

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SCA EFiled: Nov 27 2024  
03:41PM EST  
Transaction ID 75109259

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' REPLY BRIEF

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**STATEMENT OF THE CASE**

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See the Statement Of The Case as further set forth in Petitioners' Brief filed herein.

**STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Petitioners request that this Court grant an oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure as further set forth in Petitioners' Brief filed herein.

**ARGUMENT**

W.Va. Code §33-6-31(b) states, in part, that no policy or covering liability arising from the ownership, maintenance or use of any motor vehicle must include “*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). This Court has also 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. As this Court in State Automobile Mutual Insurance Company v. Youler 183 W.Va. 556, 396 S.E.2d 737 (W.Va. 1990), 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 Petitioners submit the following in response to WV National's argument set forth in the Response Brief of Respondent.

**I. THE INTERMEDIATE COURT ERRED BY REFUSING TO TOLL THE NOTICE REQUIREMENT SET FORTH IN W.VA. CODE §33-6-31(e)**

**A. WV National's argument that the petitioners failed to report the collision within twenty-four (24) hours of its occurrence ignores the unique facts/circumstances of this case**

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 is 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.

This hit-and-run collision occurred at the close of business (approx. 3:30 p.m.) on Friday, 02/15/19. Accordingly, WV National argues the petitioners were required to report the collision to a police, peace or judicial officer by approx. 3:30 p.m. on Saturday, 02/16/19 – being within twenty-four (24) hours of the collision and, since they failed to do so, their claims are barred pursuant to W.Va. Code §33-6-31(e)(1). Response Brief of Respondent at pgs. 8-11. WV National’s argument, however, ignores the unique circumstances of this case.

Friday, 02/15/19 marked the beginning of the President’s Day holiday weekend. Despite this fact, WV National argues the petitioners were required to report the collision to a police, peace or judicial officer by approx. 3:30 p.m. on Saturday, 02/16/19. This position ignores the obvious. Judicial officers (Magistrate and Circuit Court Judge) are not generally available to the public and do not maintain office hours on Saturday. Here, a judicial officer would be found at the Logan County Courthouse. The said Courthouse (just like all courthouses) is, however, closed on Saturday (and Sunday and on a legal holiday). Accordingly, the petitioners could not have reported this collision to a judicial officer on Saturday, 02/16/19. WV National also argues the petitioners were physically able to “call 911 or visit any police station within Logan County at the time of the incident, or, at any time within 24 hours of its occurrence” (including the Logan City Police Department, Logan County Sheriff’s Department or the Logan Detachment of the W.Va. State Police). Response Brief of Respondent at pg. 10. Nothing contained in W.Va. Code §33-6-31(e)(1) requires that an insured call 911 to recover uninsured motorist benefits. In fact, 911 would not have responded to this incident (a hit-and-run collision that occurred twenty-four (24) hours prior and was not an emergency) on Saturday, 02/16/19. Further, Logan City Hall (where the

Logan City Police Department is located) and the Logan County Courthouse (where the Logan County Sheriff's Department is located) are both government buildings and neither would have been open to the public on Saturday, 02/16/19. The Logan Detachment of the W.Va. State Police is located near Chapmanville, West Virginia (approximately 10 miles from Logan) and, likewise, it would not have been open to the public on Saturday, 02/16/19<sup>1</sup>. The petitioners concede some of the agencies would have been available on an emergency basis via 911, however, no entity/person would respond to a hit and run collision that occurred twenty-four (24) hours before wherein the driver fled. This is common sense. Instead, the petitioners would have been instructed to report the collision to City Hall during business hours on 02/19/19 – which is what occurred.

**B. W.Va. Code §2-2-1, et seq., tolls any twenty-four (24) hour reporting requirement set forth in W.Va. Code §33-6-31(e)(1)**

WV National argues that W.Va. Code §2-2-1 does not toll the twenty-four (24) hour reporting requirement under W.Va. Code §33-6-31(e)(1). In support of this position, WV National asserts that summoning the police to a collision scene is not an act that requires consideration of the day of the week or whether a particular day is a legal holiday because the police (and emergency service personnel) do not close Saturdays, Sundays, legal holidays or even inclement weather. Response Brief of Respondent at pg. 14. W.Va. Code §33-6-31(e)(1) does not require that the police or emergency service personnel be summoned to the scene of a hit-and-run collision. WV National also argues that W.Va. Code §2-2-1 was not intended to toll the twenty-four (24) hour reporting requirement because with “one call, all three – police officers, firefighters, and EMTs – can be summoned to the scene of a crime, a fire, or, as in this case, an automobile

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<sup>1</sup> Support staff, assistants, etc. would not be available on the weekend or a legal holiday. Further, the W.Va. State Troopers would have only been available for 911 dispatched emergencies.

accident”. Id. at pg. 15. Contrary to WV National’s assertion, Logan County 911 would not have dispatched police officers, firefighters and EMTs to a collision scene twenty-four (24) hours after the hit-and-run collision.

WV National further argues W.Va. Code §2-2-1 does not extend the toll the twenty-four (24) hour reporting requirement because “in the context of a hit and run accident, the potentiality for fraud must be a strong consideration as extending the reporting period would open pandora’s box for advancing illegitimate claims for UM coverage”. Id at pg. 15. Stated differently, WV National is essentially alleging the Petitioners have presented a fraudulent claim. All the evidence suggests otherwise. WV National assigned Mike Call with Call Adjusting Services, Inc. who inspected the Petitioners’ Dodge truck (which was involved in the hit-and-run collision) and 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. WV National also obtained statements from Alexis Hainer; Heather Neace; and Kevin Fisher – all witnesses of whom confirm the Dodge truck was struck by a hit-and-run driver. A.R. 140-141, 175. In short, all the evidence indicates the hit-and-run collision occurred. insured call 911 to recover uninsured motorist benefits. Lastly, WV National contends law enforcement agencies typically afford the public 24-hour non-emergency numbers they can use for contact and reporting. There is no evidence the police in Logan County utilized and distributed public 24-hour nonemergency numbers (and there is certainly no evidence the Petitioners were aware of any such phone numbers).

**C. W.Va. Code §33-6-31(e)(1) can be liberally construed without precluding the Petitioners' claim for uninsured motorist benefits**

“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”. Youler at 183 W.Va. at 562, 396 S.E.2d at 744. Despite this restraint and the public policy concerns which require that W.Va. Code §33-6-31 be liberally construed, WV National contends this Court has consistently upheld the twenty-four (24) hour reporting requirement. Response Brief of Respondent at pg. 17. Again, WV National argues the said reporting requirement satisfies public policy concerns by enabling emergency services to respond to the collision scene, collect physical evidence and obtain witness statements. The Petitioners responded to this argument above. WV National further asserts that if this Court concludes W.Va. Code §2-2-1 is applicable, then it conflicts with W.Va. Code §33-6-31(e)(1) and, therefore, this Court must adopt W.Va. Code §33-6-31(e)(1), the alleged more specific statute. *Id.* at pgs. 20-21. The Petitioners disagree with WV National's contention. The said statutes do not conflict. Rather, the statutes should be read in conjunction with each other. W.Va. Code §33-6-31(e)(1) states a hit-and-run collision should be reported to a police, peace or judicial officer within twenty-four (24) hours. In this case, the said reporting requirement would fall on a Saturday. Of course, judicial officers are not available on Saturday (or Sunday or President's Day, a legal holiday as set forth in W.Va. Code §2-2-1). Further, other government buildings (including Logan City Hall where the Logan City Police Department is located and the Logan County Courthouse where the Logan County Sheriff's Department is located) are both government buildings and neither would have been open to the public on Saturday, 02/16/19 (or on Sunday, 02/17/19 or Monday (President's Day), 02/18/19).

As such, reading W.Va. Code §2-2-1 in conjunction with W.Va. Code §33-6-31(e)(1) demonstrates the designated twenty-four (24) hours would not expire until Tuesday, 02/19/19.

**D. There is evidence the Petitioners reported this hit-and-run collision within the “tolled” period – being Tuesday, 02/19/19**

WV National alleges the Petitioners testimony illustrated they could not recall the exact day in which they reported this hit-and-run collision to the Logan City Police Department and, therefore, “neither Mr. Dobbins nor Mrs. Dobbins have any evidence that they attempted to report the subject accident on or before February 19, 2019, within the “tolled” period as defined by the Circuit Court”. Response Brief of Respondent at pg. 22. This argument is disingenuous. The Petitioners advised W.Va. National of this collision on Tuesday, 02/19/19. A.R. at 137-140. 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. If WV National truly believed reporting this hit-and-run collision to the police was necessary, why did it not do so? This, alone, speaks volumes.

WV National also cites testimony provided by Petitioner Danny Dobbins which it alleges demonstrates he is not certain the subject collision was reported to the police within the “tolled” period. Id. at pg. 22-25. Tthe Petitioners are not attorneys or sophisticated in the law. Petitioner Danny J. Dobbins dropped out of school in Fifth (5<sup>th</sup>) Grade and has difficulty reading. A.R. at 128-129. Petitioner Jackie L. Dobbins dropped out of school in Eleventh (11<sup>th</sup>) Grade. A.R. 3, 227-230. The undersigned does not point this out to belittle anyone. Rather, he points this out so this Court can appreciate the Petitioners’ limited understanding of the law.

**II. A PREJUDICE STANDARD IS APPLICABLE TO A REPORTING REQUIREMENT IMPOSED BY LAW AND, FURTHERMORE, THIS IS NOT A CRIMINAL CASE (RATHER IT IS ABOUT WHETHER WV NATIONAL MUST AFFORD UNINSURED MOTORIST COVERAGE TO THE PETITIONERS ARISING OUT OF A HIT-AND-RUN COLLISION)**

First, WV National keeps referring to this case as a crime and arguing that the Petitioners’ failure to report this collision to the police within twenty-four (24) hours hindered the “first responders” ability to employ “trained investigative techniques and tools to apprehend suspects and solve crimes”. Response Brief of Respondent at pgs. 27-30. This is not a criminal case as WV National suggests. Rather, this it is an uninsured motorist case wherein the purpose of such coverage is to protect “*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 . . .*” Perkins.

Next, WV National argues this Court’s should not be persuaded by the holding in Youler because Youler involved a delay in providing an insurance carrier with notice of an underinsured insured motorist claim. Response Brief of Respondent at pgs. 28-29. In other words, Youler involved the sixty (60) day notice requirement of a collision to an insurance carrier under W.Va.

Code §33-6-31(e)(2), not the twenty-four (24) hour notice requirement to a peace, police or judicial officer under W.Va. Code §33-6-31(e)(1). WV National misses the point.

In Youler, the issue concerned whether an insurance carrier must show its investigative interests were prejudiced due to an insured's failure to provide it notice of a collision within sixty (60) days as required under W.Va. Code §33-6-31(e)(2). The Court in Youler ultimately concluded that **prejudice to the investigative interests of 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. Youler at 183 W.Va. at 562, 396 S.E.2d at 744. 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 aid courts in determining 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. Accordingly, WV National argues the prejudice standard should only be applied to an insurer's investigative interests and not whether an insurer was prejudiced by an insured's failure to report

a hit-and-run collision within twenty-four (24) hours to a police, peace or judicial officer. *Id.* at pgs. 28-29. In other words, Youler should only apply to W.Va. Code §33-6-31(e)(2), not W.Va. Code §33-6-31(e)(1).

W.Va. Code §33-6-31(e) provides, in part, that for an insured to recover under an uninsured motorist endorsement or provision, he/she must: (1) report the collision within twenty-four (24) hours to a police, peace or judicial officer; (2) notify the insurance company of the collision within sixty (60) days; **and** (3) establish that the motor vehicle which caused the bodily injury or property damage, whose operator is unknown, was a “hit and run” motor vehicle. Importantly, W.Va. Code §33-6-31(e) uses the word “and”, as opposed to “or” – meaning the requirements must be read in conjunction. Applying the liberal intent of W.Va. Code §33-6-31, it makes no sense that prejudice must be established under one prong of W.Va. Code §33-6-31(e), but not under another prong of the said statute [i.e., why would the insurer be required to demonstrate prejudice to its investigative interests under W.Va. Code §33-6-31(e)(2), but not under W.Va. Code §33-6-31(e)(1)]?

Second, WV National is critical because the Petitioner and Circuit Court referenced cases that are not applicable to the facts and circumstances of this litigation. Particularly, the Petitioner and Circuit Court noted a litany of cases which hold that an insurer must show it was prejudiced by an insured’s delayed notification. See Colonial Ins. Co. v. Barrett, 208 W.Va. 706, 542 S.E.2d 869 (W.Va. 2000) [holding that 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]; Kronjaeger v. The Buckeye Union Ins. Co., 200 W.Va. 570, 490 S.E.2d 657 (W.Va. 1997) [holding that 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]; and Bowyer by Bowyer v. Thomas, 423 S.E.2d 906, 188 W.Va. 297 (W.Va. 1992) [holding 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]. Also see Moses Enterprises, LLC v. Lexington Ins. Co, et al. (W.Va. S.D. 3:19-0477). Response Brief of Respondent at pg. 32-33. Yet again, WV National misses the point. The Petitioners acknowledge the above-referenced cases are "distinguishable". Rather, the Petitioners cite the said cases to demonstrate this Court requires an insurer to demonstrate prejudice under a wide variety of circumstances.

Third, WV National is critical of the Petitioners because they cite, "for what appear to be the first time, out of jurisdiction case law in an effort to convince this Court" an insurer must demonstrate prejudice due to an insured's failure to report a hit-and-run collision to a peace, police or judicial officer. Response Brief of Respondent at pgs. 33-37. Further, the "Petitioners offer little, if any, explanation of how these cases actually support this argument". Id at pg. 34. Additionally, WV National exaggerates the issues and contends the Petitioners are asking this Court to "rewrite W.Va. Code §33-6-31(e)(1) to include a prejudice standard". Id. at pg. 37. WV National is incorrect.

To begin, the Petitioners are not aware of any requirement that prohibits them from citing "out of jurisdiction case law" as examples of how other courts have handled similar issues. In fact, the cited out of jurisdiction cases cited strongly support the Petitioners argument that this Court, at least in the circumstances presented in this case, should conclude the provisions set forth in W.Va. Code §33-6-31(e)(1) does not relieve WV National of its duty to protect the Petitioners against the loss and hardships caused by negligent, financially irresponsible hit-and-run driver who caused the collision complained of herein. Michael v. Metropolitan Prop. & Cas. Ins. Co., 3

Mass.L.Rptr. 355, 1995 WL 808878; Powell v. Automotive Cas. Ins. Co., 630 So.2d 581 (1994); Price v. Doe and Government Employees Insurance 638 A.2d 1147 (1994); Beck v. State Farm Mut. Auto. Ins. Co., 126 Cal. Rptr. 602, 54 Cal. App. 3d 347 (1976); and Pikey v. General Acc. Ins. Co. of America, 922 S.W.2d 777 (1996) all address whether an insured's failure to report a hit-and-run collision to the police within twenty-four (24) hours precludes an insured from recovering uninsured motorist coverage benefits. Each of the referenced out of jurisdiction cases held that an insurer must show it was prejudiced by an insured's failure to report the collision to emergency services within twenty-four (24) hours to preclude the recovery of uninsured motorist coverage benefits. This Court should, likewise, do the same. The Petitioners also note that WV National has not cited any cases, either in this jurisdiction or out of state, that suggest this Court should not apply a prejudice standard to determine whether W.Va. Code §33-6-31(e)(1) prevents the recovery of uninsured motorist coverage benefits herein.

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

West Virginia law does not require strict, technical compliance with the notice provisions contained in an insurance policy. If this Court required strict, technical compliance policy provisions be given full force and effect in each and every situation, then the holdings set forth in Youler, Colonial, Bowyer, Kronjaeger, along with others, would not exist. This Court has also struck insurance policy provisions 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)].

WV National also asserts the Petitioners' reliance upon Lusk v. Doe, 338 S.E.2d 375, 175 W.Va. 775 (W.Va. 1985) is misplaced. In support of its argument, WV National contends material issues of fact existed in Lusk, however, this case does not involve any unresolved issues of fact. Response Brief of Respondent at pgs. 38-39. The Petitioner disagrees with WV National's interpretation of Lusk.

WV National argues the testimony is unclear as to whether the Petitioners reported this collision to the Logan City Police Department on Tuesday, 02/19/19 (within the "tolled" period). This creates an issue of fact. A.R. at 81,82. The Court in Lusk noted "[t]he circuit court's narrow construction of the language of subsection (e)(i) of the uninsured motorist statute 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 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. This Court should, likewise, hold that the Petitioners are permitted to pursue an uninsured motorist claim against WV National for all the reasons set forth.

### CONCLUSION

*WHEREFORE*, the Petitioners pray this Court upholds the spirit 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 27<sup>th</sup> day of November, 2024, provided a true copy via e-file of the foregoing *Petitioners' Reply Brief* unto the following:

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