

**SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**NO. 33291**

**YVONNE D. REED and  
KERMIT E. REED, her husband,**

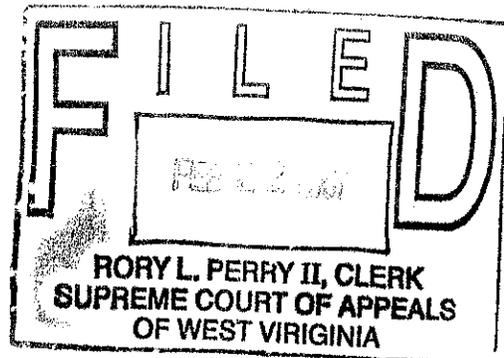
**Plaintiffs Below/Appellants,**

**v.**

**WALTER JASON ORME,**

**Defendant Below/Appellee.**

**LOGAN COUNTY CIRCUIT COURT  
CIVIL ACTION NO.: 2003-C-203-P**



---

**BRIEF OF YVONNE D. REED AND KERMIT E. REED, HER HUSBAND**

---

Submitted by: Counsel for Plaintiffs Below/Appellants,

MICHAEL A. ESPOSITO  
WV State Bar ID #1136  
Post Office Box 1680  
Logan, West Virginia 25601  
(304) 752-7300

## TABLE OF CONTENTS

	<u>PAGE</u>
The Kind of Proceeding and Nature of the Ruling in the Lower Tribunal	3
Statement of Facts of the Case	3
Assignments of Error Relied Upon on Appeal and the Manner in Which They Were Decided in the Lower Tribunal	5
Points and Authorities Relied Upon and a Discussion of the Law	5
Relief Prayed For	7

**THE KIND OF PROCEEDING AND NATURE OF THE RULING  
IN THE LOWER TRIBUNAL**

1. This is a civil action in which the Appellants, Yvonne D. Reed and Kermit E. Reed, the Plaintiffs below, sought to collect monetary damages from Walter Jason Orme as a result of a motor vehicle collision and underinsurance through an automobile liability insurance policy of Yvonne D. Reed's employer, The Logan County Board of Education.
2. The Circuit Court of Logan County, West Virginia, granted Summary Judgment to the Logan County Board of Education's insurance carrier, National Union Fire Insurance Company of Pittsburgh, Pennsylvania.

**STATEMENT OF THE FACTS OF THE CASE**

On June 5, 2001, your Appellant, the Plaintiff below, Yvonne D. Reed, was operating a school bus owned by The Logan County Board of Education, when said school bus was struck by a motor vehicle operated by Walter Jason Orme. As a result of the collision, Yvonne D. Reed was injured and she and her husband, Kermit E. Reed, filed a civil action against Walter Jason Orme for monetary damages in the Circuit Court of Logan County, West Virginia. The Reeds were eventually paid the applicable limits of the insurance policy which Walter Jason Orme had with State Farm Insurance, specifically, Twenty-Five Thousand Dollars (\$25,000.00). The Plaintiffs then, through the civil action below in the Circuit Court of Logan County, West Virginia, sought to collect

underinsurance through the insurance policy held by her employer, The Logan County Board of Education with National Union Fire Insurance Company of Pittsburgh, Pennsylvania. Yvonne D. Reed's damages and the damages of her husband exceeded the Twenty-Five Thousand Dollars (\$25,000.00) paid through State Farm Insurance. The insurance carrier, National Union Fire Insurance Company of Pittsburgh, Pennsylvania, filed a Motion For Summary Judgment claiming that language in the insurance policy precluded the Appellant from making a claim for those underinsurance benefits because she had applied for and collected Workers' Compensation Benefits. The Circuit Court of Logan County, West Virginia, the Honorable Roger L. Perry, granted the Motion For Summary Judgment finding that the Appellant's employer, The Logan County Board of Education, had in effect a commercial motor vehicle insurance policy issued by National Union Fire Insurance Company of Pittsburgh, Pennsylvania, which contained an endorsement to the underinsured motorist coverage section stating that the said insurance did not apply to a situation for which the insured may be held liable under any Workers' Compensation law. The Court below further found that the West Virginia Code §29-12A-16(a) allowed the employer, a political subdivision, to purchase a custom designed insurance policy on behalf of the political subdivision which may incorporate language absolutely limiting liability under the policy even if such language would otherwise violate West Virginia Code §33-6-31. Summary Judgment was not the appropriate mechanism to resolve this issue.

**ASSIGNMENT OF ERROR RELIED UPON ON APPEAL AND THE MANNER  
IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL**

The Circuit Court erred in granting Summary Judgment to National Union Fire Insurance Company of Pittsburgh, Pennsylvania, because there existed genuine issues of material fact which precluded Summary Judgment and the facts of this case did not meet the criteria for the exception set forth in the insurance policy. Furthermore, a declaratory judgment action rather than a Summary Judgment Motion would have been the more appropriate procedure to resolve the issues.

**POINTS AND AUTHORITIES RELIED UPON AND  
A DISCUSSION OF THE LAW**

Summary Judgment is a device designed to effect a prompt disposition of controversies on their merit without resort to a lengthy trial, if in essence there is no real dispute as to the salient facts or if only a question of law is involved. Hanks v. Beckley Newspapers Corp., 153 W. Va. 834, 172 S.E.2d 816 (1970); Oakes v. Monongahela Power Co., 158 W. Va. 18, 207 S.E.2d 191 (1974); Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995); Cavender v. Fouty, 195 W. Va. 94, 464 S.E.2d 736 (1995); HN Corp. v. Cyprus Kanawha Corp., 195 W. Va. 289, 465 S.E.2d 391 (1995).

A declaratory judgment action is a proper procedure for an adjudication of the legal rights and duties of parties to an actual, existing controversy which involves the construction or application of a statute or of statutes. Arthur v. County Court, 153 W. Va. 60, 167 S.E.2d 558 (1969).

An employee who receives Workers' Compensation Benefits for injuries that result from a motor vehicle collision with a third-party which occurs within the course and scope of the employee's employment is entitled to also assert, against the employer's motor vehicle insurance carrier, a claim for underinsured motorist benefits, where the employee's employer has in effect motor vehicle insurance providing underinsured motorist coverage and where the employee's recovery against the third-party activates such underinsurance coverage. Henry v. Benyo, 203 W. Va. 172, 506 S.E.2d 615 (1998) and Miralles v. Snoderly, - W. Va. -, 602 S.E.2d 534, 2004 W. Va. LEXIS 99 (2004).

The Appellant, Yvonne D. Reed, was injured in a motor vehicle collision with Walter Jason Orme. The collision occurred within the course and scope of Yvonne D. Reed's employment with The Logan County Board of Education. Walter Jason Orme's insurer paid the policy limits available, activating the underinsurance coverage with National Union Fire Insurance Company of Pittsburgh, Pennsylvania.

Appellant acknowledges that she also received Workers' Compensation Benefits. However, National Union Fire Insurance Company of Pittsburgh, Pennsylvania, had nothing whatsoever to do with payment of the Workers' Compensation Benefits. National Union Fire Insurance Company of Pittsburgh, Pennsylvania, should not be allowed to avoid paying underinsurance when the Appellant has not been made whole and when Appellant was exercising her right to collect Workers' Compensation Benefits.

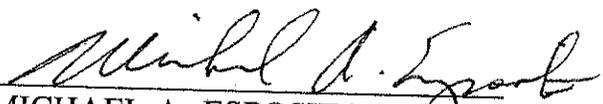
Therefore, Yvonne D. Reed is entitled to attempt to collect the underinsurance

benefits.

**RELIEF PRAYED FOR**

Appellants pray that the Summary Judgment below be set aside and the case remanded.

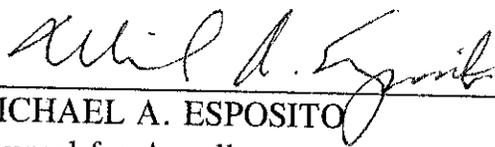
APPELLANTS,  
BY COUNSEL,

  
MICHAEL A. ESPOSITO (WV State Bar ID #1136)  
325 Stratton Street  
P. O. Box 1680  
Logan, WV 25601  
Telephone: (304) 752-7300  
Fax: (304) 752-2280

**CERTIFICATE OF SERVICE**

I, Michael A. Esposito, Counsel for the Appellants, do hereby certify that I served a true copy of the foregoing **BRIEF OF YVONNE D. REED AND KERMIT E. REED, HER HUSBAND**, upon counsel of record this 21 day of February, 2007, by depositing in the United States Mail, postage prepaid, and addressed as follows:

R. Carter Elkins, Jr., Esquire (WV State Bar #1116)  
Andrew P. Ballard, Esquire (WV State Bar #9328)  
CAMPBELL, WOODS, BAGLEY, EMERSON,  
McNEER & HERNDON, P.L.L.C.  
P. O. Box 1835  
Huntington, WV 25719-1835

  
MICHAEL A. ESPOSITO  
Counsel for Appellants