

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

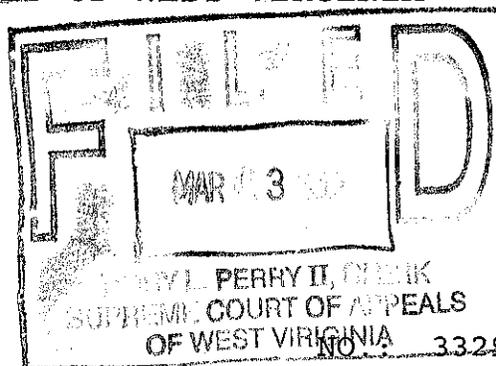
YVONNE REED and KERMIT E. REED,  
her husband,

Appellants,

v.

WALTER JASON ORME,

Appellee.



(CIVIL Action No. 03-C-203-P  
Circuit Court of Logan County)

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA'S  
RESPONSE TO BRIEF OF YVONNE D. REED AND  
KERMIT E. REED, HER HUSBAND

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KIND OF PROCEEDING AND NATURE OF THE RULING  
IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA

While operating a school bus owned by her employer, the Logan County Board of Education ["Board of Education"], appellant Yvonne Reed was involved in a collision with a vehicle operated by Walter Jason Orme. Ms. Reed received workers' compensation benefits for the injuries she allegedly sustained in the accident, and she and her husband, Kermit Reed, also filed suit against Mr. Orme in the Circuit Court of Logan County, West Virginia. Mr. Orme's insurer, State Farm, ultimately settled the claim against Mr. Orme for \$25,000.00.

The Reeds then sought underinsured motorist coverage from a policy issued by National Union Fire Insurance Company of Pittsburgh, PA ["National Union"], which provided coverage to the Board of Education. National Union filed a summary judgment motion, demonstrating to the lower court that the policy was custom designed and contained a valid exclusion of underinsured motorist coverage in instances where the employee of the insured also received workers' compensation benefits. The Circuit Court of Logan County agreed and by Order entered June 19, 2006, granted National Union's Motion for Summary Judgment. The Reeds appeal from the Circuit Court's entry of judgment in favor of National Union.

### STATEMENT OF FACTS

The material facts are not in dispute. On June 5, 2001, during the scope and course of her employment with the Board of Education, Ms. Reed was operating a school bus owned by the Board of Education. A collision occurred between the school bus operated by Ms. Reed and a vehicle operated by Walter Jason Orme. The Board of Education paid premium taxes for workers' compensation benefits for its employees and Ms. Reed received workers' compensation benefits.

Ms. Reed and her husband, Kermit Reed, filed this action in the Circuit Court of Logan County, West Virginia, on June 4, 2003. They contended that Mr. Orme had been negligent and that his negligence caused the bodily injury claimed by Ms. Reed and the loss of consortium asserted by Mr. Reed. Ultimately, Mr. Orme's insurer, State Farm, settled the Reeds' claims against Mr. Orme for \$25,000.00.

At the time of the accident, a custom designed commercial motor vehicle insurance policy issued by National Union for the policy period of July 1, 2000 through July 1, 2001, was in full force and effect. The policy, procured by the Board of Risk and Insurance Management ["BRIM"], pursuant to the authority granted to it by W. Va. Code §29-12A-16, provided coverage, including underinsured motorist coverage, to the Board of Education, a political subdivision. BRIM negotiated with National

Union to obtain an endorsement for underinsured motorist coverage, effective July 1, 2000, which contained an exclusion providing that "This insurance does not apply to any of the following: ... 8. Any obligation for which the 'insured' may be held liable under any workers' compensation, Disability benefits or unemployment compensation law or any similar law." (See Mot. for Summ. J. on Behalf of National Union, Exhibit C, Endorsement #11).

Based upon the undisputed evidence, the Circuit Court appropriately found that the National Union policy was custom designed and, therefore, could include language limiting liability, even if such language conflicted with the provisions of W. Va. Code §33-6-31. The lower court then correctly held that the exclusionary language contained within the National Union policy was valid and precluded recovery of underinsured motorist coverage because Ms. Reed had received workers' compensation benefits as a result of premiums paid by her employer. Accordingly, the Circuit Court granted National Union's Motion for Summary Judgment and entered judgment in favor of National Union and against the Reeds.

#### ASSIGNMENT OF ERROR

The Circuit Court of Logan County committed no error when it entered summary judgment in favor of National Union.

### STANDARD OF REVIEW

A *de novo* standard of review is utilized when reviewing a lower court's entry of summary judgment. Syllabus Point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). When, as in the instant case, the facts are not in dispute, determination of coverage under an insurance contract is a question of law which also is reviewed *de novo*. *Tennant v. Smallwood*, 211 W. Va. 703, 706-07, 568 S.E.2d 10, 13-14 (2002).

### DISCUSSION

**I. Given the undisputed facts relating to the insurance coverage issue, summary judgment in favor of National Union was proper.**

Before this Court, the Reeds claim that genuine issues of material fact exist which would preclude summary judgment. (Brief of Yvonne D. Reed and Kermit Reed, Her Husband ["Appellants' Br."], p. 5). This argument has no merit for two reasons. First, in the court below, the Reeds agreed that "the facts are undisputed." (See Pls.' Resp. in Opp'n to National Union's Mot. for Summ. J., p. 2).

The Reeds cannot take one position in the Circuit Court and a completely opposite position before this Court. When a party contends at the trial court level that the issue is one of fact, not law, the party cannot argue on appeal that the issue is a legal, not factual issue. *Commonwealth v. Lotz Realty Co., Inc.*, 237 Va. 1, 8, 376 S.E.2d 54, 57 (1989). By

agreeing, at the trial court level, that the facts were undisputed, the Reeds waived their right to claim before this Court that genuine issues of material fact existed.

Second, although claiming that factual issues rendered summary judgment inappropriate, the Reeds fail to articulate exactly what genuine issues of material fact exist. They do not present a single example of a disputed fact and they cannot expect the Court to ferret out the same for them. Neither the lower court nor this Court have "a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *Poweridge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 700, 474 S.E.2d 872, 880 (1996). Regardless, a review of the record reveals that no factual dispute existed and the Reeds' current argument to the contrary is wholly unsupported.

Summary judgment was an appropriate means for resolution of the insurance coverage issue presented. The Reeds agreed that there were no factual issues in dispute. (See Pls.' Resp. in Opp'n to National Union's Mot. for Summ. J., p. 2). The sole question of the applicability of the exclusion in the National Union policy was an issue of law, appropriate for resolution by the Circuit Court. See *Jenkins v. State Farm Mut. Auto. Ins. Co.*, 219 W. Va. 190, \_\_\_, 632 S.E.2d 346, 349 (2006); *Tennant v.*

*Smallwood, supra*, 211 W. Va. at 706-07, 568 S.E.2d at 13-14. It is well-settled that:

Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the non-moving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Syllabus Point 4, *Painter v. Peavy, supra*.

That standard was met in the instant case. After National Union filed its Motion for Summary Judgment, establishing the lack of genuine issue of material fact and showing that it was entitled to judgment as a matter of law, the Reeds failed to meet their burden of establishing the existence of a genuine issue of material fact to defeat summary judgment. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 59 n.7, 459 S.E.2d 329, 335-36 n.7 (1995). To the contrary, they agreed that the facts were undisputed. Therefore, the Circuit Court committed no error when it granted National Union's Motion for Summary Judgment.

The argument that this coverage issue should have been resolved by means of a declaratory judgment, as opposed to a summary judgment motion, is equally without merit. (Appellants' Br., p. 5). Although the Reeds reference *Arthur v. County Court*, 153 W. Va. 60, 167 S.E.2d 558 (1969), which stands for the proposition that a declaratory judgment action is an appropriate mechanism for resolution of the legal rights of parties

to an actual controversy involving the construction of a statute, they fail to explain why *Arthur* applies in the instant case.

In numerous instances, insurance coverage issues have been determined in actions which were not brought as declaratory judgment actions. See, e.g., *Aluise v. Nationwide Mut. Fire Ins. Co.*, 218 W. Va. 498, 625 S.E.2d 260 (2005); *Joslin v. Mitchell*, 213 W. Va. 771, 584 S.E.2d 913 (2003); *Tennant v. Smallwood*, *supra*. Moreover, in coverage cases which were filed as declaratory judgment actions, summary judgment is the frequently used mechanism for resolution of the same. See, e.g., *Howe v. Howe*, 218 W. Va. 638, 625 S.E.2d 716 (2005); *West Virginia Fire & Cas. Co. v. Stanley*, 216 W. Va. 40, 602 S.E.2d 483 (2004); *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002), *cert. denied*, 539 U.S. 942 (2003). The fact that National Union sought summary judgment within the confines of the lawsuit filed by the Reeds, as opposed to instituting a separate declaratory judgment action is of no moment. Either way, summary judgment would have been the proper means to resolve the coverage issue.

Having agreed in the lower court that the facts were undisputed, not surprisingly the Reeds cannot point to a single extant issue of fact which would preclude summary judgment in National Union's favor. Instead, given that the facts were

undisputed and that a question of insurance coverage is a matter of law in such instances, summary judgment was the proper means for resolution of the coverage issue. Accordingly, the Circuit Court did not err when it granted National Union's Motion for Summary Judgment.

**II. The Circuit Court correctly held that the National Union policy did not provide underinsured motorist coverage due to the valid workers' compensation exclusion.**

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**A. The undisputed evidence established that the National Union policy was custom designed.**

Beginning in 1993, this Court recognized that pursuant to W. Va. Code §29-12-5(a), BRIM had been given statutory supervision over insurance matters for the State and further recognized that the State's insurance policy was custom designed. *Eggleston v. West Virginia Dep't of Highways*, 189 W. Va. 230, 232-33, 429 S.E.2d 636, 638-39 (1993). A year later, in *Cook v. McDowell County Emergency Ambulance Service Authority, Inc.*, 191 W. Va. 256, 260, 445 S.E.2d 197, 201 (1994), the Court recognized BRIM's statutory authority to obtain insurance coverage for political subdivisions, pursuant to W. Va. Code §29-12A-16. In reliance upon *Eggleston*, the Court observed that most policies issued under the Governmental Tort Claims and Insurance Reform Act, W. Va. Code §29-12A-1 et. seq., were custom designed policies, including the one under consideration in *Cook*. *Id.*

Furthermore, the *Cook* Court held:

The West Virginia State Board of Risk and Insurance Management, under the terms of W.Va.Code § 29-12A-16(a), is granted broad discretion and powers relating to the procurement of insurance, and this Court believes that when a policy is a custom-designed policy procured by a body subject to the Governmental Tort Claims and Insurance Reform Act, the broad discretion granted the West Virginia State Board of Risk and Insurance Management authorizes that body to incorporate language absolutely limiting liability under the policy, even if such language would ordinarily be in violation of the provisions of W.Va.Code § 33-6-31(b), and the Court believes that that is what was done in the present case.

*Id.* at 260, 445 S.E.2d at 201.

The Court again addressed custom designed policies in *Trent v. Cook*, 198 W. Va. 601, 607, 482 S.E.2d 218, 224 (1996), reiterating that when an insurer issues a custom designed policy to a governmental entity, such as a political subdivision, "that entity may incorporate language absolutely limiting liability under the policy, even if such language would otherwise violate the provisions of West Virginia Code § 33-6-31(b)." The *Trent* Court defined a custom designed policy as one "whose terms stand in contrast in some manner to those of standardized insurance policies" and cautioned that the issue of whether a policy is custom designed must be addressed and developed in the trial court. *Id.* at 607, 608, 482 S.E.2d at 224, 225.

During the Court's most recent discussion of custom designed policies issued to political subdivisions, the Court again affirmed that a custom designed policy issued to a political subdivision may contain exclusionary provisions that violate

W. Va. Code §33-6-31. Syllabus Point 4, *Gibson v. Northfield Ins. Co.*, 219 W. Va. 40, 631 S.E.2d 598 (2005). In *Gibson*, the Court reiterated its position from *Trent* that:

"West Virginia Code § 29-12A-16(a) (1992) conveys broad discretion to both the West Virginia State Board of Risk and Insurance Management, as well as governmental entities, with regard to the type and amount of insurance to obtain. Consequently, when an insurer issues a custom-designed insurance policy to a governmental entity pursuant to the Governmental Tort Claims and Insurance Reform Act, West Virginia Code §§ 29-12A-1 to -18 (1992), that entity may incorporate language absolutely limiting liability under the policy, even if such language would otherwise violate the provisions of West Virginia Code § 33-6-31(b) (1996)." Syllabus Point 1, *Trent v. Cook*, 198 W.Va. 601, 482 S.E.2d 218 (1996).

*Id.* at Syllabus Point 4.

The *Gibson* Court then took the opportunity to clarify any misconception which the *Trent* Court's definition of a custom designed policy had engendered. Noting that W. Va. Code §29-12A-16 provided that a political subdivision could purchase an insurance policy with unique terms and conditions, but that the "terms and conditions must be 'determined by the political subdivision in its discretion'", the *Gibson* Court explained that the Legislature must have intended that a political subdivision actually exercise choice or judgment when deciding upon the terms of an insurance policy when those terms conflict with statutory requirements. *Id.* at \_\_\_, 631 S.E.2d at 607. Accordingly, the Court held that:

[A]n insurance company may incorporate limiting terms and conditions that violate *W.Va.Code*, 33-6-31 into a governmental entity's insurance policy. However, to be permissible under *W.Va.Code*, 29-12A-16(a) [2003], the limiting terms and conditions in the insurance policy must clearly be "determined by the political subdivision in its discretion." The limiting terms and conditions must therefore be the result of some choice, judgment, volition, wish or inclination as a result of investigation or reasoning by the governmental entity. The terms and conditions are not enforceable merely because they are different from those found in the typical insurance policy. To the extent that *Trent v. Cook*, 198 W.Va. 601, 482 S.E.2d 218 (1996) says otherwise, it is modified.

*Id.* at \_\_\_, 631 S.E.2d at 607-08.

That principle was followed in the instant case.

National Union presented the lower court with ample evidence to support the conclusion that the policy was custom designed. The uncontradicted affidavit of Bob Mitts, an underwriting manager for BRIM, established that prior to July 1, 2000, BRIM investigated and considered the benefits of obtaining an workers' compensation exclusion for underinsured motorist coverage. (See Supplemental Mem. of Law in Supp. of Mot. for Summ. J. on Behalf of National Union, Exhibit A).

During this process, BRIM learned that including the workers' compensation exclusion in the commercial automobile liability policy would result in a lower premium for political subdivisions. *Id.* Furthermore, it was BRIM's judgment that obtaining the workers' compensation exclusion would benefit West Virginia taxpayers, because it would prohibit claimants from

receiving both workers' compensation benefits, for which political subdivisions paid premiums, as well as underinsured motorist coverage benefits from the commercial automobile liability insurance policy, for which political subdivisions also paid the premium. *Id.* In other words, including the workers' compensation exclusion would benefit taxpayers, for it would preclude a double recovery of both workers' compensation benefits and underinsured motorist coverage benefits by the same claimant. *Id.* Accordingly, BRIM negotiated with National Union to obtain the workers' compensation exclusion endorsement for every commercial automobile liability insurance policy for political subdivisions. *Id.*

All the elements necessary to establish that the National Union policy was custom designed were met in this case. BRIM, on behalf of the Board of Education, consciously and deliberately chose to purchase the workers' compensation exclusion for underinsured motorist coverage. After undertaking an investigation into the merits of the workers' compensation exclusion, BRIM exercised its discretion and chose to obtain that exclusion for the benefit of West Virginia taxpayers. Based upon the uncontroverted evidence presented, the Circuit Court correctly concluded that the National Union policy was custom designed.

B. After concluding that the National Union policy was custom designed, the Circuit Court correctly upheld the validity of the workers' compensation exclusion.

The Circuit Court correctly determined that the outcome of the instant case was governed by *Trent v. Cook*, *supra*, wherein the Court upheld the validity of the workers' compensation exclusion in circumstances similar to the instant case. In *Trent*, a deputy sheriff was injured during the course of his employment when he was struck by a vehicle. *Id.* at 603, 482 S.E.2d at 220. He collected workers' compensation benefits, as well as the liability coverage limits of the tortfeasor's policy, and also sought underinsured motorist coverage from a policy issued by Continental Casualty Company which provided coverage to plaintiff's employer, the Wyoming County Commission. *Id.* at 603-04, 482 S.E.2d at 220-21.

The insurance policy in *Trent* provided "that '[t]his insurance does not apply to ... [a]ny obligation for which the 'insured' or the 'insured's' insurer may be held liable under workers' compensation, disability benefits or unemployment compensation law or any similar law.'" *Id.* at 608, 482 S.E.2d at 225. This Court, recognizing the fiscal drain of permitting a government employee to recover both workers' compensation benefits and underinsured motorist coverage, upheld the validity of the workers' compensation exclusion:

As we have previously stated in this opinion, by virtue of the State's insurance policy being custom-designed, a governmental entity may incorporate terms in such a policy absolutely limiting its liability, even where such limitation would otherwise violate the purview of West Virginia Code § 33-6-31. See Cook, 191 W.Va. at 260, 445 S.E.2d at 201. The workers' compensation exclusion evinces a bargained for policy that was designed to insure that an injured party is compensated for an injury, yet was also designed to prevent the taxpayers of this state from paying an injured party both workers' compensation benefits and damages through the insurance policy. For these reasons, the lower court should have also denied coverage based upon the workers' compensation exclusion. [Emphasis supplied].

*Id.* at 609, 482 S.E.2d at 226.

The Circuit Court's determination that Trent was dispositive in the instant case was correct. The workers' compensation exclusion in the National Union policy provided:

**WEST VIRGINIA UNINSURED AND UNDERINSURED MOTORISTS  
COVERAGE**

**C. Exclusions**

This insurance does not apply to any of the following:

...

**Section C - Exclusion is amended to add:**

8. Any obligation for which the "insured" may be held liable under any workers' compensation, Disability benefits or unemployment compensation law or any similar law.

(See Mot. for Summ. J. on Behalf of National Union, Exhibit C, West Virginia Uninsured and Underinsured Motorists Coverage, Endorsement CA 21 22 and Endorsement #11).

As the Court in *Trent* recognized, the workers' compensation exclusion serves the laudable policy of alleviating the burden upon taxpayers of paying for both workers' compensation benefits and insurance coverage benefits for the same loss.<sup>1</sup> The exclusion prohibits recovery of underinsured motorist coverage for any obligation for which the Board of Education would be liable under any workers' compensation law. Because Ms. Reed was in the course and scope of her employment at the time of the accident, she made a workers' compensation claim and received workers' compensation benefits. Therefore, this accident constituted an obligation for which the Board of Education was liable under workers' compensation law.

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<sup>1</sup>This is in keeping with the Legislature's acknowledgment that permitting claimants to recover both workers' compensation benefits as well as liability insurance coverage benefits creates a financial burden upon political subdivisions. When enacting The Governmental Tort Claims and Insurance Reform Act, W. Va. Code §29-12A-1 et seq., the Legislature recognized that political subdivisions were unable to procure adequate liability insurance coverage at a reasonable cost and, therefore, certain immunities and limitations were established with regard to the liability of a political subdivision. W. Va. Code §29-12A-2. The Legislature enacted certain immunities for political subdivisions, including granting immunity to a political subdivision for any claim which is covered by any workers' compensation law or any employer's liability law. W. Va. Code §29-12A-5(11); *O'Dell v. Town of Gauley Bridge*, 188 W. Va. 596, 425 S.E.2d 551 (1992). The workers' compensation exclusion in the National Union policy reflects a similar decision to decrease the financial burden upon political subdivision by excluding underinsured motorist coverage when the employee also has received workers' compensation benefits.

The Board of Education was required, under W. Va. Code §23-2-1(a), to pay premium taxes into the workers' compensation fund and its rates are adjusted to "reflect the demand on the compensation fund by the covered employer." Thus, the Board of Education's workers' compensation premium rates increase as a result of claims made by the Board of Education's employees and those increases are paid for by taxpayer dollars.

To avoid the burden upon the taxpayers of paying both automobile liability insurance premiums and workers' compensation premiums for the same risk, BRIM negotiated for a commercial automobile liability insurance policy with the workers' compensation exclusion. In this case, because Ms. Reed was injured during the course of scope of her employment, her employer, the Board of Education became liable to her for workers' compensation benefits. Thus, as the lower court correctly held, the valid workers' compensation exclusion precludes underinsured motorist coverage for the Reeds.

**III. Neither *Henry v. Benyo* nor *Miralles v. Snoderly* govern this case involving a custom designed policy issued to a political subdivision.**

**A. The lower court properly distinguished *Henry v. Benyo* and *Miralles v. Snoderly* from the case at bar.**

The Reeds seem to assert, without any analysis whatsoever, that they are entitled to recover underinsured motorist coverage based upon this Court's decisions in *Henry v. Benyo*,

203 W. Va. 172, 506 S.E.2d 615 (1998), and *Miralles v. Snoderly*, 216 W. Va. 91, 602 S.E.2d 534 (2004). (Appellants' Br., p. 6). Their reliance upon these decisions is misplaced and the lower court correctly determined that neither *Henry* nor *Miralles* controlled in the instant case.

In addition to the fact that the policy in *Henry v. Benyo* was not a custom designed policy issued to a political subdivision, in *Henry*, there was no discussion of exclusionary language such as that found in the National Union policy. Indeed, the *Henry* Court focused upon W. Va. Code §33-6-31(h) and explicitly declined to address the situation presented in the instant case.<sup>2</sup> The Court explained "[w]e do not, by our decision today, consider whether the same result would obtain where the employer's motor vehicle insurance policy, in whole or in part, specifically precludes recovery of underinsured motorist benefits by the injured employee if he/she has received workers' compensation benefits for injuries resulting from the same accident." *Id.* at 180 n.9, 506 S.E.2d at 632 n.9.

Similarly, in *Miralles v. Snoderly*, the Court summarily rejected application of *Trent v. Cook*, *supra*, and, following *Henry*, determined that an employee injured during the

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<sup>2</sup>W. Va. Code §33-6-31(h) provides that "[t]he provisions of subsections (a) and (b) of this section shall not apply to any policy of insurance to the extent that it covers the liability of an employer to his or her employees under any workers' compensation law."

course of employment as a result of the negligence of a third-party was entitled to recover under his employer's underinsured motorist coverage. *Id.* at \_\_\_, 602 S.E.2d at 540-41. The Court did not determine whether the employer was a political subdivision, and, if so, whether the policy was custom designed. *Id.* at \_\_\_, 602 S.E.2d at 537 n.7. Instead, relying on *Henry*, the Court merely concluded that because the injuries were caused by a third-party, the employer was not "liable" for the same. *Id.* at \_\_\_, 602 S.E.2d at 540-41. Respectfully, the *Miralles* Court's conclusion that a workers' compensation claim arising from injury sustained in the hands of a third-party is not a liability of the employer under workers' compensation law does not acknowledge the reality that the employer bears the burden of the employee's workers' compensation claim.

The *Miralles* Court overlooked the fact that when an employee asserts a workers' compensation claim, it is the employer who is liable under workers' compensation. The claim is not charged against or attributed to the third-party who caused the injury and that third-party suffers no consequences, fiscal or otherwise, as a result of the workers' compensation claim. The third-party is not liable to the employee under workers' compensation. Instead, it is the employer who is impacted by the aftermath of the workers' compensation claim.

Pursuant to W. Va. Code §23-2-1, the Board of Education is required to subscribe to and pay premium taxes into the workers' compensation fund. Notably, the Board of Education is:

[S]ubject to all requirements of this chapter and rules prescribed by the workers' compensation commission with reference to rate, classification and premium payment: Provided, that rates will be adjusted by the commission to reflect the demand on the compensation fund by the covered employer. [Emphasis supplied].

W. Va. Code §23-2-1(a). Furthermore, the Legislature granted rule-making authority to the executive director to establish a system for determining rates of premium taxes and directed that the rule shall provide for rate adjustment by industry or individual and also that the rule shall require the establishment of a program whereby the commissioner may grant premium rate discounts for employers who, *inter alia*, "have not incurred a compensable injury for one year ..." W. Va. Code §23-2-4(a)(1). Because the rates charged to the Board of Education for workers' compensation are dependent, in part, upon the demand on the compensation fund by the Board of Education, workers' compensation claims submitted by employees, regardless of whether the employee is injured by a third-party, are obligations for which the Board of Education is liable under the workers' compensation law.

The *Miralles* Court's interpretation of the policy language leads to an absurd result. Although the *Miralles* Court

did not discuss the policy language in detail, instead focusing upon *Henry v. Benyo, supra*, and its interpretation of W. Va. Code §33-6-31(h), the conclusion reached renders the workers' compensation exclusion a complete nullity. The exclusion provides that underinsured motorist coverage does not apply to "[a]ny obligation for which the 'insured' may be held liable under any workers' compensation, Disability benefits or unemployment compensation law or any similar law." The *Miralles* Court adopted the *Henry* Court's discussion of W. Va. Code §33-6-31(h), finding it to also be applicable to the workers' compensation exclusion policy language:

[t]he plain language of [W.Va.Code § 33-6-31(h)] prohibits an employee from collecting from his/her employer's underinsured motorist insurance coverage if his/her injuries are already covered by workers' compensation and if the accident is a result of the employer's or a coemployee's actions (i.e., "the employer's liability"). Stated otherwise, if the employee's injuries were caused by the employer, a co-employee, or, possibly, by some inadvertence of the employee him/herself (as compared to a third-party stranger to the employment relationship) thereby rendering the employer 'liable,' or 'at fault,' for the accident, the employee cannot collect workers' compensation benefits and then seek an additional recovery from the employer just because the employer has motor vehicle insurance that coincidentally also covers the employee's injuries. Rather, the employee is limited in his/her recovery to workers' compensation benefits because of the immunity provided to employers and coemployees by the workers' compensation statutes. \*\*\*

*Miralles* at 97, 602 S.E.2d at 540, quoting *Henry v. Benyo*, 203 W. Va. at 177-78, 506 S.E.2d at 620-21.

Under this analysis, the workers' compensation exclusion will never apply, rendering both W. Va. Code §33-6-31(h) and the exclusionary language meaningless. The *Henry* Court found that W. Va. Code §33-6-31(h) applied to prohibit an employee from collecting workers' compensation and underinsured motorist coverage only if the accident resulted from the fault of the employer or a co-employee.

However, under W. Va. Code §§23-2-6 and 23-2-6a, an injured employee has no right to seek damages from an employer or co-employee because of workers' compensation immunity and, therefore, cannot seek underinsured motorist coverage benefits due to the alleged negligence of the employer or the co-employee. Because W. Va. Code §§23-2-6 and 23-2-6a already forbid the recovery of damages due to the conduct of the employer or a co-employee, then W. Va. Code §33-6-31(h) serves no purpose -- at least the way the *Henry* Court chose to read it.

If W. Va. Code §33-6-31(h) and the workers' compensation exclusion in the National Union policy only apply to the "direct" obligation of the employer to the employee, then they are meaningless, for the employee has no right against the employer, outside the workers' compensation system.<sup>3</sup> The only

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<sup>3</sup>The exception to this is a "deliberate intention" cause of action under W. Va. Code §23-4-2, which permits an employee to recover against the employer if the employee establishes, by proving certain statutory elements, that the employer acted with deliberate intention, thereby stripping the employer of its

way to give effect to the statutory provision, as well as the exclusionary language of the policy, is to recognize that any claim made by an employee, resulting from a work-related injury, is an obligation of the employer. It is the employer who has subscribed to workers' compensation, paid the premiums for workers' compensation and who will suffer the consequences of the claim made by the employee through imposition of higher premiums. To hold otherwise ignores the realities of the workers' compensation system and the obligations which it imposes upon employers.

In this case, the lower court properly applied *Trent v. Cook* to conclude that the workers' compensation exclusion of the custom designed policy validly prohibited the recovery of underinsured motorist coverage. The workers' compensation exclusion safeguards the public coffers by providing "a bargained for policy that was designed to insure that an injured party is compensated for an injury, yet was also designed to prevent the taxpayers of this state from paying an injured party both workers' compensation benefits and damages through the insurance policy." *Trent v. Cook, supra*, 198 W. Va. at 609, 482 S.E.2d at 226. The lower court's reliance upon *Trent v. Cook* was correct and its Order granting summary judgment in favor of National Union should not be disturbed.

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workers' compensation immunity.

B. Even if *Miralles* had applicability to the case at bar, it cannot be applied retroactively.

Although, as discussed above, *Miralles* does not involve a custom designed policy issued to a political subdivision and, therefore, is not controlling in the instant case, even assuming that it is applicable, it cannot be applied retroactively to the case at bar.<sup>4</sup> The well-settled test for determining whether a decision should have retroactive application was enunciated by this Court in *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979):

In determining whether to extend full retroactivity the following facts are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need from limiting

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<sup>4</sup>A brief chronology of this matter reveals that the National Union policy period was July 1, 2000 through July 1, 2001; the accident involving Ms. Reed occurred on June 5, 2001; suit was filed against Mr. Orme on June 4, 2003; and, this Court decided *Miralles* on June 30, 2004, over three years after the accident in question.

retroactivity. Finally, this Court will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of the law in their overruling decisions.

*Id.* at Syllabus Point 5.

In the context of insurance coverage, this Court has applied *Bradley* to limit retroactivity of the Court's decisions. For example, in *Dalton v. Doe*, 208 W. Va. 319, 540 S.E.2d 536 (2000), the Court declined to afford retroactivity to its decision in *Hamric v. Doe*, 201 W. Va. 615, 499 S.E.2d 619 (1997), which had abolished, in certain instances, the requirement of physical contact before an insured could recover uninsured motorist coverage benefits. In *Dalton*, the accident with the unknown John Doe driver occurred on July 31, 1992, and five years later, in 1997, the *Hamric* Court held that recovery of uninsured motorist coverage due to an accident with a John Doe driver did not always require establishing that physical contact had occurred. *Dalton* at 321, 540 S.E.2d at 538. Thus, five and a half years after her accident, plaintiff filed suit, seeking to reap the benefits of the *Hamric* decision. *Id.*

The *Dalton* Court explained that *Hamric* had overruled established substantive law as to the physical contact requirement for recovery of uninsured motorist coverage. *Id.* at 323, 540 S.E.2d at 540. Further, the Court noted that *Hamric* raised substantial public issues involving many parties for it permitted any insured who had corroborating proof to recover uninsured

motorist coverage, even without physical contact with the John Doe vehicle. *Id.* The Court concluded that although the *Hamric* decision resulted in a variation of common law, "the overwhelming presence of the other factors examined in *Bradley* dictates that the *Hamric* decision should be given only prospective effect." *Id.* See also *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001) (*Hamric* would not be applied retroactively).

Similarly, in *Findley v. State Farm Mutual Automobile Insurance Company*, *supra*, 213 W. Va. 80, 576 S.E.2d 807, the Court applied the *Bradley* factors to conclude that its prior decision in *Mitchell v. Broadnax*, 208 W. Va. 36, 537 S.E.2d 882 (2000), could not be applied retroactively. In *Mitchell*, the Court held that insurers could incorporate exclusionary language in automobile liability insurance policies so long as, in keeping with W. Va. Code §33-6-31(k), the exclusion was consistent with the premium charged. If not, the exclusion was not enforceable. In *Findley*, plaintiff argued that the policy definition of an underinsured motor vehicle was exclusionary and thus invalid because the insurer could not demonstrate that the premium had been adjusted to reflect the exclusionary language:

[H]er attempt to assert a claim for relief in this context is effectively a request that this Court retroactively apply our holdings in *Mitchell v. Broadnax* so as to bring within its scope an insurance contract which was entered into before this Court's decision therein and which contract has contained the allegedly objectionable language since the date of the policy's issuance. See Syl. pt. 3, *Sizemore v. State Workmen's*

*Comp. Comm'r*, 159 W.Va. 100, 219 S.E.2d 912 (1975) ("A law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; only when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage can it be considered to be retroactive in application." (emphasis added)). When such a request for retroactivity is made, we cautiously consider whether such retrospective application is indeed warranted. [Emphasis supplied].

*Id.* at 95, 576 S.E.2d at 822.

Utilizing the factors articulated in *Bradley v. Appalachian Power Company*, the *Findley* Court concluded that *Mitchell* could not be given retroactive application as it involved an issue of substantive law where the Court's decision was not clearly foreshadowed and involved substantial public policy issues which militated against retroactivity. *Id.* at 96, 576 S.E.2d at 823. Accordingly:

[W]e likewise decline to apply our holdings in *Mitchell v. Broadnax* retroactively in order to shield insurers from the imposition of augmented substantive liability that did not clearly exist prior to the announcement of such holdings.

*Id.*

The Court's discussions in *Dalton* and *Findley* are instructive when applying the *Bradley* criteria to the instant case.<sup>5</sup> As in both *Dalton* and *Findley*, the Court's decision in

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<sup>5</sup>Readily distinguishable from the instant case is *Richmond v. Levin*, 219 W. Va. 512, 637 S.E.2d 610 (2006), where the Court retroactively applied *Louk v. Cormier*, 218 W. Va. 81, 622 S.E.2d 788 (2005), which held that the non-unanimous jury verdict provision of the Medical Professional Liability Act was uncon-

*Miralles* was not clearly foreshadowed. Instead, since the Court's 1996 decision in *Trent v. Cook*, *supra*, the validity of the workers' compensation exclusion in a custom designed policy issued to a political subdivision has not been in doubt. Even in *Henry v. Benyo*, decided in 1998, there was no foreshadowing that the Court would deviate from *Trent* with respect to a custom designed policy issued to a political subdivision. In fact, the only mention of *Trent* found in *Henry*, is the brief statement in a footnote that the Court would not consider issues not raised by the parties on appeal. *Henry*, 203 W. Va. at 180 n.9, 506 S.E.2d at 623 n.9. Therefore, assuming that *Miralles* does apply to custom designed policies issued to political subdivisions, its holding was not clearly foreshadowed and there was no indication that the Court would disavow *Trent v. Cook*. Furthermore, the policy period for the National Union policy in

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stitutional. The *Richmond* Court found that the *Louk* decision was foreshadowed for the Court consistently has overruled legislation which interfered with the Court's rule making authority. *Id.* at \_\_\_, 637 S.E.2d at 616. Furthermore, the *Louk* decision involved procedural issues which ordinarily will be given retroactive application, unlike changes in substantive law. *Id.* The Court further found that retroactivity would affect only a small group of cases pending in Circuit Court or on appeal when *Louk* was decided, did not involve substantial public issues and was not a departure from prior substantive law since it involved procedural law. *Id.* at \_\_\_, 637 S.E.2d at 616-17.

The circumstances of this case are exactly opposite and examination of the same factors militates against retroactivity of *Miralles*. The decision in *Miralles* was not foreshadowed, involved substantive law, not procedural law, impacts upon substantial public issues and was a surprising departure from the settled precedent found in *Trent v. Cook*.

this case was July 1, 2000 to July 1, 2000. *Trent v. Cook* was controlling law at that time and the workers' compensation exclusion in a custom designed policy issued to a political subdivision unquestionably was valid under the law existing at the time the policy was issued.

Also militating against retroactive application of *Miralles*, is the fact that *Miralles* involved substantive law, instead of procedural law which is more readily given retroactive status. *Dalton, supra*, 208 W. Va. at 322-23, 540 S.E.2d at 539-40. Furthermore, because the statute of limitations for underinsured motorist coverage claims is ten years, *Plumley v. May*, 189 W. Va. 734, 434 S.E.2d 406 (1993), there are potential public issues involving many parties. Assuming that *Miralles* applies to a custom designed policy issued to a political subdivision, now all employees of political subdivisions who receive workers' compensation benefits can also claim underinsured motorist coverage benefits -- a result not contemplated by the contracting parties. *Miralles* should not be applied retroactively because to do so would be to impose upon insurers "augmented substantive liabilities that did not clearly exist prior to the announcement of such holdings." *Findley, supra*, 213 W. Va. at 96, 576 S.E.2d 823.

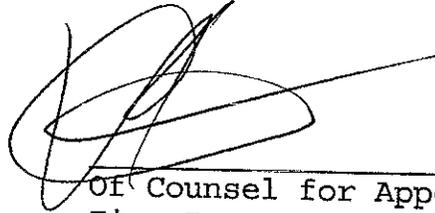
Analysis of the *Bradley* factors in this case leads to the conclusion that *Miralles*, assuming it can be construed to

apply to custom designed policies issued to political subdivisions, does not have retroactive application. Retroactive application of *Miralles* to the instant case would entail imposing upon the parties a decision which was not clearly foreshadowed and which marked an unexpected change from established substantive law as articulated in *Trent v. Cook*. *Miralles* represents a marked change in substantive law, as opposed to merely being a change in procedural law. Furthermore, a retroactive application of *Miralles* would have substantial public impact given the ten year statute of limitations for underinsured motorist coverage claims. Consideration of these factors reveals that *Miralles* should receive prospective application only.

**REQUEST FOR RELIEF**

Your appellee, National Union Fire Insurance Company of Pittsburgh, PA, respectfully requests that this Court affirm the Order Granting National Union Fire Insurance Company of Pittsburgh, PA's Motion for Summary Judgment, entered June 19, 2006, by the Circuit Court of Logan County, and permit the Circuit Court's ruling in favor of National Union Fire Insurance Company of Pittsburgh, PA, to remain undisturbed.

Respectfully submitted,

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

YVONNE REED and KERMIT E. REED,  
her husband,

Appellants,

v.

NO.: 33291  
(Civil Action No. 03-C-203-P  
Circuit Court of Logan County)

WALTER JASON ORME,

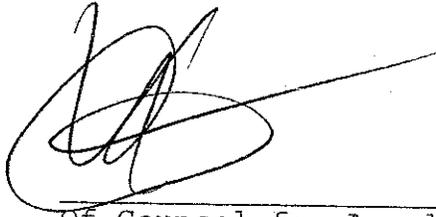
Appellee.

CERTIFICATE OF SERVICE

The undersigned, of counsel for National Union Fire Insurance Company of Pittsburgh, PA, does hereby certify that the foregoing National Union Fire Insurance Company of Pittsburgh, PA's Response to Brief of Yvonne D. Reed and Kermit E. Reed, Her Husband, was this day served upon counsel of record by mailing a true copy of the same this date, postage prepaid, to:

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Counsel for Appellants

Done this 22nd day of March, 2007.

A handwritten signature in black ink, consisting of a large, stylized initial 'A' followed by a horizontal line extending to the right.

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