four (24) hours pursuant to W.Va. Code §2-2-2.

refused to prepare a report. Id. WV National continued with its investigation and the plaintiffs cooperated by completing and returning the Insured Driver Form (which Form included the names of witnesses, among other information). A.R. 92-94, 140. Despite the plaintiffs' cooperation, WV National refused to provide uninsured motorist ("UM") coverage by letter of 03/27/19. A.R. 154-155.

B. All Evidence Indicates A Hit-And-Run Driver Was At Fault For This Collision

The Petitioners then retained counsel to represent their interests. A.R. 153. WV National now provided a letter of 04/15/19 advising it was not affording UM coverage because the Petitioners did not report the said collision to the police within twenty-four (24) hours. A.R. 154-155. The Petitioners responded by asking: (i) whether West Virginia National contended the plaintiffs' Dodge truck was not struck by a "hit-and-driver" and (ii) whether its investigation in this UM claim was, in any way prejudiced. A.R. 156. By letter of 06/12/19, WV National now requested, for the first time, witness contact information and an available time to inspect the Petitioners' Dodge truck. A.R. 160. The Petitioners complied with this request and provided the identity for the witnesses and his/her last known phone number. A.R. 161. Thereafter, WV National advised it would contact witnesses, appraise the damage to the Dodge truck and *"advise as to any change in its coverage position after obtaining statements from the witnesses"*. A.R. 160. Obviously, this letter suggests that West Virginia National would provide UM coverage if witness(es) confirm the Dodge truck which Petitioner Danny Dobbins was operating was struck by a hit-and-run driver and that the property damages to the said vehicle could be verified.

WV National assigned Mike Call with Call Adjusting Services, Inc. who inspected the Dodge, confirmed damage to the rear passenger side of the said vehicle, photographed the damage,

and confirmed the Dodge was a total loss due to this collision. A.R. at 160, 162-174[3]. Further, it obtained a statement from Alexis Hainer on 06/28/19; Heather Neace on 07/31/19; and Kevin Fisher on 08/12/19 – all of whom confirm the Dodge truck was struck by a hit-and-run driver. A.R. 140-141, 175. Despite the overwhelming evidence that the Petitioners' Dodge truck was struck by a hit-and-run driver on 02/15/19 (in fact **all evidence** indicates the Dodge truck by a negligent, financially irresponsible hit-and-run driver), WV National provided a letter of 09/3/19 advising that it *"must respectfully deny any and all uninsured motorist claims arising from the subject loss as the police were not contacted within 24 hours of the discovery of subject loss as required by the subject policy[4] and WV statute 33-6-31 (e) (1)."* A.R. 176[5]. This letter, clearly, begs the question as to why WV National obtained witness statements and inspected the truck if it intended to again deny coverage because the police were not contacted within twenty-four (24) hours (which fell in the middle of a holiday weekend as defined by West Virginia law).

C. Lower Court Proceedings

The Petitioners then filed declaratory judgment action in the Circuit Court of Logan County, West Virginia seeking, among other things, a declaration that WV National must afford $25,000/$50,000/$25,000 in UM coverage under the Auto Policy. A.R. 25-34. The Circuit Court held that WV National must afford UM coverage under the Auto Policy to protect against the loss and hardships caused by a hit-and-run driver in the motor vehicle collision of 02/15/19. A.R. 1-

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[3] The undersigned apologizes for the poor quality of the black and white photos contained within the said estimate. The undersigned was not, however, provided with color copies.

[4] Like most, the Petitioners are not attorneys or sophisticated in the law. Petitioner Danny J. Dobbins dropped out of school in Fifth (5th) Grade and has difficulty reading. A.R. at 128-129. Petitioner Jackie L. Dobbins dropped out of school in Eleventh (11th) Grade. A.R. 3, 227-230.

[5] This obviously begs the question as to why West Virginia National obtained witness statements and examined the truck if it intended to again deny coverage because the police were not contacted within twenty-four (24) hours - which fell in the middle of a holiday weekend.

21. In reaching this conclusion, the Circuit Court applied W.Va. Code §2-2-1, et seq., and held that the collision was reported to the police "within twenty-four (24) hours" as required under the Auto Policy[6] and W.Va. Code §33-6-31(e)(1); that WV National was able to adequately investigate this matter and was not prejudiced by any purported delay (i.e., it was able to obtain statements from independent witnesses who all confirmed the hit-and-run collision occurred and was able to inspect the Petitioners' Dodge truck which confirmed physical damage to the same); and that W.Va. Code §33-6-31 (the uninsured motorist statute) is remedial in nature and, therefore, must be construed liberally in order to effect its purpose. WV National then appealed to the Intermediate Court of Appeals.

The Intermediate Court of Appeals ("Intermediate Court"), however, reversed the Circuit Court and held that the Petitioners were not entitled to UM coverage under the Auto Policy to protect against the loss and hardships caused by the hit-and-run driver. In reaching this conclusion, the Intermediate Court refused to apply W.Va. Code §2-2-1, et seq.; ignored the preeminent public policy of this State which requires a Court to liberally construe W.Va. Code §33-6-31 (the uninsured motorist statute); and ignored long-standing precedent which required WV National demonstrate it was prejudiced by any purported delayed notice to avoid responsibility under the

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[6] The Auto Policy states, in part, as follows:

Part E – DUTIES AFTER AN ACCIDENT OR LOSS

C. A person seeking Uninsured Motorist Coverage must also:

1. Within twenty-four hours after the insured discovers, and being physically able to report the occurrence of such accident, the insured or someone on his or her behalf, reports the accident to a police, peace or to a judicial officer, unless the accident has already been investigated by a police officer.

See A.R. 98-102.

Auto Policy. See State Automobile Mutual Insurance Company v. Youler 183 W.Va. 556, 396 S.E.2d 737 (W.Va. 1990), and its progeny.

SUMMARY OF ARGUMENT

First, the Intermediate Court erred by failing to apply W.Va. Code §2-2-1, et seq., and toll the twenty-four (24) hour notice requirement under W.Va. Code §33-6-31(e). W.Va. Code §33-6-31(e) states that if an owner or operator of a motor vehicle which causes property damage or bodily injury is unknown, then the insured must report the collision to a police, peace or judicial officer within twenty-four (24) hours. Here, the twenty-four (24) hours would fall on Saturday, 02/16/19. Of course, the next day would be Sunday. The following day would be Monday, 02/18/19, President's Day and a legal holiday as set forth in W.Va. Code 2-2-1. The Peace officers and judicial officers are not typically available on Saturdays, Sunday and legal holidays. Further, many small-town police departments, such as the one in Logan, operate with a skeleton crew on the weekends and legal holidays and only respond to impending emergencies. Luckily, W.Va. Code §2-2-1, et seq., addresses this situation. W.Va. Code §2-2-1(e) states, in part, that "If **any applicable provision of this code** or any legislative rule or other administrative rule or regulation promulgated pursuant to the provisions of this code **designates a particular date on, before or after which an event, default or omission is required or allowed to occur**, and **if the particular date designated falls on a Saturday, Sunday, legal holiday** or designated day off, **then the date on which the act, event, default or omission is required or allowed to occur is the next day that is not a Saturday, Sunday, legal holiday** or designated day off **[emphasis added]**." Accordingly, the designated twenty-four (24) hours would not expire until Tuesday, 02/19/19.

Second, the Intermediate Court erred by refusing to apply the prejudice standard set forth in Youler to the twenty-four (24) hour notice requirement set forth in W.Va. Code §33-6-31(e)(1).

Instead, the Intermediate Court concluded that the prejudice standard set forth in Youler is only applicable to the sixty (60) day notice requirement to the insurer under W.Va. Code §33-6-31(e)(2), and not the twenty-four (24) hour reporting requirement under W.Va. Code §33-6-31(e)(1). The Intermediate Court's holding disregards well established law that requires a Court to liberally construe notice provisions under W.Va. Code §33-6-31 and automobile insurance policies to effectuate coverage and protect first-party insureds (such as the Petitioners) against the loss and financial hardships caused by a negligent hit-and-run driver. In short, WV National cannot demonstrate any prejudice due to any purported delay by the Petitioners and, therefore, this Court should declare WV National must afford UM coverage under the Auto policy.

Third, the Intermediate Court erred by strictly applying the language contained within the Auto Policy which required the collision be reported to the police, peace or judicial officer within twenty-four hours. West Virginia law does not require strict, technical compliance with the notice provisions contained in an insurance policy. Otherwise, the holdings set forth in Youler; Colonial Ins. Co. v. Barrett[7] 208 W.Va. 706, 542 S.E.2d 869 (W.Va. 2000); Kronjaeger v. The Buckeye Union Ins. Co., 200 W.Va. 570, 490 S.E.2d 657 (W.Va. 1997); Bowyer by Bowyer v. Thomas, 423 S.E.2d 906, 188 W.Va. 297 (W.Va. 1992) and Moses Enterprises, LLC v. Lexington Ins. Co, et al., (W.Va. S.D. 3:19-0477) would not exist. Moreover, this Court has not hesitated to strike an insurance policy provision when the same is not justified or contrary to law and public policy. *See, e.g.,* Jones v. Motorist Mut. Ins. Co., 177 W.Va. 763, 356 S.E.2d 634 (W.Va. 1987) [named driver exclusion not valid up to the mandatory liability limits of insurance]; Henry v. Benyo, 203 W.Va.

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[7] Also see Petrice v. Federal Kemper Ins. Co., 163 W.Va. 737, 740, 260 S.E.2d 276, 278 (1979) which held that a notice provision "is to be liberally construed in favor of the insured" (and not read as a series of technical hurdles). Rather, all that is required is the insurer must be able to adequately investigate the claim and estimate its liabilities. Id.

172, 506 S.E.2d 615 (W.Va. 1998) [workers' compensation exclusion not valid with respect to non co-worker tortfeasor]; Hamric v. Doe, 201 W.Va. 619, 499 S.E.2d 619 (W.Va. 1997) [physical contact requirement not valid where there is independent third party testimony to verify existence of phantom vehicle]; and Cunningham v. Hill, 226 W.Va. 180, 698 S.E.2d 944 (W.Va. 2010) [reduction of UIM coverage not valid pursuant to W.Va. Code §33-6-31(b)]. Lastly, though this Court has not previously considered whether an insurer must demonstrate prejudice due to an insured's failure to report an occurrence to the police, peace or judicial officer within twenty-four (24) hours other jurisdictions have provided guidance. Specifically, the Courts in Michael v. Metropolitan Property & Casualty Insurance Company, 3 Mass. L. Rptr. 355, 1995 WL 808878; Powell v. Automotive Casualty Insurance Company, 630 So.2d 581 (1994); Price v. Doe and Government Employees Insurance Company, 638 A.2d 1147 (1994); Beck v. State Farm Mut. Auto. Ins. Co., 126 Cal. Rptr. 602, 54 Cal. App. 3d 347 (Cal. App. 1976); and Pikey v. General Acc. Ins. Co. of America, 922 S.W.2d 777 (Mo. App. 1996) all held, in part, that an insured's failure to report a hit-and-run collision to the police within twenty-four (24) hours did not preclude UM coverage because the insurer was not prejudiced by the insured's failure to timely report the same. Based upon all the above, this Court should declare WV National must afford UM coverage to the Petitioners under the Auto Policy.

STATEMENT REGARDING ORAL ARGUMENTAND DECISION

The Petitioners request that this Court grant oral argument. This Court, upon information and belief, has not previously determined whether an insurer must demonstrate prejudice due to an insured's failure to report an occurrence to the police, peace or judicial officer within twenty-four (24) hours [perhaps because it is logical to conclude that if prejudice must be shown under W.Va. Code §33-6-31(e)(2) it must also be shown under W.Va. Code §33-6-31(e)(1)]. Thus, this

is an issue of first impression. Further, this matter involves an issue of fundamental public importance (the Intermediate Court's ruling will leave scores of innocent West Virginians without recourse if they are the victim of a negligent, financially irresponsible hit-and-run driver). As such, an oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure is appropriate.

ARGUMENT

I. THE INTERMEDIATE COURT ERRED BY REFUSING TO APPLY W.VA. CODE §2-2-1, ET SEQ., WHICH TOLLED THE TWENTY-FOUR (24) HOUR NOTICE REQUIREMENT UNDER W.VA. CODE §33-6-31(e)

W.Va. Code §33-6-31(e) states, in summary, that for an insured to recover under an uninsured motorist endorsement or provision, he/she must:

> (1) within twenty-four (24) hours report the occurrence of the accident to a police, peace or judicial officer unless the same has been investigated by a police officer;
>
> (2) notify the insurance company, within sixty days after such collision, that the insured or his/her legal representative, has a cause of action arising out of such accident for damages against a person whose identity if unknown and setting forth the facts in support thereof; and upon written request of the insurance company communicated to the insured not later than five days after receipt of such statement, make available for inspection the motor vehicle which the insured occupying at the time of the accident; and
>
> (3) upon trial establish that the motor vehicle which caused the bodily injury or property damage, whose operator is unknown, was a "hit and run" motor vehicle, meaning a motor vehicle which causes damage to the property of the insured arising out of physical contact of such motor vehicle therewith, or which causes bodily injury to the insured arising out of physical contact of such motor vehicle with the insured.

W.Va. Code §33-6-31(b) states, in part, that no policy or contract for bodily injury liability insurance, or of property damage liability insurance, covering liability arising from the ownership, maintenance or use of any motor vehicle *"be so issued unless it contains an endorsement or provision undertaking to pay the insured all sums which he or she is legally entitled to recover*

from the owner or operator of an uninsured motor vehicle." In other words, uninsured motorist coverage is mandatory. Miller v. Lambert, 195 W.Va. 63, 464 S.E.2d 582 (W.Va. 1995). The purpose of W.Va. Code §33-6-31 is to *"insure that innocent West Virginia citizens who are injured in motor vehicle accidents are protected against the loss and hardships caused by negligent, financially irresponsible drivers who are uninsured or underinsured."* Perkins v. Doe, 177 W.Va. 84, 350 S.E.2d 711 (W.Va. 1986). Also see Westfield Ins. Co. v. Paugh, 390 F.Supp.2d 511 (N.D. W.Va. 2005).

The "most and basic and preeminent concern . . . is that insurance consumers . . . receive the benefit of their bargained for exchange" when contracting for motor vehicle insurance coverage. Findley v. State Farm Mutual Automobile Ins. Co., 213 W.Va. 80, 576 S.E.2d 807 (W.Va. 2002). Also see Mitchell v. Broadnax, 208 W.Va. 36, 537 S.E.2d 882 (W.Va. 2000). The West Virginia Supreme Court of Appeals has repeatedly recognized that W.Va. Code §33-6-31 (the uninsured motorist statute) "is remedial in nature and, therefore, must be construed liberally in order to effect its purpose." Perkins. Also see Cunningham. As the Court in Youler, noted:

> the legislature has articulated a public policy of full indemnification or compensation underlying both uninsured or underinsured motorist coverage in the State of West Virginia. **That is, the preeminent public policy of this state in uninsured or underinsured motorist cases is that the injured persons be fully compensated for his or her damages not compensated by a negligent tortfeasor, up to the limits of the uninsured or underinsured motorist coverage (emphasis added).**

Youler, 183 W.Va. at 564, 396 S.E.2d at 745.

Applying the public policy of this State which requires W.Va. Code §33-6-31 be liberally construed to protect innocent citizens (such as the Petitioners) against injuries and damages, the Intermediate Court erred by refusing to apply W.Va. Code §2-2-1, et seq. W.Va. Code §2-2-1(e) states, in part, if "**any applicable provision of this code** or any legislative rule or other

administrative rule or regulation promulgated pursuant to the provisions of this code **designates a particular date on, before or after which an event, default or omission is required or allowed to occur**, and **if the particular date designated falls on a Saturday, Sunday, legal holiday** or designated day off, **then the date on which the act, event, default or omission is required or allowed to occur is the next day that is not a Saturday, Sunday, legal holiday** or designated day off **[emphasis added]**." First, W.Va. Code §33-6-31(e) is the applicable provision of the West Virginia Code. Second, W.Va. Code §33-6-31(e) states that if an owner or operator of a motor vehicle which causes property damage or bodily injury is unknown, then the insured must report the collision to a police, peace or judicial officer within twenty-four hours. Accordingly, W.Va. Code §33-6-31(e) designates a particular date which an event is required. Third, the subject collision occurred at the end of business on Friday, 02/15/19. Twenty-four (24) hours following the collision would fall on a Saturday. Of course, the next day would be Sunday. The following day would be Monday, 02/18/19, President's Day and a legal holiday as set forth in W.Va. Code §2-2-1. The next day would be Tuesday, 02/19/19. Accordingly, the designated twenty-four (24) hours would not expire until Tuesday, 02/19/19.

The Intermediate Court also held that, assuming *arguendo*, the twenty-four (24) hour reporting period was tolled, the Petitioners failed to report the said collision within the "tolled" period. Specifically, the Intermediate Court noted Petitioner Danny Dobbins testified he was not certain whether he went to Logan City Hall to report the collision to the police before he contacted WV National or after he contacted WV National and, therefore, the Circuit Court erred by holding the collision was reported to the police within the "tolled" twenty-four (24) hour period as set forth under W.Va. Code §33-6-31(e)(1) and the Auto Policy. WV National was advised of this collision on Tuesday, 02/19/19. This is not in dispute. WVCSR §114-14-1, et seq., requires that an insurer

must disclose to first-party claimants all pertinent benefits, coverages or other provisions of an insurance policy under which a claim is presented. The Petitioners are first-party claimants. WV National, as the insurer, was required to disclose the pertinent provisions of the insurance contract (including any provisions that require the Petitioners to report the collision to the police within twenty-four (24) hours). Thus, WV National was required to inform the Petitioners during the initial conversation of 02/19/19 (which would have been within twenty-four (24) hours under W.Va. Code §2-2-2) of the policy provisions which required they immediately report the collision to the police. It, however, failed to make such required disclosure to the Respondents (and there is no evidence to suggest otherwise). As such, WV National should now be precluded from taking advantage of its insureds (the Petitioners) – which is exactly what it is attempting to do.

II. THE INTERMEDIATE COURT ERRED BY HOLDING THE PREJUDICE STANDARD SET FORTH IN YOULER IS ONLY APPLICABLE TO THE SIXTY-DAY NOTICE REQUIREMENT TO THE INSURER UNDER W.VA. CODE §33-6-31(e)(2), AND NOT THE TWENTY-FOUR HOUR REPORTING REQUIREMENT TOT HE POLICE, PEACE OR JUDICIAL OFFICER UNDER W.VA. CODE §33-6-31(e)(1) – ALL OF WHICH DISREGARDS WELL ESTABLISHED LAW THAT REQUIRES A COURT TO LIBERALLY CONSTURE NOTICE PROVISIONS UNDER W.VA. CODE §33-6-31 AND AUTOMOBILE INSURANCE POLICIES TO EFFECUATE COVERAGE AND PROTECT INNOCENT PARTIES AGAINST THE LOSS AND FINANCIAL HARDSHIPS CAUSED BY A NEGLIGENT HIT-AND-RUN DRIVER

The Intermediate Court erred by refusing to apply the prejudice standard set forth in Youler to the twenty-four (24) notice requirement set forth in W.Va. Code §33-6-31(e)(1). Instead, the Intermediate Court concluded that the prejudice standard set forth in Youler is only applicable to the sixty (60) day notice requirement to the insurer under W.Va. Code §33-6-31(e)(2), and not the twenty-four (24) hour reporting requirement under W.Va. Code §33-6-31(e)(1). The Intermediate Court is wrong.

To begin, this Court in Youler warned that "Courts should exercise restraint in regard to requiring strict technical compliance with coverage provisions that require the notice of an accident or proof of claim requirements". Id at 183 W.Va. at 562, 396 S.E.2d at 744. "**In an uninsured motorist case, prejudice to the investigative interests to the insurer is a factor to be considered, along with the reasons for the delay and the length of delay**, in determining the overall reasonableness in giving notice of the collision. Id. Typically, an insured must put on evidence showing the reason for the delay in giving notice. Once this prerequisite is satisfied, the insurer must then demonstrate that it was prejudiced by the insured's failure to provide notice sooner". Syl. Pt. 2, Youler. To determine whether an insurer has been prejudiced by an unreasonable delay, Courts should abide by the following:

> . . . several factors must be considered before the Court can determine if the delay in notifying the insurance company will bar the claim against the insurer. The length of the delay in notifying the insurer must be considered along with the reasonableness of the delay. If the delay appears reasonable in light of the insured's explanation, the burden shifts to the insurance company to show that the delay in notification prejudiced their investigation and defense of the claim. If the insurer can produce evidence of prejudice, then the insured will be held to the letter of the policy and the insured barred from making a claim against the insurance company. If, however, the insurer cannot point to any prejudice caused by the delay in notification, then the claim is not barred by the insured's failure to notify.

Dairyland Ins. Co. v. Voshel, 189 W.Va. 121, 428 S.E.2d 542 (1993) at Syl. Pt. 2. Thus, WV National must show its investigative interests were prejudiced. It cannot, however, do so.

This collision occurred at the close of business on Friday, 02/15/19, at 3:30 p.m. Contrary to WV National's position, Logan City Hall, where the City Police Department is located, would not be open for business until Tuesday, 02/19/19 due to the President's Day holiday. The same holds true with the Logan County Sheriff's Department and West Virginia State Police. Obviously, the said agencies would be available on an emergency basis via 911, however, none

would respond to a hit and run collision that occurred twenty-four (24) hours before wherein the driver fled. This is common sense. Rather, the Petitioners would have been instructed to report the collision to City Hall during business hours on 02/19/19 – which is what occurred. There are additional reasons for any purported delays. Petitioner Danny Dobbins dropped out of school in Fifth (5th) Grade and cannot read or write. A.R. 128-129. Petitioner Jackie Dobbins dropped out of school in Eleventh (11th) Grade and had difficulty filling out collision-related documents for WV National. Since the Petitioners have set forth reasons for the purported delay, WV National must now show it was prejudiced by this delay. It cannot do so.

Specifically, the Petitioners reported the collision to WV National on 02/19/19 (the first business day following President's Day Weekend and within twenty-four hours pursuant to W.Va. Code §2-2-2); they provided WV National with the completed Insured Driver Statement Form as requested; WV National examined and inspected the Petitioners' Dodge truck as requested; they provided WV National with the identity and contact information for the individuals who witnessed the hit-and-run collision as requested; and, importantly, WV National was given an opportunity to independently obtain statements from the witnesses. Put simply, WV National cannot show it was prejudiced by any purported delay on behalf of the Petitioners in notifying the police.

As additional support this Court consistently holds an insurer must show it was prejudiced by an insured's delayed notification, the Petitioners submit the following: In Colonial the Court held that the notice requirement in an insurance contract is satisfied when the said insurer receives notice of the claim from any source (the insured or a third party) and, therefore, the issue is whether the notice was unreasonably delayed so as to prejudice the insurer's rights. In Kronjaeger, the Court held an insurer must show it was prejudiced due to an insured failing to obtain the insurer's consent to settle and waiver of subrogation before settling with the tortfeasor to justify a refusal to

pay UIM benefits. In Bowyer the Court held that before an insurance policy will be voided because of an insured's failure to cooperate, such failure must be substantial and of such nature to prejudice the insurer's rights.

Lastly, the United States District Court for the Southern District of West Virginia in Moses recently addressed whether an insurer was required to provide coverage under an insurance policy wherein the insured was not notified of the loss within ninety (90) days as required under the policy. A.R. 177-181. In Moses, the plaintiff sold a vehicle to an individual using a stolen identity on 08/2/18. The vehicle was financed through United Bank. On 11/15/18, a person reported to law enforcement their identity had been stolen to purchase the said vehicle. United Bank then notified the plaintiff of the fraudulent purchase on 11/28/18. That same day, the plaintiff contacted its insurance agency to advise of the claim. A formal claim was then submitted to the insurer on 12/4/18, however, the insurer denied the same because it was not reported within ninety (90) days after parting with the vehicle as required under the policy. Suit was filed and the District Court agreed more than ninety (90) days had passed since the plaintiff parted with the vehicle. The Court, however, noted the plaintiff reported the fraudulent transaction to its insurance agent the same day it learned of the same and that a formal claim was filed with the insurer less than a week later. Based upon these facts, the burden shifted to the insurer to show it was prejudiced due to the delay. The insurer could not demonstrate prejudice by the delay, so the Moses Court granted summary judgment to the plaintiff by concluding the insurer unlawfully denied coverage.

The Petitioners acknowledge this Court, upon information and belief, has not previously determined whether an insurer must demonstrate prejudice due to an insured's failure to report an occurrence to the police within twenty-four (24) hours [perhaps because it is logical to conclude that if prejudice must be shown W.Va. Code §33-6-31(e)(2) it must also be shown under W.Va.

Code §33-6-31(e)(1)]. Other jurisdictions have, however, considered this issue and concluded an insurer must show prejudice due to the insured's failure to report a hit-and-run collision to the police within twenty-four (24) hours. For example, in Michael v. Metropolitan Prop. & Cas. Ins. Co., the Court held that an insured's failure to report a hit-and-run collision to the police within twenty-four (24) hours did not preclude uninsured motorist coverage wherein the insurer could not show it was prejudiced by any delay. Likewise, in Powell v. Automotive Cas. Ins. Co., the Court held that an insured's failure to report a hit-and-run collision to the police within twenty-four (24) hours as required did not preclude uninsured motorist coverage because the insured was not prejudiced by the insured's failure to timely report the said collision to the police. Also see Price v. Doe and Government Employees Insurance, wherein the District of Columbia Court of Appeals refused to enforce a policy provision which required that the police be notified of an accident within twenty-four (24) hours; Beck v. State Farm Mut. Auto. Ins. Co., wherein the Court held an insurer could not show prejudice as a result of an insured's failure to report a collision to the police within twenty-four (24) hours; and Pikey v. General Acc. Ins. Co. of America, wherein the Court held an insured must only substantially comply with the notice requirement in an insurance policy and that substantial compliance is determined by whether an insurer is prejudiced by the late notification.

III. WEST VIRGINIA LAW DOES NOT REQUIRE STRICT, TECHNICAL COMPLIANCE WITH AUTOMOBILE INSURANCE POLICY PROVISIONS REQUIRING NOTICE

The Intermediate Court also held the unambiguous terms of the Auto Policy requires an insured to contact the police within twenty-four (24) hours of a hit-and-run collision. The Intermediate Court, however, failed to acknowledge West Virginia law does not require strict, technical compliance with the notice provisions contained in an insurance policy. If policy

provisions are given full force and effect in each and every situation, then the holdings set forth in Youler, Colonial, Bowyer, Kronjaeger, and Moses would not exist. Moreover, the West Virginia Supreme Court of Appeals has not hesitated to strike an insurance policy provision when the same is not justified or contrary to law and public policy. *See, e.g.,* Jones v. Motorist Mut. Ins. Co., [named driver exclusion not valid up to the mandatory liability limits of insurance]; Henry v. Benyo, [workers' compensation exclusion not valid with respect to non co-worker tortfeasor]; Hamric v. Doe, [physical contact requirement not valid where there is independent third party testimony to verify existence of phantom vehicle]; and Cunningham v. Hill [reduction of UIM coverage not valid pursuant to W.Va. Code §33-6-31(b)].

This Court's holding in Lusk v. Doe, 338 S.E.2d 375, 175 W.Va. 775 (W.Va. 1985) also demonstrates strict, technical compliance with a notice provision contained within an automobile insurance policy is not required. In Lusk, Wilma Lusk ("Mrs. Lusk") was operating her vehicle on Thursday, 03/25/82 when she was struck by the driver of an unknown truck. Due to the collision, she was injured and hospitalized. Thereafter, Mrs. Lusk and Paul Lusk ("Mr. Lusk") filed suit against John Doe and served State Farm, their UM carrier. Mrs. Lusk testified her vehicle was struck by an unknown driver of a coal truck; Mrs. Lusk's sister-in-law testified she informed the State Farm agent on Friday, 03/26/82, Mrs. Lusk was injured in the collision and that the driver of the at-fault coal truck was unknown; and Mrs. Lusk's brother-in-law testified he went to the hospital on Sunday, 03/28/82, and assisted Mrs. Lusk with filling out a DMV accident report form. Lusk, 338 S.E.2d at 377. Mr. Lusk also testified he provided information about the collision to the State Farm agent on Monday, 03/29/82; that he met with a State Farm adjuster on Tuesday,

03/31/82[8]; and that he completed and mailed the DMV accident report. Id. State Farm refuted this evidence by arguing the sister-in-law was unaware as to whether Ms. Lusk's vehicle made "physical contact" with the truck. Further, State Farm Agent Glen McKinney testified that he was never advised Mrs. Lusk's vehicle made "physical contact" with the coal truck and that he was never informed of a potential UM claim within sixty (60) days of the collision. Id. Lastly, State Farm submitted an affidavit from the DMV advising its records were reviewed and no report of the subject collision was on file (i.e., it did not have record of the collision being reported). Id. State Farm then moved to dismiss because Mrs. Lusk's vehicle did not make "physical contact" with the truck; the collision was not reported to the police and/or DMV within twenty-four (24) hours; and because it was not timely notified of the collision pursuant to W.Va. Code §33-6-31(e).

Ultimately, the Court in Lusk held that State Farm was not entitled to a dismissal. In reaching this conclusion, the Lusk Court noted W.Va. Code §33-6-31(e) contains two separate notice provisions appliable to a hit and run driver. Subsection (e)(i) provides for notice to the police and/or DMV and subsection (e)(ii) provides for notice to the UM carrier. As such, Mr. Lusk's statement to the insurance agent that his wife advised she was struck by an unknown vehicle would constitute sufficient notice to the insurer as subsection (e)(ii) does not require a "legalistic" formal notice couched in the language of the statute. Lusk, 338 S.E.2d at 378, 379. Further, "*[t]he circuit court's narrow construction of the language of subsection (e)(i) of the uninsured motorist statue contravenes the intended objective of the uninsured motorist statute. The* ***primary, if not sole purpose of mandatory uninsured motorist coverage is to protect innocent victims from the hardships caused by negligent, financially irresponsible drivers. [emphasis added]***" Id. Based

[8] He informed the adjuster that he did not know whether Ms. Lusk's vehicle made actual contact with the coal truck because he was not present at the time of the collision.

upon the above and the spirit and intent of the UM statute, the Court in Lusk held that the fact the collision was not reported to the police and/or DMV within twenty-four (24) hours did not prejudice Ms. Lusk's ability to pursue an UM claim against State Farm.

The facts of this case are more compelling than the facts in Lusk. Here, there is no dispute there was "physical contact" between the Dodge truck and the hit and run driver. The Petitioners also reported this collision to WV National on the next business day following the collision, just like the sister-in-law in Lusk reported the collision to State Farm on the next business day following the collision. Further, the Respondents attempted to report this collision to the police, just like Mr. Lusk attempted to report the collision to the DMV. As such, this Court should follow the guidance set forth in Lusk and liberally construe W.Va. Code §33-6-31(e) by holding WV National must afford UM coverage to the Petitioners.

In closing, the Intermediate Court also noted the Petitioners did not argue the twenty-four-hour reporting language contained in W.Va. Code §33-6-31(e)(1) and the Auto Policy was ambiguous (and ambiguity must be construed in favor of the insured and coverage). *See* National Mutual Insurance Co. v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (W.Va. 1987). The Petitioners acknowledge they did not advance any such argument, however, whether the twenty-four (24) hours to report to the police, peace or judicial officer also includes weekends and legal holidays is ambiguous. This issue was fairly comprised before the lower Courts. To the extent it was not, plain error is asserted. See W.Va. Rules App. Proc. 10(c)(3).

CONCLUSION

WHEREFORE, the Petitioners pray this Court upholds the spirt and intent of W.Va. Code §33-6-31 by reversing the Intermediate Court's decision.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Danny J. Dobbins and Jackie L. Dobbins,

Petitioners

v.

No.24-362
(Appeal from an order of the
Intermediate Court of Appeals
(23-ICA-101))

West Virginia National Auto Insurance Company,

Respondent

CERTIFICATE OF SERVICE

I, Matthew M. Hatfield, counsel for Petitioners, do hereby certify that I have this the 23rd day of September, 2024, provided a true copy via e-file of the foregoing *Petitioners' Brief* unto the following:

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