SUPREME COURT OF APPEALS OF WEST VIRGINIA

Danny J. Dobbins and Jackie L. Dobbins,

Petitioners,

vs.

WV National Auto Insurance Company,

Respondent.

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No. 24-362
(Appeal from a final order
of the Circuit Court of Logan
County (20-C-98))

Response Brief of Respondent

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COUNTER-STATEMENT OF THE CASE

In an effort to appeal to the sympathies of this Court, Petitioners, Mr. and Mrs. Dobbins, claim that the West Virginia Intermediate Court of Appeals' ("ICA") application of established West Virginia law, as written, will leave scores of innocent West Virginians without recourse if they are the victim of a negligent, financially irresponsible hit-and-run driver. Simply put, Petitioners' claim is barred by the plain, unambiguous language of West Virginia Code §33-6-31(e)(1). Below, and now again before this Court, Petitioners seek to upend years of settled law as it relates to uninsured motorist coverage/claims. Petitioners would have this Court reinstate a decision of the Circuit Court that entirely eliminates the intent and purpose of the notice provision set forth in West Virginia Code §33-6-31(e)(1) as adopted by this State's legislature and recognized by this Court; wrongly apply a "prejudice standard" to the plain, unambiguous Policy language contained in WV National's Policy in contravention of West Virginia law; and ignore the indisputable facts established by Petitioners' own deposition testimony – all to wrongfully conclude that Petitoners reported the alleged hit-and-run incident within this newly prescribed period the Circuit Court created.

Both below and on appeal, Petitioners have repeatedly failed to accurately depict the facts and circumstances surrounding their alleged reporting of the incident giving rise to this litigation in an effort to bolster their claim for uninsured motorist coverage. Simply put, even if a Court in West Virginia were to conclude that tolling of the 24-hour reporting requirement set forth in West Virginia Code §33-6-31(e)(1) was proper, which it is not, Petitioners cannot offer any evidence that they ever actually reported the subject accident within the "tolled" period.

In that regard, while for argument's sake, Petitioners have generally claimed that they reported the accident on the first business day following President's Day 2019, in reality, there is

absolutely no available evidence to substantiate this claim. Indeed, Petitioners have always indicated that they do not know the date they actually sought to report the incident to any authorities to which they were permitted by law to report it. In that regard, Petitioners allege that on February 15, 2019, Mr. Dobbins was the victim of a hit-and-run incident. Admittedly, Petitioners are not aware of any police or law enforcement agency having been contacted on the date of the incident. App. at 73, at Resp. to Interrog. No. 2. Mr. Dobbins admitted during his deposition that he never reported the incident on the day that it occurred, February 15, 2019. App. at 78, D. Dobbins, at 46-49. Mr. Dobbins did not call 911 on the day of the incident or at any time after the incident. App. at 76, at 26-27. Instead, a few days later, he reportedly went to "city hall." *Id.* at 48-49. More specifically, Mr. Dobbins testified as follows:

> **A. I'm saying I went to City Hall to report that and they said that I waited too long.**
> Q. Okay.
> **A. So I guess they didn't want to even -- nothing to do with me, I guess.**
> Q. So whenever you went down there, was it days later?
> **A. Yeah, it was few days later.**

App. at 78, at 49. According to Mrs. Dobbins, it was "so many days after or several days after" the incident that she and Mr. Dobbins went to City Hall, and, at that time, they were informed by City Hall that they could not make a police report because too much time had passed since the incident. App. at 86-87; 90 at J. Dobbins at 21-23; 48.

Despite allegedly being turned away by those at Logan City Hall days after the accident, Mr. and Mrs. Dobbins did report the incident to WV National on February 19, 2019, approximately **four** days after it occurred. App. at 81-82, at 58-62. However, at that time, neither Mr. Dobbins nor anyone on his behalf had attempted to make contact with any policing agency within or around Logan County to report the incident. App. at 84, at 78-79; *See* App. at 88, at 27.

Mr. Dobbins admitted that he possessed knowledge of the incident on February 15, 2019, such that, if he wished to report it to anyone, he could have done so at that time. App. at 83, at 74. Mr. Dobbins further admitted that he was physically and emotionally able to report the incident to anyone he wanted to immediately following the incident. App. at 83, at 74-77. Mrs. Dobbins further confirmed both her and Mr. Dobbins' fitness such that they could have immediately reported the incident following its occurrence had they chosen to do so. App. at 86-87; 89, at 21-23; 42. Neither Mr. Dobbins nor anyone on his behalf, including Mrs. Dobbins, reported the subject incident to any policing agency in or around Logan County, West Virginia, including the Logan City Police Department, the Logan County Sheriff's Department, or the Logan County detachment of the West Virginia State Police, within the 24 hours after the incident occurred.[1] App. at 83, at 75-76.

Mr. and Mrs. Dobbins were unable recall the exact day they finally attempt to report the event to the Logan City Police Department, but were reportedly turned away; however, it appears that it was more than four days after the subject accident because, as noted previously, they had not reported it to any "authorities" at the time they first contacted WV National regarding the incident on February 19, 2019. App. 84, at 78-79; App. at 88, at 27; App. at 91, at Automobile Loss Notice. Despite the event having not been reported to the police, in an effort to learn more

[1] Mr. Dobbins does not dispute that The Logan County Emergency Operations Center does not have any documentation or information related to any motor vehicle accident occurring on February 15th, 2019, and reported by him or his wife. *See* App. at 78-79, at 48-50. This includes the lack of a Police Report, statements or recorded written information to suggest an accident was reported to the Logan Police Department. *See id.* Admittedly, the Logan City Police Department would not record any information from Mr. Dobbins because, according to Mr. Dobbins, he waited too long to report the incident. App. at 79-80, at 50-55. Mr. Dobbins has also admitted that he never contacted the Logan County Sheriff's Office or the Logan County detachment of the West Virginia State Police to make a report. App. at 80, at 55-57. WV National notes that, with regard to the Logan County Sheriff's Office, in their written responses to discovery, Petitioners initially stated that they contacted the Logan County Sheriff's Department; however, both Petitioners testified during the depositions that they contacted the Logan City Police Department located at "City Hall" regarding the subject incident. *See* App. at 0073, at Interrog. No. 3; *see also* Ex. App. at 78, at 49; App. at 86-87; 90, at 21-23; 48.

about Petitioners' claim, including the identity of any investigating agency, WV National sent a letter to Petitioners on February 21, 2019. App. at 92, at Ltr. At that time, WV Virginia National requested that an enclosed claim form be completed and returned to WV National. *See id.* It appears that WV National received the completed form on April 1, 2019, approximately 39 days after it was initially mailed to Petitioners. *See* App. at 93-94, at Completed "Insured Driver Statement Form." The completed Form stated that no police report was made and no police department was identified as having investigated the incident. *See id.* It is unclear whether Petitioners had gone to "city hall" to report the incident, but were turned away, at the time Petitioners completed this Form. This lack of clarity is only made worse by the deposition testimony of Mrs. Dobbins. Indeed, she was asked about her and Mr. Dobbins' efforts to report the alleged hit-and-run accident to law enforcement in relation to completion of the claim form and she provided the following testimony:

> Q. So what police department did you go down there to report it to? Was it the Logan City Police?
>
> **A. I guess it was city police because -- yeah, the city police right there, where the City Hall is. I guess it's all on one or something. I don't know.**
>
> Q. Have you all went down there to talk to the city police before you signed and sent this form back that's –
>
> **A. I can't really remember that. I just know that we went down there days later after the accident.**
>
> Q. Is there any reason to believe, Mrs. Dobbins, that whenever you completed this form that was sent back to West Virginia National, that whenever this was done, you still hadn't gone down there and made that report?
>
> **A. I don't -- I don't know. I just know it was several days after it happened, is all I remember.**

App. at 229. While this claim form has a date of February 15, 2019, Mrs. Dobbins has admitted that that date was not the date of completion of the form by her as she did not even have the form as of that date. App. at 230. It would appear that it was completed sometime after February 21,

2019, the date WV National mailed it to her and Mr. Dobbins. During her deposition, Mrs. Dobbins could not recall whether she and Mr. Dobbins had gone to "city hall" by the time she completed this form, which was, admittedly, sometime after February 21, 2019.

As the ICA correctly noted in its April 22, 2024, Order, "the [C]ircuit [C]ourt's determination that Mr. Dobbins attempted to report the accident to the City of Logan Police Department on February 19, 2019, is without foundational support in the record. The uncontroverted testimony of Mr. Dobbins and Mrs. Dobbins during their depositions, establishes that neither of them could recall with any specificity the actual date of their attempted report to police and simply stated it was "several days" following the accident. App. at 374-75. Thus, the circuit court's finding of February 19, 2019, as the date of the alleged reporting to police was wholly speculative." Consequently, Petitioners' continued representations to the contrary are also speculative and wholly unsupported by the uncontroverted evidence.

SUMMARY OF ARGUMENT

The West Virginia ICA correctly found that the Circuit Court's February 14, 2023, Order granting Petitioners' Motion for Partial Summary Judgment, declaring that WV National must afford coverage under the Auto Policy to the Petitioners for the hit-and-run collision, was improper. App. at 362-377. Likewise, the ICA was correct in reversing the Circuit Court's decision and remanding this matter to the Circuit Court of Logan County for further proceedings consistent with the ICA's opinion. App. at 362-377.

First, the ICA properly found that Petitioners failed to report the subject accident to police within twenty-four hours of the occurrence of the accident, as expressly and unambiguously directed by West Virginia Code § 33-6-31(e)(1) and expressly required under the Policy at issue, precluding their claim for UM coverage under the Policy. *Id.* at 370-371. Counsel for Mr. and

Mrs. Dobbins expressly acknowledged that Mr. and Mrs. Dobbins failure to report the subject accident to the appropriate authorities within twenty-four hours of the occurrence of the accident. *Id.* Furthermore, based upon the available evidence, Mr. Dobbins was physically able to report the occurrence of the accident to police within twenty-four hours following said accident. *Id.*

Second, the ICA properly concluded that the Circuit Court improperly tolled the notice requirement of West Virginia Code Section 33-6-31(e). In that regard, the ICA rejected the Circuit Court's finding that the language of West Virginia Code §§ 2-2-1 and 2-2-2 are applicable to the facts of Mr. and Mrs. Dobbins' case. The ICA explained:

> In relying upon this language, the circuit court concluded that West Virginia Code § 33-6-31(e)(1) designates a particular date in which an event is required to occur. Thus, because the underlying accident occurred on Friday, February 15, 2019, near the close of business, and because Monday was a recognized judicial holiday (President's Day), then Tuesday, February 19, 2019, was the deadline for required reporting, thus extending the reporting deadline by four days.

Id. at 372. Simply put, West Virginia Code §§ 2-2-1 and 2-2-2 are simply statutes enumerating legal holidays and outlining their effect on summonses and court proceedings and have no effect on the instant case. The ICA found that the instant case does not deal with a summons, court proceeding, or a notice fixing a designated time to hold court or do an official act, but rather the individual actions of a policyholder of a UM policy seeking UM coverage. *Id.* at 373. (citing *State ex rel. McDowell County Correctional Officers' Ass'n v. Yeager*, 182 W. Va. 370, 372-373, 387 S.E.2d 837, 839 (1989) (citing *Means v. Kidd,* 136 W. Va. 514, 518, 67 S.E.2d 740, 743 (1951)). The ICA correctly reasoned that this fact, coupled with the fact that West Virginia Code § 2-2-1(e), which references "a particular date," does not encompass or reference periods of time (i.e., twenty-four hours) can lead to only one conclusion, West Virginia Code §§ 2-2-1 and 2-2-2 are inapplicable to the unique facts of Mr. and Mrs. Dobbins' case. Furthermore, the only permissible tolling of the twenty-four-hour reporting period is mandated in West Virginia Code § 33-6-

31(e)(1), itself, and states that such tolling occurs only when any insured is physically unable to report an accident. *Id.* at 373-374. (citing Syl. Pt. 2, *Lusk v. Doe*, 175 W. Va. 775, 338 S.E.2d 375 (1985) (overruled on other grounds)).

Third, as explained in detail above, the Circuit Court's determination that Mr. Dobbins attempted to report the accident to the City of Logan Police Department on February 19, 2019, is without foundational support in the record. The uncontroverted testimony of Mr. Dobbins and Mrs. Dobbins during their depositions, establishes that neither of them could recall with any specificity the actual date of their attempted report to police and simply stated it was "several days" following the accident. As a result, the Circuit Court clearly erred in concluding that Mr. and Ms. Dobbins attempted to report the accident by February 19, 2019.

Fourth, the ICA properly concluded that the circuit court erred in applying a prejudice standard when considering Mr. and Mrs. Dobbins' compliance with the terms of the WV National Policy (which mirrored the statutory requirements in West Virginia). The Circuit Court's reliance on *State Auto. Mut. Ins. Co. v. Youler*, 183 W. Va. 556, 396 S.E.2d 737 (1990) is misplaced. There is no case law, including *Youler*, that expressly applies, or even suggests, that the prejudice analysis is applicable to the twenty-four-hour requirement to report to the police set forth in West Virginia Code § 33-6-31(e)(1) and mirrored in the WV National Policy. While Petitioners cite (what appears to be for the first time) to a number of out of jurisdiction cases to support their contention that *Youler* should be extended to the facts and circumstances of their case, Petitioners' failure to actually examine the case law to which they cite is telling. When these cases are actually examined, they offer little, if any support of their position. The law and facts that serve as the basis for the decision rendered by the ICA is easily distinguishable from these out of jurisdiction cases. These cases lack any relevancy to this Court's consideration of the issues before it.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the Rules of Appellate Procedure, WV National respectfully requests that this Court grant oral argument. This Court should not reinstate a Circuit Court decision that wrongly applied settled West Virginia law to the facts and circumstances of this case. The Circuit Court entirely eliminated the intent and purpose of the notice provision set forth in West Virginia Code §33-6-31(e)(1) and recognized by this Court, wrongly applied a "prejudice standard" to the plain, unambiguous Policy language contained in WV National's Policy in contravention of West Virginia law, and ignored the indisputable facts established by Petitioners own deposition testimony to wrongfully conclude that Petitioners reported the alleged hit-and-run incident within this newly prescribed period created by the Circuit Court. The ICA, relying upon established law, soundly rejected the Circuit Court's flawed reasoning. The West Virginia Intermediate Court of Appeal's decision should be affirmed. Under Rule 19 of the West Virginia Rules of Appellate Procedure, oral argument is appropriate to address this issue. Thereafter, this matter may be disposed of by memorandum decision.

ARGUMENT

I. THE ICA PROPERLY REJECTED THE CIRCUIT COURT'S INCORRECT TOLLING OF THE NOTICE REQUIREMENT OF WEST VIRGINIA CODE §33-6-31(e).

A. The uncontroverted evidence clearly demonstrates that Petitioners were required to and failed to report the subject accident within 24-hours after its occurrence as required by the plain, unambiguous language of West Virginia Code §33-6-31(e)(1).

West Virginia Code §33-6-31(e) imposes three mandates upon an insured, if he or she wishes to recover uninsured motorist coverage benefits. Of those three mandates, only one is at issue here, and, it provides, in relevant part, the following:

> (e) If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, the insured, or someone in his or her behalf, in order for the insured to recover under the uninsured motorist endorsement or provision, shall:
>
> (1) **Within twenty-four hours after the insured discover, and being physically able to report the occurrence of such accident, the insured, or someone in 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**;

W. Va. Code §33-6-31(e)(1). (Emphasis supplied.) The undisputed facts in this litigation clearly demonstrate that Petitioners failed to report the underlying incident within the 24 hours immediately following its occurrence to a police, peace, or judicial officer. Admittedly, neither of the Petitioners were physically, or emotionally, incapable of reporting the occurrence of the underlying incident. As such, Petitioners' claim is barred by the plain language of West Virginia Code §33-6-31(e)(1). Further, as found by the ICA, WV National is entitled to summary judgment and a declaration that Petitioners are not entitled to uninsured motorist coverage under the Policy.

In *Lusk v. Doe*, 175 W. Va. 775, 338 S.E.2d 375 (W. Va. 1985), *overruled on other grounds by Hamric v. Doe*, 201 W.Va. 615, 499 S.E.2d 619 (1997), the West Virginia Supreme Court of Appeals recognized that subsection (e) of West Virginia Code § 33-6-31 contains notice provisions applicable to "hit and run" situations. *Id.* at 379. The first notice provision recognized in *Lusk*, and the one applicable to this litigation, is contained in subsection (e)(i) [now (e)(1)] and provides for notice of a "hit and run" accident to the police.[2] *Id.*

There, the Court explained that, under West Virginia Code § 33-6-31(e)(i) [now (e)(1)], those injured in person or property are separate "insureds" for the purposes of the notice requirement. *Id.* at 381. The Court concluded that "[b]y the clear language of this provision, the

[2] At the time of the *Lusk* decision, West Virginia Code § 33-6-31(e)(i) (Supp.1985), permitted the reporting of a hit-and-run to the commissioner of motor vehicles. West Virginia Code § 33-6-31(e)(i) [now (e)(1)] has since been revised to remove the commissioner of motor vehicles as an individual or entity to which such an incident may be reported.

twenty-four-hour notice period is tolled as to insureds "physically unable to report the occurrence of such accident ...." *Id.* The Court explained:

> Although another person, whether it be another named or additional insured, or a friend, relative or witness to the accident, may report the accident on behalf of a physically injured insured, their failure to do so cannot prejudice those unable to make such report within the initial twenty-four-hour period immediately following such accident. *See generally Helvy v. Inland Mutual Insurance Company*, 148 W.Va. 51, 132 S.E.2d 912 (1963) (under policy provisions requiring notice of accident, failure of additional insured to give notice does not relieve insurer of its liability under the policy where named insured complied with the notice provision). The provision reasonably requires that once a victim of a "hit and run" is physically able to report the accident, that victim has twenty-four hours to make the report unless someone in his or her behalf acts within the same extended time period.

Id.

In the present litigation, Mr. Dobbins admits that, on the day of the subject alleged incident, he possessed knowledge of the incident such that, if he wished to report it to anyone, he could have done so at that time. App. at 83, at 74. Mr. Dobbins further admits that he was physically and emotionally able to report the incident to anyone he wanted to immediately following the incident. App. at 83, at 74-77; *See also* App. at 86-87, at 21-23. In other words, Mr. Dobbins was in no way incapacitated such that he could not 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. Further, there is also no evidence to suggest that Mrs. Dobbins, the named insured, was in anyway incapacitated preventing her from reporting the subject incident within 24 hours of its occurrence. It is important to remember, Mrs. Dobbins was not even involved in this accident – so there is not a hint of a physical or mental ailment that would have prevented her from reporting this as required by State Code. Yet, neither Mr. Dobbins nor anyone on his behalf, including Mrs. Dobbins, reported the subject incident to any police agency in or around Logan County, West Virginia, including the Logan City Police Department, the Logan County Sheriff's Department, or the Logan County detachment of

the West Virginia State Police, within the 24 hours after the incident occurred. *See* App. at 83, at 75-76. As a result, Petitioners, being of sound mind and body, failed to comply with the first criteria of West Virginia Code §33-6-31(e)(1), and, as a result, they are precluded from collecting uninsured motorist coverage benefits under the Policy.

Further, there is no available evidence to demonstrate that Petitioners were relieved of their affirmative duty to report the incident to a police, peace, or judicial officer. In other words, there is absolutely no evidence that the incident had already been investigated by a police officer. *See* West Virginia Code §33-6-31(e)(1). There is no evidence that any authorities responded to the scene of the incident on Lorraine Street. Further, the Deputy Director of the Logan County Emergency Operation and the Logan County Sheriff have confirmed that they have no evidence of any report of an incident having occurred on February 15, 2019, involving Mr. Dobbins at or around Lorraine Street such that an investigation by a police officer would have been conducted. *See* App. at 95-97. Finally, there is no evidence that the Logan City Police Department responded to the scene of the accident on February 15, 2019, conducting an investigation of the same either.

B. The circumstances under which the reporting requirement set forth in West Virginia Code §33-6-31(e)(1) may be tolled are statutorily defined therein, and, as a result, West Virginia Code §§2-2-1 and 2-2-2 do not operate to toll this requirement otherwise.

While the Circuit Court sought to wrongfully toll the statutory reporting requirement under circumstances other than those already created within the statute itself and recognized in *Lusk,* the ICA rejected these efforts, reversing the Circuit Court decision in this regard. The ICA properly rejected the Circuit Court's reasoning that West Virginia Code §2-2-1(e) operated to toll the 24-hour reporting period because West Virginia Code §33-6-31(e) designated a particular date on, before or after which an act, event, default, or omission was required, and that particular date fell on a Saturday, Sunday, legal holiday, or designated day off. It further rejected the Circuit Court's

conclusions that, therefore, the date on which the 24-hour notice requirement expired was tolled until the next day that was not a Saturday, Sunday, legal holiday or designated day off, which was February 19, 2019.

The Circuit Court ignored the legislature's clear purpose and intent behind this reporting requirement, disregarding the legislature's clear recognition of the urgency with which hit-and-run incidents must be investigated, if the incident itself is to be (1) confirmed and (2) any opportunity to locate and hold accountable the criminal perpetrator is to be preserved. The prompt 24-hour reporting requirement for a hit-and-run incident set forth in West Virginia Code §33-6-31(e)(1) enables police to determine if such an incident did in fact occur, *i.e.,* is not a fraudulent claim[3] – from interviews with people in the neighborhood, possible location and review of video that may exist, and the presence of debris, fluids, and tire marks at the alleged scene. It also increases the likelihood of apprehension of the offender, thus facilitating inquiry as to whether the hit-and-run vehicle was in fact an uninsured vehicle, and allowing the insurer to enforce its subrogation rights against a negligent uninsured hit-and-run motorist. In *Lusk,* the West Virginia Supreme Court of Appeals recognized the urgency associated with reporting hit-and-run incidents, explaining in Syl. Pt. 2 of *Lusk, supra,* that the initial twenty-four-hour period prescribed by statute is that period "**immediately** following such accident."

Furthermore, West Virginia Code §2-2-1 was not meant to toll this requirement. West Virginia Code §2-2-1 was meant to identify official State holidays and to guide citizens who could

[3] To further demonstrate the importance of the 24-hour reporting requirement and the Circuit Court's complete failure to appreciate the importance of it expiring in the 24 hours immediately following the incident, the Circuit Court actually concluded "no evidence has been adduced to suggest the plaintiffs have presented a fraudulent insurance claim herein." To the extent any such evidence existed, much, if not all of such evidence, especially the presence or absence of debris on the roadway would have been lost in the days following the alleged incident when the incident went unreported. Hit-and-run drivers' identities are typically shielded by the vehicle they operate, making identification of the actual driver nearly impossible. If reported within the 24 hours immediately following the incident, the authorities are more likely to have an opportunity to locate the vehicle and identify the driver.

not perform an act, event, default or omission required by law because an intermediate Saturday, Sunday or legal holiday prevented it. Indeed, the ICA addressed the purpose of these statutes in its decision, there, the ICA acknowledged that West Virginia Code §§2-2-1 and 2-2-2 govern "official acts" or "court proceedings" and define days upon which such official acts or court/official judicial business can be conducted and/or required of someone. West Virginia Code §§ 2-2-1 and 2-2-2 were enacted to govern the transaction of official acts or court proceedings, taking into account that typically, government offices, including West Virginia's judicial system, conduct business only Monday through Friday, and only then, when such days are not, Saturdays, Sundays, legal holidays or other sanctioned days. *See State ex rel. Varney v. Ellis*, 149 W.Va. 522, 524, 142 S.E.2d 63, 65 (W. Va. 1965) ("[A] trial is a judicial proceeding which, in the absence of a statute providing otherwise, can not [sic] be conducted on a Sunday. It appears clear from the provisions of Code, 1931, 2-2-2, that the Legislature intended Sunday to be a nonjudicial day."). *See also Crawford v. Erwin*, 171 W. Va. 7, 297 S.E.2d 206 (W. Va. 1982) (The West Virginia Supreme Court of Appeals applied West Virginia Code §2-2-2 to find that a January 2 filing was timely where the petitioner's deadline for filing her appeal with the West Virginia Civil Service Commission for her dismissal from her employment ended on a legal holiday, January 1.) The ICA further explained that this Court "has previously reasoned that West Virginia Code § 2-2-1,

> 'by its express terms, deals with and applies only to a summons, a court proceeding or a notice fixing a designated time to hold court or to do an official act, and provides that when the time so fixed for holding court or doing such act falls on a legal holiday, the time specified in the summons or the notice shall be meant and intended for the ensuing secular day instead of the holiday designated in the summons or the notice.'"

App. at 373 (quoting *State ex rel. McDowell County Correctional Officers' Ass'n v. Yeager*, 182 W. Va. 370, 372-373, 387 S.E.2d 837, 839 (1989) (citing *Means v. Kidd,* 136 W. Va. 514, 518, 67 S.E.2d 740, 743 (1951)). As argued by WV National below and adopted by the West Virginia

Intermediate Court of Appeals, the reporting of an accident to authorities and/or summoning of the authorities to an accident scene is not an "official act" or a "court proceeding" as meant by either West Virginia Code §§2-2-1 or 2-2-2. *Id.* Further, the ICA took its analysis one step further noting that "the express and unambiguous language of West Virginia Code § 2-2-1(e), which references 'a particular date' and does not encompass or reference periods of time (i.e., twenty-four-hours) with no fixed 'particular date,' such as the reporting deadline in the instant case." *Id.* By drawing this distinction, the ICA found that West Virginia Code §§ 2-2-1 and 2-2-2 were inapplicable to the unique facts of the underlying case and conclude that the circuit court erred in tolling the twenty-four-hour reporting period expressly outlined in West Virginia Code § 33-6-31(e)(1). In other words, the ICA properly concluded that the only tolling of the twenty-four-hour reporting period mandated in West Virginia Code § 33-6-31(e)(1) is expressly stated within the statutory language and occurs only when any insured is physically unable to report an accident. See Syl. Pt. 2, *Lusk v. Doe*, 175 W. Va. 775, 338 S.E.2d 375 (1985) (overruled on other grounds).

Simply put, summoning city, county, and state authorities, more particularly, police officers, sheriffs or deputies and troopers, to the scene of an accident or making a report to city, county or state authorities is not an act that requires consideration of the day of the week or whether the particular day is a legal holiday. Emergency service personnel do not close for Saturdays, Sundays, legal holidays or even inclement weather. Every single day of the calendar, citizens can count on one thing - law enforcement officers being on duty, regardless of the agency with which they are affiliated. This is to protect the safety of citizens, but also allows individuals to report crimes like the hit-and-run allegedly committed in this litigation. The Legislature has acknowledged this by enacting a separate code section to govern police officers' payment and/or compensatory leave for working holidays. *See* West Virginia Code §8-14-2a. Police officers, like

firefighters and EMTs, are accessible 24 hours a day, seven days a week, 365 days per year. Society has deemed their accessibility so paramount to the continued orderly and peaceful operation of our nation that they are uniformly accessible nearly anywhere one is located by merely dialing 911. 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 accident. Under these circumstances, West Virginia Code §2-2-1 was not intended to and does not toll the 24-hour reporting period set forth in West Virginia Code §33-6-31. In fact, application of West Virginia Code §2-2-1 to a hit and run accident only serves to frustrate, if not eliminate, the goals behind West Virginia Code §33-6-31(e)(1). One need not wait for a Saturday, Sunday or legal holiday day to pass in order to report a crime. Yet, this is precisely what Petitioners allege should be accepted in this case. Crime can be reported on any day of the week, at any time, and, as a society, we encourage expeditious reporting of crime to prevent further acts and to hold those responsible accountable. Moreover, 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.

As explained by WV National below, at both the Circuit Court level and on Appeal, WV National makes reference to 911 to illustrate the ease with which one can summons the aid of law enforcement in this State 24 hours a day, seven days a week, 365 days a year. WV National makes reference to 911 to illustrate that West Virginia Code §2-2-1 was not intended to and does not toll the 24-hour reporting period set forth in West Virginia Code §33-6-31. Furthermore, 911 is not the only way in which to report the occurrence of a crime. In fact, law enforcement agencies typically afford the public 24-hour non-emergency numbers by which the authorities may be called to report crimes, suspected crimes and/or to provide information relative to an active investigation.

Moreover, law enforcement officers serve the public and can be approached directly while on duty. Frankly, there are so many ways to report a hit and run accident, that even the most basic imagination could create an endless number of scenarios. Calling 911 is an example of the easiest way. It is worth noting that Petitioners go to great lengths to provide excuses as to why they failed to report this incident within the time permitted by West Virginia law. Simply put, they never tried to report the incident within the first 24-hours, and as a result, their suggestion that their efforts to do so would have been unsuccessful are nothing more than mere a red heron.

C. Liberally construing a statute does not permit the reading out of the statute the provisions of the statute that, however inconveniently, preclude an insured's claim for uninsured benefits.

Without question, the West Virginia Supreme Court of Appeals has repeatedly recognized that West Virginia Code § 33-6-31 "is remedial in nature and, therefore, must be construed liberally in order to effect its purpose." Syl. Pt. 7, *in part, Perkins v. Doe*, 177 W.Va. 84, 350 S.E.2d 711 (1986); *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (2000). As the Court observed in *State Auto. Mut. Ins. Co. v. Youler*, 183 W. Va. 556, 396 S.E.2d 737 (1990):

> 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.

183 W.Va. at 564, 396 S.E.2d at 745). In *Pristavec v. Westfield Insurance Company*, 184 W. Va. 331, 400 S.E.2d 575 (1990):

> "... in light of the preeminent public policy of the underinsured motorist statute, which is to provide full compensation, not exceeding coverage limits, to an injured person for his or her damages not compensated by a negligent tortfeasor, this Court holds that underinsured motorist coverage is activated under W. Va. Code, 33-6-31(b), as amended when the amount of such tortfeasor's motor vehicle liability insurance actually available to the injured person in question is less than the total amount of damages sustained by the injured person, regardless of the comparison

between such liability insurance limits actually available and the underinsured motorist coverage limits."

184 W.Va. at 338, 400 S.E.2d at 582. Notwithstanding this liberal construction of West Virginia Code §33-6-31, the West Virginia Supreme Court of Appeals has also recognized the legitimacy and applicability of the notice provisions set forth in West Virginia Code §33-6-31. As explained previously, in *Lusk, supra,* the Court explained that the notice requirement set forth in subsection (e) of West Virginia Code §33-6-31 is enforceable, noting only that "[b]y the clear language of this provision, the twenty-four-hour notice period is tolled as to insureds "physically unable to report the occurrence of such accident ...." *Id.* at 381. While the policy may be to construe West Virginia Code §33-6-31 liberally, the legislature defined the limits of that liberal construction, and, the West Virginia Supreme Court has plainly and consistently imposed said limits, finding only physical impossibility tolls the running of the 24-hour reporting period. *See generally, Lusk.* Otherwise, the 24-hour period prescribed in West Virginia Code § 33-6-31 is that period "**immediately** following such accident." *Lusk,* at Syl. Pt. 2.

Of note, the legislature and this Court have recognized the importance of the 24-hour reporting period. This requirement allows both a plaintiff and his or her insurer an expeditious police investigation of an incident that may allow location of the driver that caused the subject incident. Prompt notification of the police allows for the use of such resources as a BOLO ("be on the lookout"), for the liable driver. Further, real time witness statements may be collected on the day in question to determine the potential identity of the driver and/or his or her purpose for traveling in or around the area of the incident, which may lead law enforcement to identification of this individual and allowing this individual to be held responsible, criminally and/or civilly, for the crime committed and the damages he or she caused. The collection of physical evidence left at or around the scene of the incident may also occur, which could include any available video

surveillance that could reveal the identity of the offending driver. Further, it also helps prevent fraudulent insurance claims by ensuring the collection of all available evidence from the scene of the incident to ensure that an event did, in fact, occur for which uninsured motorist coverage is sought. Essentially, in the present case, Petitioners' failure to report the incident to authorities within the first 24-hours after its occurrence not only frustrated all of these objectives, it completely defeated them.

The Petitioners, whose hit-and-run incident occurred on a Friday, possessed the same access to law enforcement in the 24-hours immediately following the alleged incident as a hypothetical individual whose incident occurred on a Wednesday. Nevertheless, instead of acting as the Code requires, and despite this same access as the hypothetical individual involved in an accident on a Wednesday, by application of the Circuit Court's decision, these Petitioners need not report their incident until the first business day after Saturday, Sunday and President's Day to enjoy access to uninsured motorist benefits – frustrating the intent and purpose of the 24-hour reporting requirement. The other hypothetical individual, however, was required to either report it within the first 24 hours immediately following the incident or forego any opportunity to collect uninsured motorist coverage – furthering the intent and purpose of including the statutory requirement. Petitioners have argued that they "are innocent West Virginia citizens who were injured in the subject motor vehicle collision" and that this Court is required to liberally construe the UM statute to protect them against the hardships and losses caused by a hit-and-run. Arguably, the other hypothetical individual above is also an "innocent West Virginia citizen" similarly situated as Petitioner. Yet, the liberal construction (advocated for by Petitioners and adopted below by the Circuit Court) of a plain, unambiguous statutory requirement creates a disparity among two similarly situated individuals. Simply put, the ability of this Court to "liberally

construe the UM statute" is not without its limits. If Petitioners wished to avail themselves of the remedial benefits of West Virginia Code §33-6-31, they were required to comply with the mechanism outlined in this Section to recover uninsured motorist coverage benefits for bodily injury or property damage caused by an uninsured motor vehicle whose driver or operator was unknown. Petitioners are not excused from complying with the law.[4]

In the present litigation, Petitioners have admitted in written discovery that they were neither physically nor mentally unable to report the occurrence of the subject incident. *See* App. at 200-209. Further, Petitioners have also admitted in written discovery that they did not undertake any efforts or steps to report and did not report said incident to any law enforcement agencies within or around Logan County, West Virginia within the 24 hours after the subject incident occurred. *See id.* Likewise, during his deposition, Mr. Dobbins admitted that, on the day of the subject incident, he possessed knowledge of the incident such that, if he wished to report it to anyone, he could have done so at that time. App. at 0084, at 74. Mr. Dobbins further admitted that he was physically and emotionally able to report the incident to anyone he wanted to immediately following the incident. App. at 0084, at 74-77; *see also* App. at 0086-0087, at 21-23.

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[4] As the ICA properly noted in footnote 7 of its opinion, to the extent that this Court's ruling may seem inequitable or fundamentally unfair, The Supreme Court of Appeals of West Virginia has consistently noted that:

> [t]his Court does not sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation. It is the duty of the Legislature to consider facts, establish policy, and embody that policy in legislation. It is the duty of this Court to enforce legislation unless it runs afoul of the State or Federal *Constitutions*. Syl. Pt. 2, *Huffman v. Goals Coal Co.*, 223 W. Va. 724, 679 S.E.2d 323 (2009); *accord Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 692, 408 S.E.2d 634, 642 (1991) ("[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines."); Syl. Pt. 1, in part, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965) ("Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary.") As such, the remedy for this perceived inequity lies not with this Court, but with the West Virginia Legislature.

App. at 371-372 (quoting *Progressive Max Insurance Company v. Brehm*, 246 W. Va. 328, 335-36, 873 S.E.2d 859, 866-67 (2022)).

In other words, Mr. Dobbins was in no way incapacitated such that he could not call 911 or visit a police station within Logan County at the time of the incident, or, at any time within 24 hours of its occurrence. Further, there is also no evidence to suggest that Mrs. Dobbins, the named insured, was in anyway incapacitated preventing her from reporting the subject incident within 24 hours of its occurrence.

Under these circumstances, the liberal construction Petitioners seek from this Court is the removal of the 24-hour reporting requirement from the statute, a construction that has never been authorized by the West Virginia Supreme Court of Appeals. Moreover, this is essentially a license to eviscerate the protections against fraud and eliminates the investigating law enforcement agency a fair opportunity to investigate, charge, and possibly remove from the highway negligent, careless, and reckless motorists. At a minimum, it certainly prevents any attempt to hold those that caused the accident responsible for what they have done. Finally, as discussed above, this opens the window for an easy path to submit fraudulent claims for insurance coverage.

Statutory construction does not permit the tortured reading performed by the Circuit Court. West Virginia Code §§2-2-1 and 2-2-2 have no application to West Virginia Code §33-6-31(e)(1). However, even if this Court were to find that it does, West Virginia Code §33-6-31(e)(1) must prevail as the statutes are in apparent conflict and they cannot be construed to give each effect. *See* Syl. pt. 4, *in part, State ex rel. Graney v. Sims,* 144 W. Va. 72, 105 S.E.2d 886 (1958). "When it is not reasonably possible to give effect to both statutes, the more specific statute will prevail." *Barber v. Camden Clark Mem'l Hosp. Corp.*, 240 W. Va. 663, 670, 815 S.E.2d 474, 481 (2018). In that regard, the West Virginia Supreme Court of Appeals has held that "[t]he general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Syl. pt.1, *UMWA by*

Trumka v. Kingdon, 174 W. Va. 330, 325 S.E.2d 120 (1984). *See Wells v. State ex rel. Miller*, 237 W. Va. 731, 752, 791 S.E.2d 361, 382 (2016) ("This Court has long recognized that when both a general and a specific statute apply to a given set of facts, our well-established rules of statutory construction instruct that the specific statute governs."); *In re Chevie V*, 226 W. Va. 363, 371, 700 S.E.2d 815, 823 (2010) ("As a rule, when both a specific and a general statute apply to a given case, the specific statute governs."); *Newark Ins. Co. v. Brown*, 218 W. Va. 346, 351, 624 S.E.2d 783, 788 (2005) ("When faced with a choice between two statutes, one of which is couched in general terms and the other of which specifically speaks to the matter at hand, preference is generally accorded to the specific statute."). Here, if this Court were to find that West Virginia Code §§2-2-1 and 2-2-2 apply to §33-6-31(e)(1), then it is clear that the statutes are in conflict. Application of West Virginia Code §§2-2-1 and/or 2-2-2 to §33-6-31(e)(1) would nullify the 24-hour reporting requirement and the purpose and intent of such requirement in relation to the specific requirements relating to uninsured motorist coverage. West Virginia law dictates that §33-6-31(e)(1) must prevail.

D. Even if the reporting period was properly tolled, there is no evidence that Petitioners ever reported the incident within the "tolled" period, a statutory prerequisite to receiving UM coverage.

The available testimonial evidence - the only available evidence as to the issue of whether and when Petitioners sought to report the alleged hit-and-run incident to the authorities - clearly demonstrates that Petitioners do not know when they sought to report the subject incident to the City of Logan Police Department. As a result, the ICA's finding that the Circuit Court's conclusion that Petitioners sought to report the incident to the City of Logan Police Department on February 19, 2019, was without foundational support in the record was both correct and proper. Indeed, the Circuit Court committed reversible error in this regard.

A complete reading of the testimony clearly demonstrates that the Circuit Court failed to consider Petitioner's full testimony and erred in its decision. Mr. and Mrs. Dobbins' testimony actually illustrated that they could not recall the exact day they finally attempted to report the event to the Logan City Police, but were reportedly turned away, and, as a result, the Circuit Court erred when it concluded "that the plaintiffs reported this collision to the police within twenty-four (24) hours as contemplated under W.Va. Code §2-2-l(e)." App. at 0011. As a matter of law, 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.

First, with regard to Mr. Dobbin's testimony, he testified that on February 19, 2019, he and Mrs. Dobbins reported the subject incident to West Virginia National. Ex. B, attached to West Virginia National's Motion, at 58-62. At the time that report was made, Petitioners informed West Virginia National that the authorities had not been contacted. App. at 0081, at 61. In an effort to determine when Mr. Dobbins did, finally, attempt to report the subject incident to the authorities, Mr. Dobbins was asked whether he was "sure you either went down there before you made that phone call to report this to the insurance company or did you do it after you were told that you needed to have an accident report?" App. at 82, at 62. In response to this question, Mr. Dobbins responded, "I don't remember." *Id.* This acknowledgment of his lack of memory as to the actual date and time upon which he attempted to report the alleged incident to the authorities is contained in the five lines immediately following the testimony cited by the Circuit Court in its Order to support its conclusion. In fact, when the testimony cited by the Circuit Court is read together with this additional testimony what becomes readily apparent is that Mr. Dobbins did not fully understand the questions being asked him until undersigned counsel was able to clarify with him the information being sought. It was at this time Mr. Dobbins acknowledged that he did not recall

when he had sought to report the accident to the authorities:

> Q. Okay. Would you agree with me that that form accurately reflects that you had not contacted the authorities as of February 19th, 2019?
>
> **A. Yeah, because they wouldn't let me report it.**
>
> Q. Okay. Do you know if you had even went down there by February 19th, 2019?
>
> **A. Yeah, I went down there to report it, yeah. She said you waited too late.**
>
> Q. Listen to me. Okay? According to the information that we have, you waited several days before you went down there. Is that correct?
>
> **A. Yeah, yeah.**
>
> Q. You didn't go the next day, you went several days later?
>
> **A. Yeah.**
>
> Q. Is that correct?
>
> **A. Yeah.**
>
> Q. Okay. Are you sure you either went down there before you made that phone call to report this to the insurance company or did you do it after you were told that you needed to have an accident report?
>
> **A. I don't remember.**

App. at 81-82, at 61-62. The Circuit Court ignored this testimony. It also ignored page 79 of Mr. Dobbins' deposition testimony wherein he provides the following testimony:

> Q. I understand you went down there at some point. What I'm trying to say is, is that when you called in and you gave this information on February 19th, this was four days after the accident, it says that you had not contacted the police as of that date.
>
> **A. Yeah, yeah.**
>
> Q. Would you agree that as of that date you hadn't made the contact?
>
> **A. Yeah.**
>
> Q. Okay.

App. at 84, at 79.

What is more, the Circuit Court goes on to summarily conclude that Mrs. Dobbins corroborated Mr. Dobbins' alleged testimony (testimony cited by the Court, but not corroborated by the deposition transcript when read in context) "by advising she went with plaintiff Danny Dobbins to Logan City Hall to report this collision." App. at 11. Page 36 of Mrs. Dobbins' deposition testimony offers no testimony as to the date she and Mr. Dobbins purportedly went to

"Logan City Hall." App. at 0229, at 36. Instead, all it does is suggest that Mr. and Mrs. Dobbins went, together, to City Hall sometime after the accident. In that regard, page 36 states as follows:

> Q. And then below there, it talks about police information. Do you see that?
> **A. Yes, sir.**
> Q. Now here it says, "Was police report made." Was there a police report made?
> **A. No.**
> Q. Okay. Did you all actually go down there and try to report this?
> **A. Yes.**
> Q. Did you go with him?
> **A. I went to the City Hall, yes.**
> Q. So what police department did you go down there to report it to? Was it the Logan City Police?
> **A. I guess it was city police because -- yeah, the city police right there, where the City Hall is. I guess it's all on one or something. I don't know.**
> Q. Have you all went down there to talk to the city police before you signed and sent this form back that's –

Id. Clearly, the Circuit Court's citation to Mrs. Dobbins' testimony as evidence supporting its conclusion that Petitioners reported the subject incident within the "tolled" period as defined by the Circuit Court is plainly wrong and a mischaracterization of Mrs. Dobbins' testimony. In fact, on the very next page, page 37, in answer to the final question asked on page 36, Mrs. Dobbins testified as follows: "I can't really remember that. I just know that we went down there days later after the accident." App. at 0229, at 37. Additional testimony from Mrs. Dobbins regarding this issue is even more telling as she testified as follows:

> Q. The information that's written on there, that's filled out by the insurance company, says that the authorities were not contacted. Would you agree with me that as of February 19th, 2019 when West Virginia National was notified of this accident, that you had not contacted the authorities?
> **A. Yes.**
> Q. Because that's what Mr. Dobbins said. He said that he doesn't –
> **A. Yes.**
> Q. -- he doesn't remember contacting them before February 19th, 2019.
> **A. Yes.**
> Q. And you agree with that?
> **A. Yes.**

Q. Okay. Now since it looks like February 19th, we agree that you hadn't contacted the police about this, do you know when it was that you did contact the police or go down there to City Hall?

A. No, I just know it was so many days after or several days after.

Q. Okay. All right. And do you know if it was the following week or was it -- had you already made your way into the month of March before you guys made it down there?

A. Well, I'm really not for sure, but, you know, I just know they said it was because of something about 24 hours or something, they didn't take -- you know, take our thing about it.

App. at 0088, at 26-27. Mrs. Dobbins was asked about her and Mr. Dobbins' efforts to report the alleged hit-and-run accident to law enforcement in relation to completion of the claim form mailed to her following their reporting of the accident to WV National and she provided the following testimony:

Q. So what police department did you go down there to report it to? Was it the Logan City Police?

A. I guess it was city police because -- yeah, the city police right there, where the City Hall is. I guess it's all on one or something. I don't know.

Q. Have you all went down there to talk to the city police before you signed and sent this form back that's –

A. I can't really remember that. I just know that we went down there days later after the accident.

Q. Is there any reason to believe, Mrs. Dobbins, that whenever you completed this form that was sent back to West Virginia National, that whenever this was done, you still hadn't gone down there and made that report?

A. I don't -- I don't know. I just know it was several days after it happened, is all I remember.

App. at 0229.

Quite evidently, an examination of the Petitioners' own deposition testimony reveals that the ICA properly concluded that the Circuit Court committed plain error when it assigned a date certain to when Petitioners sought to inform authorities about this incident. The only available evidence of when Petitioners may have reported the subject incident to the authorities (Petitioners' own recollections at their depositions) clearly demonstrates that neither Mr. Dobbins nor Mrs.

Dobbins know when they sought to inform the authorities of the incident, but have acknowledged that they had not done so at the time they reported the incident to WV National on February 19, 2019. Again, there is no available evidence to support the Circuit Court's conclusion that Mr. and Mrs. Dobbins sought to report this incident on February 19, 2019, and the ICA rightfully rejected this finding by the Circuit Court. As such, as concluded by the ICA, WV National should have been granted summary judgment.

Notably, in the argument section of their brief, Petitioners offer little to counter the ICA's finding that, essentially, there is no available evidence to support the Circuit Court's conclusion that Mr. and Mrs. Dobbins sought to report this incident on February 19, 2019, a date still within the revised reporting period required under West Virginia Code §33-6-31(e)(1) as created by the Circuit Court. Instead of illustrating or pointing to evidence within the record to demonstrate that they did, in fact, comply with West Virginia law, even as it was revised by the Circuit Court, they instead argue that WV National was advised of this collision on Tuesday, 02/19/19. Unfortunately for Petitioners, advising WV National is not the same as reporting a crime to the proper authorities as is **REQUIRED** by law. This is a distinction that Petitioners have glossed over time and time again. Moreover, they seek to blame their failure to comply with West Virginia law on WV National, claiming that WV CSR§ 114-14-1, *et seq.*, requires that an insurer disclose to first-party claimants all pertinent benefits, coverages or other provisions of an insurance policy under which a claim is presented. Petitioners assert that WV National was required to inform the Petitioners during the initial conversation on February 19, 2019, of the Policy provisions which required they immediately report the collision to the police. Petitioners provide no citation to support this bald assertion that WV National did not fulfill some duty owed them. Moreover, Petitioners fail to explain why they believe the general principle of West Virginia law that "'[a]ll persons are

presumed to know the law. Ignorance thereof is no excuse'" *Hartley Hill Hunt Club v. County Comm'n of Ritchie County*, 220 W.Va. 382, 391 n. 13, 647 S.E.2d 818, 827 n. 13 (2007) (*quoting State v. McCoy*, 107 W.Va. 163, 172, 148 S.E. 127, 130 (1929))." is inapplicable to them. *Dept. of Transp. v. Parkersburg Inn*, 671 S.E.2d 693, 222 W.Va. 688 (W. Va.2008). Indeed, this is not just a policy reporting requirement, this a reporting requirement required by law. One can hardly claim that WV National is seeking to "taking advantage of its insureds" when the legislature, itself, has imposed a duty on an insured to report a hit-and-run accident to the appropriate authorities within the 24-hour-period following the accident, if he or she wish to be eligible for UM coverage.

II. A "PREJUDICE STANDARD" IS NOT APPLICABLE TO A REPORTING REQUIREMENT WHEN THE REPORTING REQUIREMENT IS IMPOSED BY LAW AND IS THE REPORTING OF A CRIME TO THE APPROPRIATE AUTHORITIES.

A. The reporting requirement as well as the prescribed time in which to comply with said reporting requirement set forth in WV National's Policy is mandated by West Virginia Code §33-6-31(e)(1).

Pursuant to the terms of WV National's policy, if Petitioners wished to recover uninsured motorist coverage benefits for the subject incident, then, just as required by the West Virginia Code, they were required to report the same to the **police** within 24 hours. *See* App. at 98-102. Petitioners did not timely notify the authorities, thereby failing to comply with the notice provision of the Policy as well as the State's statute. No "prejudice" standard may be applied to policy language that is authorized by and mirrors that required by State statute. As the ICA properly concluded, the Circuit Court's application of such a standard is not supported under West Virginia law.

Indeed, as WV National previously explained in its appeal before the ICA, the Circuit Court improperly relied upon *State Auto. Mut. Ins. Co. v. Youler*, 183 W. Va. 556, 396 S.E.2d 737 (1990), an underinsured motorist coverage case that is distinguishable from the facts and

circumstances of this case. *Youler* was a case presented to the West Virginia Supreme Court of Appeals upon certified questions. *Id.* at 183 W. Va. at 559, 396 S.E.2d at 740. The area of concern in *Youler* that the Circuit Court apparently deemed relevant to the facts and circumstances of this case was "delay in giving notice of an automobile accident to one's own insurer providing underinsured motorist coverage." *Id.* The Youlers' automobile insurance policies contain a part, applicable to all coverages, on "Duties After an Accident or Loss[.]" *Id.* One of the "General Duties" thereunder is that the insurer, State Auto, "must be notified promptly of how, when and where the accident or loss happened." *Id.* In the same part of the policies, one of the "Additional Duties for Uninsured [or Underinsured] Motorists Coverage" is that a person seeking such coverage must also "[p]romptly send [State Auto] copies of the legal papers if a suit is brought." *Id.* State Auto received notice of the accident in question, in the form of a copy of the Youlers' complaint against Moore, nearly three years after the accident occurred, specifically, on April 26, 1988. *Id.*

Certified question number 3 related to whether prejudice to the insurer in a case of uninsured or underinsured motorist coverage was a material factor to be considered in determining **if a delay in notifying such insurer of an accident justifies the denial of coverage**. *Id.* at 183 W. Va. at 561, 396 S.E.2d at 742. The Court answered this question, "yes," concluding that in an uninsured or underinsured motorist case, where there has been delay in complying with the notification requirement of an insurance policy requiring notification to an insurer, "prejudice to the investigative interests of the insurer is a factor to be considered, along with the reasons for delay and the length of delay, in determining the overall reasonableness in giving notice of an accident." *Id.* "In the typical case, the 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 give notice sooner. If the insurer fails to present evidence as to prejudice, then the insured's failure to give notice sooner will not be a bar to the insured's recovery. If the insurer puts on evidence of prejudice, however, the reasonableness of the notice ordinarily becomes a question of fact for the fact finder to decide. On remand, there should be further proceedings consistent with these guidelines." *Id.*

Unlike *Youler*, Petitioners claim does not involve underinsured motorist coverage. Moreover, WV National does not seek to strictly enforce a notice provision of its policy that requires notice to **WV National, an insurer,** to justify its denial of the Petitioners' claim. Rather, Petitioners' claim is one for uninsured motorist coverage and merely seeks enforcement of a **notice provision to a police, peace, or to a judicial officer that mirrors a legal obligation imposed upon a UM policyholder under West Virginia Code §33-6-31(e)(1)**. In *Youler,* the respondents' reporting requirement was the subject of a provision contained in an insurance policy. Here, while the reporting requirement is subject to a provision contained in an insurance policy, that requirement simply mirrors a legal requirement imposed by West Virginia statute. The issue of notice involved in *Youler* did not involve notice to the authorities and it did not mirror an affirmative legal duty imposed by West Virginia law. The duty to report a hit-and-run incident to a police, peace, or judicial officer is not the same duty considered in *Youler*.

The *Youler* Court never considered the application of its "prejudice to the investigative interest of the insurer" where the delay in notification by an insured violated a statutory duty, mirrored in the Policy language, to report a hit-and-run accident for purposes of uninsured motorist coverage to a **police, peace, or judicial officer**. By contrast, the West Virginia Legislature has. By establishing the 24-hour reporting period, the West Virginia legislature concluded that reporting a hit-and-run accident after that initial 24-hour reporting period, prejudices law

enforcement's ability to effectively investigate hit-and-run accidents. WV National was well within its contractual right to incorporate this same legal requirement into its Policy's language. After all, law enforcement officers are "first responders." As explained previously, they are some of the first, if not the first, people to arrive at an accident scene. Once there, they employ trained investigative techniques and tools to apprehend suspects and solve crimes. Failure to comply with a legal requirement to notify law enforcement of crimes is detrimental, and, in some cases, fatal, to law enforcement's ability to solve these crimes. Under these circumstances, *Youler* is clearly not controlling. For that matter, it simply is not persuasive as to the Petitioners' failure to comply with the statutory and policy notice requirement. The Circuit Court's reliance upon it to impose a prejudice standard upon Petitioners' requirement to report a hit-and-run accident to law enforcement was plain error. The Intermediate Court of Appeals properly distinguished the facts and circumstances of this case from those contained in *Youler*, finding no reason to extend *Youler* to West Virginia Code § 33-6-31(e)(1).

B. The other West Virginia authority cited by Petitioners and the Circuit Court are not applicable to the facts and circumstances of this litigation.

In Footnote 15 of its Order, the Circuit Court explained,

> [t]here is 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].

App. at 21. Throughout this litigation and, again, before this Court, Petitioners have submitted

these cases as further support for their position. Petitioners as well as the Circuit Court's reliance on these cases is as flawed as its reliance on *Youler*. Simply put, these cases do not involve notice requirements that mandate notice to law enforcement, which mirror an affirmative legal duty imposed by West Virginia law. Both the Petitioner and the Circuit Court are confusing prejudice for reporting to the insurer, when the issue in the instant case is reports mandated by West Virginia Code to the proper authorities and policy language that follows these Code requirements.

For example, in *Colonial*, the West Virginia Supreme Court of Appeals addressed a requirement in a liability insurance policy that notice of a claim against a policyholder be given to the insurance company as soon as possible. *Id.* 208 W. Va. 706, 542 S.E.2d at 871. There, the insurance company received prompt notice of a claim from a person injured by a policyholder's negligence. *Id.* However, the insurance company argued below that the policyholder had failed to give any notice of the claim to the insurance company, and the policy's notice requirements had not been met. *Id.* The circuit court entered an order holding that because the policyholder had failed to give the insurance company notice of the claim, there was no coverage under the policy. *Id.* The Court concluded that the notice requirements of an insurance policy may be satisfied when notice of a claim is provided to the insurance company from any source, including a person injured by a policyholder's negligence. *Id.* Notably, there was no discussion of the notice language contained in WV National's policy, which mirrors the statutory obligations of Petitioners under West Virginia Code §33-6-31(e)(1). In other words, there was no discussion by the Court of the application of a "prejudice standard" to policy language that adopts an affirmative, statutory duty imposed upon an insured to make a reporting to law enforcement.

Similarly, in *Kronjaeger v. The Buckeye Union Ins. Co.,* 200 W. Va. 570, 582, 490 S.E.2d 657, 669 (W.Va. 1997), there was, once again, no discussion of the notice language contained in

WV National's policy, which mirrors the statutory obligations of Petitioners under West Virginia Code §33-6-31(e)(1). Instead, there, the West Virginia Supreme Court of Appeals held that in cases like the one before it, where the insured had failed to obtain his/her insurer's consent before settling with a tortfeasor, but in settling had procured the full policy limits available under the tortfeasor's insurance policy, the insurer must show that it was prejudiced by its insured's failure to obtain its consent to settle in order to justify a refusal to pay underinsured motorist benefits. *Id.* Again, there was no discussion by the Court of the application a "prejudice standard" to policy language that adopts an affirmative, statutory duty imposed upon an insured to make a reporting to law enforcement.

Finally, in *Bowyer by Bowyer v. Thomas*, 188 W. Va. 297, 423 S.E.2d 906 (W.Va. 1992), it also did not involve the imposition of a "prejudice standard" to policy language that adopted an affirmative, statutory duty imposed upon an insured to make a reporting to law enforcement. Like the previous cases discussed above, there was no discussion by the Court of the application a "prejudice standard" to policy language that adopts an affirmative, statutory duty imposed upon an insured to make a reporting to law enforcement. Instead, in *Thomas* the Court considered only an insured's duty to cooperate with his or her insurer under an automobile liability policy.

All of the cases cited by Petitioners and the Circuit Court are easily distinguishable and none of them set forth a standard of law that is applicable or that should be applied to the facts and circumstances of the present case. In fact, yet another case cited by Petitioners, *Moses Enterprises, LLC v. Lexington Ins. Co, et al.* is also not applicable. Again, it also involves a suit where an insured's claim was denied for failure to report a claim to the **insurer** within the time allowed in the policy provision. The delay in the reporting by Moses was that they had not yet learned that the purchaser had stolen the identity of another to purchase the vehicle. There, the US District

Court for the Southern District of WV applied a "substantial compliance" standard, citing to WVCSR §114-14-4.4, which specifically provides, **"[e]xcept where a time limit is specified by statute or legislative rule**, no insurer may require a first-party claimant to give notification of a claim or proof of claim within a specified time." In the present litigation, unlike in *Moses,* the time limit is specified by statute. As such, Petitioners in this litigation, unlike in *Moses*, had a duty to comply with West Virginia law or have their uninsured motorist coverage benefit claim denied.

As the Intermediate Court properly concluded, the prejudice standard applied by the Circuit Court to WV National's Policy language exceeds the rule of law set forth in West Virginia Code §33-6-31(e)(1) (the source of WV National's Policy language), and therefore, is plainly wrong.

C. No support for Petitioners argument that an insurer must demonstrate prejudice due to an insured's failure to report an occurrence to the police within twenty-four (24) hours may be derived from the out of jurisdiction case law cited by Petitioners for the first time on appeal.

In an effort to bolster their argument, Petitioners cite, for what appears to be the first time, out of jurisdiction case law in an effort to convince this Court that perhaps the reason this Court 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 is "because it is logical to conclude that if prejudice must be shown [with regard to] W.Va. Code §33-6-31(e)(2)[,] it must also be shown under W.Va. Code §33-6-31(e)(1)]." Simply put, this is the most illogical conclusion that could be drawn from this Court's silence on this issue. Indeed, it treats 31(e)(1) and 31(e)(2) as if they are identical in nature, when nothing could be further from the truth. It ignores the fact that the reporting requirements set forth in each respective provision are dramatically different and are set forth for dramatically different purposes, namely, the reporting requirement to the police is meant to aid in the identification of individuals responsible for injuries and damages sustained by an insured, allowing for the opportunity to hold those individuals accountable for these injuries

and damages. The reporting requirement also aids in the potential arrest of individuals who have committed a crime. Perhaps the only thing more illogical than the aforementioned conclusion suggested by Petitioners, is Petitioners' citations of these out of jurisdiction cases for the first time to bolster their argument that this Court should extend the *Youler* decision to the reporting requirement set forth in West Virginia Code §33-6-31(e)(1). Petitioners offer little, if any, explanation of how these cases actually support this argument. By and large, this is because they do not. It appears that most, if not all, of these jurisdictions lack statutory provisions like or even comparable to West Virginia Code §33-6-31(e)(1). Additionally, the facts and circumstances of these cases would either fail under West Virginia Code §33-6-31(e)(1), or, they are not analogous to the facts and circumstances of Petitioners case. Simply put, just like *Colonial*, *Kronjaeger*, *Bowyer*, and *Moses*, they are not instructive to this Court.

First, *Pikey v. General Acc. Ins. Co. of America*, 922 S.W.2d 777 (Mo. App. 1996) is distinguishable from Petitioners case as it does not appear that Missouri's uninsured motorist coverage statute imposes a similar 24-hour reporting requirement like the one present in West Virginia Code §33-6-31(e)(1). In other words, *Pikey* addressed a stand-alone policy provision that an accident giving rise to an uninsured motorist coverage claim be reported to the police within 24-hours. That policy provision does not appear to have been based in a Missouri statutory provision like West Virginia Code §33-6-31(e)(1), which specifically provides that **in order for the insured to recover under the uninsured motorist endorsement or provision, shall: (1) Within twenty-four hours** after the insured discovers, and being physically able to report the occurrence of such accident, the insured, or someone in 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**. As a result, the only questions that existed in *Pikey* was whether failure by the

insureds to notify the Missouri Highway Patrol was a material breach of the policy which prejudiced the insurer. Certainly, this is not the same issue presented by Petitioners case where Petitioners have, admittedly failed to comply with the plain, unambiguous reporting requirement of West Virginia law, which just so happens to be mirrored in WV National's policy language.

Interestingly, in *Pikey*, the accident at issue occurred at 5:15 a.m., within 5 minutes of the accident, it was reported to the authorities, and by 5:24 a.m., the Missouri Highway Patrol made three accidents reports. Under the facts and circumstances, of that case, in West Virginia, under West Virginia law, an insured would have had no obligation to report the accident to a police, peace, or judicial officer, because, pursuant to West Virginia statute, the accident would have "already been investigated by a police officer." Moreover, one of the arguments of the insureds in that litigation was that they were excused from their failure to provide timely notice to the police as required by the policies provisions because of the husband's incapacity. Again under West Virginia law scenario is accounted for because the statute tolls the reporting requirement until an insured is physically able to report.

Second, *Price v. Doe*, 638 A.2d 1147 (D.C. 1994), also appears to address a stand-alone policy provision that an accident giving rise to an uninsured motorist coverage claim be reported to the police within 24-hours. As in *Pikey*, this policy provision does not appear to have been based in a District of Columbia statutory provision like West Virginia Code §33-6-31(e)(1). In fact, for all intents and purposes, when reviewing the *Price* decision, the only uninsured motorist coverage statute cited by the District of Columbia Court of Appeals is one defining an uninsured motor vehicle. Although Petitioners would like for this Court to believe Price is persuasive authority, in light of West Virginia Code §33-6-31(e)(1) it cannot be. In *Price*, no one ever contacted the police or any other public office regarding the accident, which runs in clear

contravention to West Virginia statutory law.

Third, *Powell v. Automotive Cas. Ins. Co.*, 631 So.2d 581 (La. App. 1994), also only addresses a stand-alone policy provision that an accident giving rise to an uninsured motorist coverage claim be reported to the police within 24-hours. It does not appear that Louisiana possesses a statutory provision comparable to West Virginia Code §33-6-31(e)(1). Accordingly, like in *Pikey* and *Price*, the *Powell* Court based its coverage determination solely upon the existence of policy language and the facts and circumstances of the underlying case as there appears to be no controlling statutory provisions like those contained in West Virginia Code §33-6-31(e)(1).

Fourth, *Michel v. Metropolitan Property & Cas. Ins. Co.*, 3 Mass.L.Rptr. 355, Not Reported in N.E.2d (1995), also appears to address only a stand-alone policy provision. Of note, in that case, within 24 hours, Michel had reported the accident to the police and to Safety Insurance Company, the insurer of Michel's friend's automobile, which Michel was operating. The real issue in that case was the delayed reporting to a second insurance company, Metropolitan, the insurance company of Michel's brother at the time of the accident. Michel's claim arose as a "household member." Metropolitan has denied Michel's claim for uninsured motorist benefits based on a lack of prompt notice of the claim.

Fifth, *Beck v. State Farm Mut. Auto. Ins. Co.*, 126 Cal.Rptr. 602, 54 Cal.App.3d 347 (Cal. App. 1976), also offers little, if any, support for the position taken by Petitioner in this litigation. There, the language of California's statutes, unlike West Virginia's statute, does not specifically require that **in order for the insured to recover under the uninsured motorist endorsement or provision, shall within twenty-four hours report the accident to a police, peace, or judicial officer, making in a statutorily required condition precedent to coverage.** Furthermore, the

facts and circumstances of *Beck* were also strikingly different from those at issue in this litigation. There, the insured spoke to the driver of the other vehicle after the accident, which occurred around 2:30 p.m. in the afternoon, collecting what she believed was his name and license plate number. Accordingly, she did not, at that time, believe, she was dealing with an uninsured motorist claim. Moreover, she telephoned her insurance agent the same day as the accident, sharing with her agent's secretary all the information she knew about the accident. Sometime between her call with her agent's office and the next morning, she had called the Los Angeles Police Department to report the accident and the police advised her to call the Department of Motor Vehicles, which she did, and to call the Sheriff's Office, in whose jurisdiction the accident occurred. She called her agent again the day after the accident, after having contacted the authorities, and during that call the insured's agent informed her he would make the report and run down the driver. Again, as with *Michel*, *Pikey, Price, Powell,* and *Beck* is not analogous in law or fact to the case before this Court. Under these circumstances, Petitioners can provide no legal justification as to why this Court should now, after all these years, rewrite West Virginia Code §33-6-31(e)(1) to include a prejudice standard when the legislature has already deemed the provisions set forth there in a condition precedent to uninsured motorist coverage where an insured has sustained bodily injury or property damage by motor vehicle for which the owner or operator is unknown.

III. WHERE A NOTICE PROVISION IS REQUIRED UNDER WEST VIRGINIA LAW STRICT, TECHNICAL COMPLIANCE WITH THAT REQUIREMENT IS COMPULSORY.

Simply put, the Circuit Court's conclusion that *Youler, Colonial, Kronjaeger* and *Bowyer* would not exist if it were as simple as determining whether the exclusionary language contained in an insurance policy was clear and unambiguous (*i.e.*, a Court would not be required to consider whether an insurer's investigative interests were prejudiced as a factor in an UIM or UM case when

determining the reasonableness of any delayed notification) and Petitioners continued advocacy of this point demonstrates their lack of understanding of the legal duty imposed by West Virginia Code §33-6-31(e)(1), which is an absolute legal duty with which an insured must comply, if he or she wishes to recover uninsured motorist coverage. Of the cases cited by the Circuit Court and Petitioners, none of them consider an insured's compliance with West Virginia Code §33-6-31(e)(1) or if an insured is entitled to uninsured motorist coverage.

It is wholly lost on WV National as to the point Petitioners seek to make by contending that *Lusk* does not support strict, technical compliance with notice provisions contained in insurance policies. In the present litigation, WV National's policy mirrors West Virginia Code §33-6-31(e)(1) by providing as follows:

> C. A person seeking Uninsured Motorists 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 App. at 0098-0102. Complying with WV National's policy and WV Code §33-6-31(e)(1) is one and the same. It is disingenuous for Petitioners to claim they are entitled to uninsured coverage under WV National's policy because they need not strictly and technically comply with the notice provision contained therein **when that same notice requirement is a statutorily created legal duty**.

Further, pursuant to the logic in *Lusk*, it is inexplicable how one could conclude that "the facts of this case are more compelling than the facts of *Lusk*" as advanced by Petitioners. Mr. Dobbins (the insured in the present case that would be similarly situated to Ms. Lusk) has admitted that, unlike Ms. Lusk, he was physically and emotionally able to report the incident to anyone he wanted to immediately following the incident. App. at 0083, at 74-77. Summary judgment was

improper as to Ms. Lusk's claims because the Court concluded that "the provision reasonably requires that once a victim of a 'hit and run' is physically able to report the accident, that victim has twenty-four hours to make the report unless someone in his or her behalf acts within the same extended time period." *Lusk,* 175 W.Va. 775, 338 S.E.2d at 381. The Court held that "summary judgment was precluded as to her claims by the disputed issues of material fact pertaining to whether notice was actually sent to DMV, and whether Ms. Lusk was physically able to give notice earlier." *Id.* In *Lusk*, the accident occurred on Thursday, March 25, 1982. *Id.* 175 W.Va. 775, 338 S.E.2d at 377. Approximately three days later, on Sunday, March 28, 1982, Mr. Lusk visited Ms. Lusk in the hospital and based upon what she told him "filled out a Department of Motor Vehicles (DMV) accident report form and had her sign it." *Id.* Mr. Lusk claims that after undertaking some additional steps to complete the form with his insurance agent, he mailed the accident report form to the DMV on Tuesday, March 30, 1982. In the present litigation, there are no questions of material fact that remain. Mr. Dobbins has admitted that he was physically and emotionally able to report the incident immediately following its occurrence. Moreover, he and Mrs. Dobbins have admitted that they cannot recall specifically when they attempted to report the alleged hit-and-run accident, but at the earliest, it was more than four days after the accident's occurrence. The remaining questions of fact identified by the West Virginia Supreme Court of Appeals in *Lusk* clearly indicate that, if either (1) notice was never actually given to the DMV, or (2) even if it was, if Ms. Lusk was physically able to give notice earlier than such notice was given, then her claim would be barred for failing to comply with West Virginia Code § 33-6-31. *See Lusk,* 175 W.Va. 775, 338 S.E.2d at 381. Importantly, in footnote 4 of *Lusk*, the Court explains that the notice provisions are **prerequisites** to recover under the uninsured motorist endorsement or provision of the insured's policy. *See id.* Petitioners had a legal duty to comply with all of the prerequisites to

recover under the uninsured motorist endorsement or provision. Accordingly, Petitioners' attempt in this litigation to substitute the notice given to WV National for the notice they were statutorily obligated to give the appropriate authorities is plainly wrong. The question here, like in *Lusk,* is when was the alleged hit-and-run reported to the appropriate authorities and was it within the time period required by West Virginia Code §33-6-31(e)(1). It was not. Consequently, as concluded by the ICA, there is no UM coverage.

CONCLUSION

The Circuit Court's order granting Petitioners' Partial Motion for Summary Judgment was properly reversed by the ICA. Petitioners failed to comply with the 24-hour notice requirement to report their alleged hit-and-run incident to law enforcement, and, as a result, they are not entitled to uninsured motorist coverage under WV National's Policy.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2024, true and accurate copies of the foregoing *"Response Brief of Respondent"* was served electronically and also via United States mail, postage prepaid to all other parties to this appeal as follows:

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