

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LLOYD MICHAEL NOLAND, R.N.

Appellant,

v.

Appeal No.: 34702

VIRGINIA INSURANCE RECIPROCAL, and
THE RECIPROCAL GROUP, INC., a Virginia
Corporation, LISA HYMAN, individually,
COVERAGE OPTIONS ASSOCIATES a.k.a.
KENTUCKY HOSPITAL SERVICE COMPANY,
a Kentucky Limited Liability Company,
KENTUCKY HOSPITAL ASSOCIATION, a
Kentucky Corporation, and RICHARD STOCKS,

Appellees.

BRIEF OF APPELLANT, LLOYD MICHAEL NOLAND, R.N.

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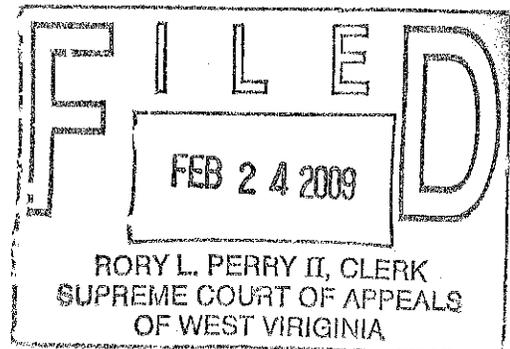


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KENTUCKY HOSPITAL ASSOCIATION, a
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Appellees.

BRIEF OF APPELLANT LLOYD MICHAEL NOLAND, R.N.

I. TYPE OF PROCEEDING AND NATURE OF RULING

This matter arises out of a suit for declaratory judgment and bad faith by appellant against appellees. On cross-motions for summary judgment on the coverage issues presented, the Raleigh County Circuit Court granted the motions in part and denied the motions in part. More specifically, the Circuit Court found that appellant was entitled to coverage under the policy issued by appellee Virginia Insurance Reciprocal for the period from May 24, 2000 to August 1, 2000, but that this duty was extinguished and did not exist after August 1, 2000, despite the existence of an umbrella or excess policy.

Following that ruling, appellant filed a Motion to Reconsider the portion of the ruling holding that his right to a defense and indemnity was extinguished after August 1, 2000. The Motion to Reconsider was denied by a final and appealable Order entered by the lower Court on March 28, 2008. Appellant appeals this

ruling.

Appellant also appeals the Circuit Court's ruling granting the Motions to Dismiss of Respondents Stocks, Hyman, Coverage Options Associates and the Kentucky Hospital Association. Appellant's Motion to Reconsider that ruling as to appellees Hyman, Coverage Option Associates and Kentucky Hospital Association was denied by the Circuit Court by the same March 28, 2008 Order. The Motion to Reconsider as to appellee Stocks was denied by the Circuit Court's Order entered August 21, 2008. These rulings are also clear error because they misapply the applicable statute of limitations.

II. STATEMENT OF FACTS

A. The Underlying Noel Case

Appellee, The Virginia Insurance Reciprocal is hereinafter referred to as the "VIR". For the pertinent policy period applicable to this case, Appellant, Mike Noland is defined as an insured under the Comprehensive Hospital Liability Policy No.: KYPL2999998 (hereinafter referred to as "VIR Primary Policy") and its Health Care Umbrella Policy No.: KYUM2999998 (hereinafter referred to as "VIR Umbrella Policy"). *See*: Record at _____. During this same period, Mike Noland had his own insurance through ACE American Insurance Company (hereinafter "ACE American") which is not a party to the appeal.

On August 12, 1998, Ireland J. Noel and Charlene Noel filed a Complaint in the Circuit Court of Kanawha County, West Virginia, and alleged that Appalachian Regional Healthcare, Inc., d/b/a Beckley Appalachian Regional

Healthcare (hereinafter referred to as "BARH") and Charleston Area Medical Center, (hereinafter referred to as "CAMC") negligently administered care to Ireland J. Noel, which resulted in various injuries. *See*: Noel Complaint; Record at _____. The VIR retained William F. Foster, II and the law firm of Kay, Casto & Chaney (hereinafter referred to together as "Law Firm") to defend BARH in the case filed by Ireland Noel.¹ The Noels did not sue Mike Noland, and by May 2000, the statute of limitations for Ireland Noel to bring a cause of action against Mike Noland had run.

During discovery, an attorney from the Law Firm interviewed Mike Noland regarding his involvement in this case. *See*: Affidavit of Lloyd Michael Noland; Record at _____. Mr. Foster prepared Mr. Noland for his deposition and represented him at his deposition. *Id.* In fact, Mr. Foster represented to Mr. Noland that he did not need separate counsel in this case because he was not a party to the case. *Id.* The Law Firm did not advise Mike Noland that he had the right to retain independent counsel. *Id.* As a result of the referenced acts of the Law Firm, an attorney-client relationship was established between Mike Noland and the VIR.

¹ Although the Law Firm was retained to represent BARH in the action filed by Noel, Noland contends that the Law Firm entered into a attorney-client relationship with the VIR and Mike Noland in addition to BARH. Further, Noland contends that these representations created various conflict of interests that interfered with the Law Firm's duties owed to Mike Noland. *See*, May 8, 2001 Letter from Perry W. Oxley to Richard D. Stocks; Record at _____. Finally, Noland contends that the VIR was aware of the actions of the Law Firm and that the VIR endorsed and encouraged the representation of multiple parties in violation of its duty of good faith and fair dealing to Mike Noland under the West Virginia Unfair Trade Practices Act, West Virginia § 33-11-1 through 33-11-9.

At some time during discovery, Mr. Foster and the VIR found out that Mike Noland had additional insurance. At this time, Mr. Foster began negotiating with ACE American on behalf of BARH and the VIR to have ACE American contribute to the settlement of the case based on the existing discovery in the case. In addition to pleadings and deposition transcripts, Mr. Foster represented that Mike Noland has been targeted by the underlying plaintiffs as the primary, if not the sole tortfeasor. *See*: May 24, 2000 Letter from William F. Foster to Valerie Shea; Record at _____. These negotiations and representations continued through May, 2000 even though the evidence Mr. Foster was collecting through discovery was contrary to his representations that there was no other tortfeasor being targeted by the plaintiffs in the case. For example, plaintiffs' expert, Stephen Holbrook, testified at his deposition on May 1, 2000 that Dr. El-Katib and other agents of BARH breached the standard of care in their care of Mr. Noland.² *See*: Deposition Transcript of Stephen Holbrook; Record at _____.

On May 17, 2000, Mr. Foster drafted a coverage opinion letter in his capacity as coverage counsel for the VIR in which he opined that the VIR was a primary insurer of Mike Noland. *See*: May 17, 2000 Letter from William F. Foster to Terry Fox; Record at _____. The letter was copied to counsel for Mike Noland, Perry W. Oxley, and in pertinent part, it stated that "[u]pon careful review

² In addition, Ireland Noel's expert, Wayne David Longmore, M.D., also testified that Dr. El-Katib breached the standard of care in this case during his March 16, 2000 deposition. Despite the evidence that other tortfeasors may bear the burden of some or all of the liability in this case, and Mr. Noland's persistent stance that he did not breach the standard of care. Mr. Foster and the VIR continued to represent to Mike Noland and ACE American that Mike Noland was at least the primary tortfeasor and likely the sole tortfeasor in the medical malpractice claim.

of Cigna's [(ACE American was formerly known as CIGNA)] policy and both the hospital liability policy and umbrella policy which the Virginia Insurance Reciprocal issued to BARH, I believe that a West Virginia court would rule that Cigna's policy and VIR would share responsibility for any judgment entered against BARH as a result of your insured's [Mike Noland] negligence on a pro rata basis." Id.

On May 24, 2000, the VIR through BARH filed a Third-Party Complaint against Mike Noland (*See*: Record at _____), which in part alleged that if BARH is found negligent in his care of Ireland J. Noel, Mike Noland is liable to BARH for the percentage of fault attributed to BARH as a result of his acts (hereinafter the contribution claim of BARH referred to as "Third-Party Claim"). On May 25, 2000, Mike Noland demanded that the VIR provide Mike Noland with a defense for the allegations set forth in the BARH third-party Complaint, by way of a letter from Valeria Shea, who obtained the express permission to write the VIR from Mike Noland's counsel, Perry W. Oxley and through counsel for Mike Noland, Perry W. Oxley.³ *See*: Affidavit of Valerie Shea; Record at _____.

On July 13, 2000, Appellee Lisa Hyman (hereinafter "Hyman"), claims manager for Coverage Options Associates representing the VIR, revised the position of the VIR set forth by Mr. Foster by stating that "[s]ince we are seeking indemnification from Mr. Noland via the third-party Complaint, his ACE USA

³ The petitioner, Mike Noland, contends that discovery will reveal that multiple requests for the VIR to provide a defense were made to William F. Foster, counsel for the VIR.

policy becomes primary as to that action. I disagree that the VIR is a primary insurer under these circumstances. Therefore, we do not have a duty to provide Mr. Noland a defense.” See: Exhibit C to Valerie Shea Affidavit; Record at _____. On June 29, 2000, Valerie Shea issued a letter to Mr. Foster on behalf of Mike Noland, with the express permission of his counsel, Perry W. Oxley, and requested again that the VIR provide Mike Noland with a defense for the claims set forth in the Third-Party Complaint. Id.

On July 28, 2000, Mr. and Mrs. Noel filed a motion to amend their complaint to bring actions for bad faith against ACE USA, Cigna Insurance Co. (hereinafter referred to together as “ACE American”), and the VIR. See: February 8, 2002 Order; Record at _____. On July 31, 2000, the Court heard and granted Mr. and Mrs. Noel’s motion to amend their Complaint. Id. Likewise, BARH was granted leave to file an amended third-party Complaint against ACE American for bad faith. Id. On August 2, 2000, Mr. and Mrs. Noel settled their claims against BARH and the VIR for a sum which exhausted the policy limits of the VIR Primary Policy. Id.

However, while the settlement also purportedly settled the Noels’ claims for bad faith against the VIR, the settlement agreement did not provide a breakdown or allocation as to how much of the settlement was allocated to the bad faith claims as opposed to the medical negligence claims.⁴ Although BARH continued in the

⁴ The settlement totaled \$2.5 million dollars. Of this amount, \$1 million came from the Primary Policy; the remainder was from the Umbrella Policy, which was not exhausted. This payment also covered medical negligence claims against the other BARH employees. A copy of the Settlement Agreement is

case to prosecute its contribution claim against Mike Noland, the VIR was completely removed as a party from the case and was removed from the style of the case. Id.

B. Post-Settlement Conduct

After the settlement of the underlying Noel case, the VIR argued that it did not owe a defense or coverage to Mike Noland because the VIR Primary Policy was exhausted and there is no duty to defend under the VIR Umbrella Policy. On October 24, 2000, appellee Richard D. Stocks, second vice president of VIR, wrote a letter to Noland's counsel and stated that the VIR had no duty to defend Mike Noland. *See*: Record at _____. On May 8, 2001, Mike Noland, through counsel, sent a letter to making one of several requests for VIR to provide Noland with a defense to the Noel's medical malpractice claim. *See*: Record at _____. In said letter, the VIR was placed on notice that Mr. Noland was investigating a bad faith claim against the VIR. Id. On May 26, 2001, Mike Noland's attorney, Perry W. Oxley, received a telephone call from VIR's attorney, Joshua Barrett, informing him that the VIR, in the Kanawha County action, was filing a motion to amend BARH's third-party Complaint to bring a declaratory action to determine if the VIR owed Mike Noland a duty to defend.

On July 25, 2001, Mike Noland filed civil action number 01-C-609B in the Circuit Court of Raleigh County, West Virginia, against the VIR and the

unavailable. However, these facts are uncontested, having been stipulated in the lower court.

Reciprocal Group, Inc. for bad faith and for declaratory relief in which the plaintiff seeks to determine the duties owed him by the VIR under the subject insurance policies. Specifically, Noland claims the VIR owes him a duty to defend and indemnity under the VIR Primary Policy and the VIR Umbrella Policy for the contribution claim brought by BARH and the VIR. The Raleigh County Circuit Court case also pertains to Mike Noland's claims for first party bad faith under the West Virginia Unfair Trade Practices Act (hereinafter "UTPA"), which primarily deals with the VIR's complete and total failure to discharge any of the duties the VIR owed Mike Noland.

On August 9, 2001, BARH was granted leave to file an amended third-party Complaint in the Kanawha County action, which allowed the VIR to intervene and reenter the case as a real party in interest in BARH's claim for contribution. In pertinent part, the amended third-party Complaint set forth a claim brought by VIR for declaratory relief against Mike Noland to determine whether the VIR owes a duty to defend under the VIR Primary Policy when the policy limits were exhausted.

On August 29, 2001, Mike Noland was granted leave to file a fourth-party Complaint for contribution against Dr. El-Katib. After filing a Motion to Consolidate and transfer the case to Raleigh County Circuit Court, the Raleigh County Circuit Court held the Kanawha County Circuit Court was the proper Court to decide the Motion to Consolidate and Transfer. The Kanawha County

Circuit Court then transferred this case to the Raleigh County Circuit Court.

C. Procedural History of the Motions at Issue.

1. Coverage Issues

Subsequently, Noland and the VIR filed cross-motions for summary judgment on the threshold coverage issues presented by the case; specifically, whether Noland was entitled to a defense and indemnity under the VIR Primary Policy and/or the VIR Umbrella Policy.

On or about July 25, 2003, the Raleigh Circuit Court issued a Memorandum and Order ruling on Noland's Motion for Partial Summary Judgment as well as the VIR's Motion for Summary Judgment. *See*: Record at _____. The Circuit Court held that VIR owed Noland a duty to defend and indemnify from May 24, 2000 to August 1, 2000. However, the Circuit Court inexplicably held that this duty was extinguished and did not exist after the August 1, 2000 settlement by the defendants of the underlying Noel claims.

Noland then filed with the Raleigh County Circuit Court a Motion to Reconsider, asking the lower court to reconsider its ruling that defendants owed him no duty to defend or indemnify after August 1, 2000. Noland contended that the Circuit Court's ruling did not properly interpret the language of the VIR Umbrella Policy and did not consider the effect of ambiguous language contained in both the VIR policies.

Specifically, the Raleigh Circuit Court's July 25, 2003 Memorandum states, at p. 13:

The ROA Hospital Liability Policy [the VIR Primary Policy] provides that its duty to defend terminates upon the exhaustion of liability limits of \$1 million. These limits were exhausted upon August 1, 2000, settlement in the amount of \$2.5 million. Pursuant to the clear terms of the Hospital Liability Policy, its duty to defend its insureds ended upon that settlement.

The Hospital Umbrella Policy [the VIR Umbrella Policy] provides that it is "subject to the same terms, conditions, exclusions and limitations as the primary insurance . . ." This provision adopts into the Hospital Umbrella Policy the Hospital Liability Policy's limitations on the duty to defend. As a result, ROA's duty to defend Noland under the ROA Umbrella Policy terminated upon the exhaustion of the Hospital Policy's liability limits as a consequence of the August 1, 2000 settlement. (See Record ___).

As is more fully argued below, the above statements or findings fail to consider and resolve: (1) the effect of ambiguous policy language in determining when and how the limits of the VIR Primary Policy are to be considered exhausted, and (2) the excess nature of the VIR Umbrella Policy. The Raleigh Circuit Court treated the VIR Umbrella Policy as an additional primary policy rather than as an excess policy which takes effect upon the exhaustion of the VIR Primary Policy. However, by Order dated March 28, 2008, the lower court denied Noland's Motion to Reconsider and declined to reconsider its earlier ruling.

2. The Motions to Dismiss

In August, 2005, the Raleigh Circuit Court granted leave for Mike Noland to amend his Complaint to add Lisa Hyman, Richard Stocks, Coverage Options Associates, and the Kentucky Hospital Association as defendants in this matter.

Mike Noland filed his Amended Complaint on October 25, 2005, and asserted numerous violations of both first-party common law bad faith and statutory first-party bad faith law. *See*: Amended Complaint; Record at _____. In response, Richard Stocks filed a motion to dismiss. Shortly thereafter, Lisa Hyman, Coverage Options Associates, and the Kentucky Hospital Association filed a separate motion to dismiss. On December 18, 2006, this Court granted Stocks' motion to dismiss, and two days later, it granted Hyman's motion. On March 12, 2007 the Circuit Court granted the motions to dismiss filed by the Kentucky Hospital Association and Coverage Options Associates, incorporating by reference its prior memorandum order. *See*: Record at _____. Petitioner filed a Motion to Reconsider the rulings made by the Circuit Court on these Motions To Dismiss.

On or about March 28, 2008, the Circuit Court denied the Motion to Reconsider as it pertained to appellees Hyman, Coverage Options Associates, and the Kentucky Hospital Association. On or about August 21, 2008, The Circuit Court entered its Order Denying Noland's Motion To Reconsider its prior ruling granting appellee Stocks' Motion To Dismiss. It is from these Orders that Noland appeals.

III. ASSIGNMENTS OF ERROR

1. The lower Court erred in its ruling that VIR owed Noland no duty to defend or indemnify him after August 1, 2000 because this ruling did not properly interpret the language of the VIR Umbrella Policy and treats it as a primary policy rather than an excess policy.
2. The lower Court erred when it ruled that the VIR owed Noland no duty to defend or indemnify him after August 1, 2000 because the VIR primary policy contained ambiguous language determining when and how the limits of the VIR primary policy are to be considered exhausted.
3. The lower Court erred when it granted the motions to dismiss petitioner's bad faith claims against certain appellees because the lower Court applied an improper standard to its review of the motions to dismiss.
4. The lower Court erred when it granted the motions to dismiss Noland's bad faith claims against certain respondents because the statute of limitations for filing such claims had not yet run.
5. The lower Court erred when it granted the motions to dismiss Noland's bad faith claims against certain appellees because there is no distinction between when the statute of limitation runs in a first-party bad faith action and a third-party bad faith action.

IV. POINTS AND AUTHORITIES RELIED UPON

1. Ambiguous terms in an insurance contract are to be strictly construed against the insurer and in favor of the insured. National Mutual Insurance Co. v. McMahon & Sons, Inc., 356 S.E.2d 488 (W.Va. 1987).
2. A policy is ambiguous when language is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning. Change, Inc. v. Westfield Insurance Co., 542 S.E.2d 475 (W.Va. 2000).
3. The doctrine of reasonable expectations is that objectively reasonable expectations of applications and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations. National Mutual Insurance Co. v. McMahon & Sons, Inc., 356 S.E.2d 488 (W.Va. 1987).
4. Recognition of a claim based on a reasonable expectation of insurance is consistent with the traditional rule that any ambiguities in an insurance policy must be resolved in favor of the insured. Keller v. First National Bank, 403 S.E.2d 424 (W.Va. 1991).
5. A "limitation of liability" provision or "exhaustion" provision in an insurance policy is ambiguous where it does not provide a manner by which the coverage must be exhausted before the duty to defend or indemnify terminates. Brown v. Lumberman's Mutual Casualty Co., 390 S.E.2d 150 (N.C. 1990).
6. The plaintiff's burden of resisting a motion to dismiss is light. In evaluating a motion to dismiss, the court must construe the complaint in a light

most favorable to the plaintiff and its allegations are to be taken as true. John W. Lodge Distrib. Co. v. Texaco, Inc., 245 S.E.2d 157 (W.Va. 1978).

7. When assessing the sufficiency of the complaint on a Rule 12(b)(6) motion, a court should not dismiss the complaint unless it appears beyond doubt the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. McGinnis v. Cayton, 312 S.E.2d 765 (W.Va. 1984).

8. Claims involving unfair settlement practices that arise under the UTPA are governed by the one-year statute of limitations for personal actions not otherwise provided for. The one-year statute of limitations which applies to claims of unfair settlement practices brought pursuant to the UTPA does not begin to run until the appeal period has expired on the underlying cause of action upon which the statutory claim is predicated. Klettner v. State Farm Mutual Auto. Ins. Co., 519 S.E.2d 870 (W.Va. 1999).

V. ARGUMENT

A. APPELLANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW THAT HE HAS COVERAGE UNDER THE VIR UMBRELLA POLICY AND IS ENTITLED TO A DEFENSE AND INDEMNITY IF THE PRIMARY POLICY IS EXHAUSTED.

Appellant Mike Noland is entitled to indemnity and a defense under the VIR Umbrella Policy with respect to the third-party claims against him from August 1, 2000 to the present. Section II. A of the VIR Umbrella Policy provides, in pertinent part: "this agreement covers any insured under the primary insurance **to the same extent that they are covered under the primary insurance.**" The term "primary insurance" is a specifically defined term.

According to Section VII.Q.11 of the VIR Umbrella Policy, "primary insurance means the insurance policies listed in the Schedule of Primary Underlying Insurance." The Schedule of Primary Underlying Insurance lists the VIR Primary Policy, Policy No. KYPL 299998. See: Record at _____. Clearly, the "primary insurance" referred to in Section II.A. of the VIR Umbrella Policy is the VIR Primary Policy, and as such, because the circuit court found that petitioner is insured under the VIR Primary Policy, he must be insured under the VIR Umbrella Policy pursuant to Section II.A. of the VIR Umbrella Policy.

Section II.B. of the VIR Umbrella Policy states:

This agreement covers those sums **in excess** of the amount payable under primary insurance that any insured becomes legally obligated to pay as damages because of injury or damages to which this coverage applies. **This coverage only applies to injury or**

damage covered by the primary insurance. This coverage is subject to the same terms, conditions, exclusions and limitations as the primary insurance, except with respect to any provisions to the contrary contained in this contract. (Emphasis added).

Clearly, the VIR Umbrella Policy is an excess policy which does not take effect until the VIR Primary Policy is exhausted. To hold otherwise would be to defeat its very nature as an excess policy and transform it into a primary policy, which is not its intent. Yet, this is exactly what the circuit court's ruling does. Therefore, VIR owes Noland a duty to defend and indemnify him against any claim Noland becomes legally obligated to pay as damages in excess of the amount owed under the VIR Primary Policy. In other words, under the VIR Umbrella Policy, the VIR must defend and indemnify Mike Noland even after August 1, 2000 for the third-party claims against him.

Section IV of the VIR Umbrella Policy, titled "Additional Benefits," provides:

All of the following are **in addition** to the Limits of Liability:

If the **limits of liability of primary insurance have been exhausted** by payments of claims to which coverage A would apply . . . we **shall defend** any claim or suit brought against any insured covered for damages covered under this policy. We have the right to investigate, to negotiate and to settle such claim or suit if we think that is appropriate. (Emphasis added).

As set forth above, "primary insurance" is defined under the VIR Umbrella Policy as those insurance policies listed in the Schedule of Primary Underlying

Insurance. Further, as set forth above, the exhaustion provision of Section IV of the VIR Umbrella Policy is limited to the VIR Primary Policy.

Because the VIR Primary Policy has arguably been exhausted, the VIR owes a duty to defend under the Additional Benefits section of the VIR Umbrella Policy. The Raleigh Circuit Court's July 25, 2003 Order eviscerates this section of its clearly intended meaning, as does the March 28, 2008 Order upholding the prior ruling.

Logically, the Circuit Court's ruling on the coverage issues just doesn't make sense. The Circuit Court correctly found that there was coverage under the VIR Primary Policy, but also found that the VIR Primary Policy was exhausted. Given that predicate, there **must** be coverage under the VIR Umbrella Policy. If there is coverage under the VIR Primary Policy, there are only two situations in which there would be no coverage under the VIR Umbrella Policy. The first would be if the VIR Primary Policy is not yet exhausted (which would mean there would still be coverage available under the VIR Primary Policy); the second would be if the VIR Umbrella Policy is also exhausted, which is not the case here. The Circuit Court's ruling does not make sense logically. It cannot be explained, and must be corrected.

Therefore, this Honorable Court should reverse the Circuit Court's March 28, 2008 Order denying Noland's Motion for Reconsideration and reverse that portion of the Circuit Court's July 25, 2003 Order which denied in part Noland's Motion for Partial Summary Judgment on the issue of coverage under the VIR Umbrella Policy. This Honorable Court should rule that VIR owes Noland a duty

to indemnify up to the exhaustion of the remaining limits of the Five Million Dollars (\$5,000,000.00) limit of the Umbrella Policy and owes Noland a duty to defend **after August 1, 2000** for BARH's third-party claims against Noland under the VIR Umbrella Policy.

B. APPELLANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW THAT HE IS ENTITLED TO COVERAGE AND A DEFENSE BECAUSE OF AMBIGUOUS POLICY LANGUAGE.

1. The Ambiguity to VIR's Exhaustion Provision Requires VIR to Defend Noland.

The exhaustion provision from the VIR Primary Policy states:

Our right and duty to defend ends when **we have exhausted the applicable limits of liability** stated in Section III of the Declarations in the payment of judgments or settlements under this policy.

Id. (Emphasis added). See: Record at _____.

This provision is ambiguous for two reasons. First, this provision lacks specific guidelines that govern a situation where multiple insureds are covered by the insurance policy. The provision does not specify which insureds will enjoy the protection of the duty to defend and which insureds will be left without coverage and/or a defense. Therefore, the insurance provision above is ambiguous as to multiple insureds under the same policy.

Second, the provision is ambiguous in terms of how the policy limits for purposes of exhaustion apply to claims against an insured or insureds and claims **against the insurer itself**, which theoretically should **not** be included in a policy

paid for by an insured.

The Supreme Court of North Carolina has specifically addressed a situation quite similar to the underlying case in Brown v. Lumbermens Mutual Casualty Company, 390 S.E.2d 150 (N.C. 1990). The Brown court examined whether an insurance company's duty to defend was terminated with regards to an ambiguous insurance provision. Id at 154. The insurance policy provision at issue stated:

We will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted. Id at 153.

The Brown court found the above provision to be ambiguous because it did not provide a manner by which the coverage must be exhausted before the duty to defend terminates. Id. at 154. Therefore the Brown court adopted the following rule to determine whether or not a duty to defend ends when applicable limits of liability are exhausted:

The question is whether, considering both propositions, exhaustion of the coverage limits must be by way of settlement or judgment before the duty to defend ends, or whether simply exhausting the limits in any manner terminates the duty. Both interpretations are possible. Id.

The Court further stated that, "[g]iven the ambiguity, the provision relating to the insurer's duty to defend must be interpreted favorably to the insured." Id. As a result, the ambiguity of the insurance provision is construed against the party

seeking to enforce it. Id. See also: ABT Building Products Corp. v. National Union Fire Ins. Co. of Pittsburgh, 472 F.3d 99 (4th Cir. 2006).

The rule set forth in Brown is applicable to the facts of the underlying case because the insurance provision provided by VIR to petitioner is ambiguous with regards to multiple insureds. The insurance provision fails to provide clear and unambiguous guidelines that specify the manner in which VIR's duty to defend will operate in the event that multiple insureds require such a duty. The provision fails to set forth what amounts of the coverage will be delegated to the insureds covered by said policy. **The provision also fails to address the use of policy proceeds by an insurer to settle claims against itself.** In the case at bar, it is plaintiff's understanding and belief that the underlying Noel settlement resolved not only the Noels' claims against BARH, but also their bad faith claims against the VIR. There is no evidence as to any allocation of the settlement amount as between insured and insurer, or between medical negligence and bad faith claims.

Therefore, applying the rule set forth in Brown, the question is whether exhausting the limits of liability in settling the underlying claims on behalf of either VIR or BARH will terminate the VIR's duty to defend Noland. Clearly, the insurance provision does not set forth the manner in which such a question is to be resolved. As such, the provision is ambiguous and is unenforceable as to the petitioner, Mike Noland, and any interpretation of said provision must be favorable to the insured, Mike Noland.

2. Appellant Has a Reasonable Expectation of Coverage under Both the VIR Primary Policy and the VIR Umbrella Policy.

It is well settled law in West Virginia then ambiguous terms in an insurance contract are to be strictly construed against the insurer and in favor of the insured. National Mutual Insurance Co. v. McMahon & Sons, Inc., 356 S.E.2d 488 (W.Va. 1987). A policy is ambiguous when language is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning. Change, Inc. v. Westfield Insurance Co., 542 S.E.2d 475 (W.Va. 2000). Because the VIR primary policy and VIR Umbrella Policy are ambiguous, plaintiff has a reasonable expectations of coverage under said policies.

Recognition of a claim based on a reasonable expectation of insurance is consistent with the traditional rule that any ambiguities in an insurance policy be resolved in favor of the insured. Keller v. First National Bank, 403 S.E.2d 424 (W.Va. 1991). Once an insurer creates a reasonable expectation of coverage, the insurer must give the coverage or promptly issue a denial. Id.

In West Virginia, the doctrine of reasonable expectations is that the objectively reasonable expectations of applications and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations. McMahon, 356 S.E.2d 488 (W.Va. 1987). The doctrine of reasonable expectations places the burden on the insurer to communicate coverage and exclusions of a

policy to the insured accurately and clearly. Id.

In this situation, appellant Noland has a reasonable expectation of coverage based on the ambiguous policy language concerning the exhaustion of benefits under the VIR Primary Policy. He also has a reasonable expectation of coverage based on the actions of attorney Foster in the underlying Noel litigation. Therefore, this Honorable Court must find that a reasonable expectation of coverage was created in favor of Noland, and reverse the judgment of the Raleigh County Circuit Court.

C. THE LOWER COURT APPLIED AN IMPROPER STANDARD IN GRANTING APPELLEES' MOTIONS TO DISMISS; THEREFORE, ITS RULINGS MUST BE REVERSED.

Under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, "a Circuit Court must determine whether the [c]omplaint has stated a claim for which relief can be granted." Paul Wright v. White, 503 S.E.2d 860, 865 (W. Va. 1998). The policy underlying Rule 12(b)(6) is to ensure that cases are decided upon the merits. See, John W. Lodge Distrib. Co. v. Texaco, Inc., 245 S.E.2d 157, 159 (W. Va. 1978). Thus, "if the complaint states a claim upon which relief can be granted *under any legal theory*, a [motion to dismiss] *must* be denied." Id. Under the rule, all the pleader is required to do is to set forth sufficient information to outline the elements of his claim. Id. A trial court should not dismiss a complaint merely because it doubts that the plaintiff will prevail. Id. Whether the plaintiff can prevail is a matter properly determined on the basis of proof, and not merely on

the pleadings. Id.

The plaintiff's burden of resisting a motion to dismiss is light. McGinnis v. Cayton, 312 S.E.2d 765, 768 (W. Va. 1984). In evaluating a motion to dismiss, the court must construe the complaint in the light most favorable to the plaintiff, and its allegations are to be taken as true. *See*, John W. Lodge Distrib. Co. v. Texaco, Inc., 245 S.E.2d 157 (W. Va. 1978). When assessing the sufficiency of the complaint on a Rule 12(b)(6) motion, a court "should not dismiss the complaint unless it appears beyond doubt the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." McGinnis, 312 S.E.2d at 768. (citing Stricklen v. Kittle, 287 S.E.2d 148 (W. Va. 1981)). In other words, the court should dismiss a complaint for failure to state a claim only where "it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." Albright v. White, 503 S.E.2d 860,865, *quoting*, Murphy v. Smallridge, 468 S.E.2d 167, 168 (W. Va. 1996). Therefore, in response to a motion to dismiss, the plaintiff must only show relief could be granted under any set of facts that might reasonably arise under the allegations set forth in the Amended Complaint.

In the case at hand, Mike Noland asserted facts in his Amended Complaint against appellees upon which relief can be granted. In his Amended Complaint, Mike Noland asserted numerous breaches of the West Virginia Unfair Trade Practices Act, W. Va. Code § 33-11-1 through 33-11-10 ("UTPA") against appellees. Specifically, Noland alleged that both Lisa Hyman and Richard Stocks breached

their duty to act in good faith and fair dealing by complying with the law of West Virginia regarding handling and adjusting his claim. See, ¶ 84, ¶ 85 of Amended Complaint, Record at _____. He further alleged that the appellees, including Hyman and Stocks, violated the UTPA and applicable insurance regulations because their conduct established a general business practice, which includes, but is not limited to: (1) misrepresenting pertinent facts or insurance policy provisions relating to coverage at issue, (2) failing to adopt and implement reasonable standards for prompt investigation of claims arising under insurance policies, and (3) failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement. See: Record at _____. Finally, Mike Noland alleged that appellees willfully, maliciously, and intentionally breached the UTPA. See: Record at _____.

In granting appellees' Motions to Dismiss, the Circuit Court improperly found that Mike Noland could not state a claim upon which relief can be granted. Rather than considering all of the allegations contained within Mike Noland's Amended Complaint, the Circuit Court only focused on the common law duty of good faith and fair dealing, and the statutory duty to provide a defense. In doing so, the Circuit Court lost site of the allegations that both Hyman and Stocks breached the UTPA in multiple other respects, such as those mentioned above.

These factual questions regarding the breach of the duty of good faith and fair dealing are to be resolved by a trier of fact, and not by the trial court on a

motion to dismiss. Because Mike Noland asserted sufficient facts in his Amended Complaint to overcome a Rule 12(b)(6) motion and the allegations must be viewed as being true, the Circuit Court improperly granted appellees' motions to dismiss.

D. THE CIRCUIT COURT ERRED WHEN IT IMPROPERLY APPLIED THE STATUTE OF LIMITATIONS TO NOLAND'S CLAIMS FOR BAD FAITH UNDER THE UTPA.

1. There Is No Distinction Between When the Statute of Limitation Runs in a First-Party Bad Faith Action and a Third-Party Bad Faith Action.

In evaluating Mike Noland's first-party statutory bad faith claims, the Circuit Court improperly concluded that there is a distinction between the statute of limitation in a first-party bad faith action versus a third-party bad faith action. In reaching this erroneous conclusion, the Circuit Court relied upon Johnson ex rel. Estate of Johnson v. Acceptance Ins. Co., 292 F.Supp.2d 857 (N.D.W.Va. 2003). In relying on Johnson, the Circuit Court reasoned that there are distinguishing factors between first and third-party statutory bad faith claims on the statute of limitation issues. The Circuit Court's reliance on Johnson, however, is erroneous because the Johnson court did not follow clearly established West Virginia law on this issue.

When new points of law are announced in West Virginia, the Supreme Court of Appeals articulates those points through syllabus points. See, Walker v. Doe, 558 S.E.2d 290 (W. Va. 2001). Accordingly, syllabus points reflect the law of this state and must be followed unless overruled by a subsequent opinion. Under West Virginia law, claims involving unfair settlement practices that arise under the

UTPA are governed by the one-year statute of limitations for personal actions not otherwise provided for. Syl. Pt. 1, Klettner v. State Farm Mut. Auto. Ins. Co., 519 S.E.2d 870 (W. Va. 1999). The one-year statute of limitations which applies to claims of unfair settlement practices brought pursuant to the UTPA does not begin to run until the appeal period has expired on the underlying cause of action upon which the statutory claim is predicated. Id. at Syl. Pt. 7 (emphasis added).

Although Klettner is a third-party bad faith action, this Honorable Court does not distinguish between the statute of limitation in first-and third-party bad faith actions in its syllabus point. Instead, it clearly states that the statute of limitation for claims brought pursuant to the UTPA does not begin to run until the appeal period expires. Because both first and third-party bad faith claims are brought pursuant to the UTPA (or were when the Klettner case was decided), the Court would have limited its ruling to third-party bad faith actions if it so intended.

Any rationale for applying the Klettner rule to third-party UTPA claims should also apply to first-party claims. Many times, particularly where coverage issues are involved, a first-party claimant will not know if he or she has a valid UTPA claim until the underlying coverage action has been resolved. If coverage is resolved in favor of the insurer, often times there will be no bad faith or UTPA claim. A resolution of a coverage issue against the insurer and in favor of the insured, on the other hand, serves to strengthen or establish a bad faith or UTPA

claim. In either case, an accurate determination cannot be made before the conclusion of the coverage action.

It also doesn't make sense from a policy standpoint to place a third-party claimant (who has no contractual relationship to the insurer) in a better position than the first-party claimant who does have a contractual relationship to the insurer. Yet this would be the result if the Klettner rule was only applicable to third-party UTPA claims. Essentially, that interpretation would create a longer statute of limitations for third-party claims than first-party claims, which should not be the case. The first-party claimant should be on at least equal footing with respect to the time afforded to bring a claim, particularly since despite the existence of a contractual relationship, the UTPA claim is subject to the shorter limitations period for torts rather than the longer statute of limitations applicable to contract actions.

Finally, there is no reason to open the door to a bevy of potential legal malpractice actions against attorneys who have reasonably read Klettner to apply to both first-party and third-party UTPA claims. If the Klettner court had intended its ruling to apply only to third-party claims, all it had to do was insert "third-party" somewhere in Syllabus Point 7 of its opinion. It did not.

While the Johnson court correctly concluded that the applicable statute of limitations governing first-party statutory bad faith claims is one year, it failed to follow Syl. Pt. 7 of Klettner which specifies that the statute of limitations does not begin to run until the appeal period has expired on the underlying cause of action

upon which the statutory claim is predicated. Instead of following West Virginia law governing this issue, the Johnson court reasoned that the one-year statute of limitation in a first-party bad faith action is different, and begins to run on the date that coverage was denied, rather than the date the appeal period expires. The Circuit Court's reliance on Johnson is misplaced because it does not follow a clearly established principle of law that is binding on the Circuit Court. Applying West Virginia law, the statute of limitations governing this action had not even begun to run because the underlying action was still pending in the Circuit Court of Kanawha County. Accordingly, this Honorable Court should reverse the rulings made by the Circuit Court on this issue.

2. The Statute of Limitation Governing a Claim for Violation of the UTPA Had Not Expired; Therefore, the Motions to Dismiss Should Have Been Denied.

The statute of limitations governing breaches of the UTPA, W. Va. Code §33-11-4(9), is one (1) year. W. Va. Code §55-2-12(c) (1994). This Honorable Court held that “the one-year statute of limitations which applies to claims of unfair settlement practices brought pursuant to West Virginia Code 33-11-4(9) **does not begin to run until the appeal period has expired** on the underlying cause of action upon which the statutory claim is predicated.” Syl. Pt. 7, Klettner v. State Farm Mut. Auto. Ins. Co., 519 S.E.2d 870, 872 (W. Va. 1999). (Emphasis added).

The underlying case upon which this action is predicated, Beckley Appalachian Regional Healthcare v. Lloyd M. Noland et al., Civil Action 98-C-1868, was still pending in the Circuit Court of Kanawha County at the time the

Amended Complaint was filed and when the Circuit Court granted respondents' motions to dismiss. Because the underlying case upon which the UTPA claim is predicated had not been resolved, the statute of limitations for Mr. Noland to file a claim for a violation of § 33-11-4(9) against the respondents had not yet commenced, let alone expired. Accordingly, pursuant to Klettner, Mr. Noland's Amended Complaint was filed within the statute of limitation for all respondents, and the respondents' Motions to Dismiss should have been denied by the Circuit Court.

Moreover, the Circuit Court already addressed this issue in its Memorandum dated July 27, 2005. Counsel for all parties thoroughly briefed this issue and presented argument at the hearing. After examining the arguments of counsel and Klettner, the Circuit Court properly concluded that the statute of limitation had not yet commenced. See: Record at _____. The law is clearly set forth in Klettner and the Circuit Court properly applied it at that time. The facts were exactly the same as they were when the lower Court previously examined this issue. As such, the Circuit Court should have reached the same conclusion and found that the statute of limitations had not expired. Instead, the Circuit Court committed error.

The appellees contended that the Circuit Court should depart from the clear bright line test set forth in Klettner and adopt a different method for determining when the statute of limitation would commence. Essentially, the respondents

argued that since VIR denied Mr. Noland coverage under the Primary Policy on October 23, 2000, he only had until October 23, 2001 to raise statutory bad faith claims against them. There is absolutely no West Virginia law supporting this position, which fails in the face of Syllabus Point 7 of Klettner.

In support of this ill fated proposition, the respondents cited an opinion from the United States District Court for the Northern District of West Virginia, Johnson v. Acceptance Ins. Co., 292 F. Supp. 2d 857 (N.D.W.Va. 2003)⁵. In that case, the estate of a mentally impaired resident of a care facility brought a first-party bad faith action against an insurance company and the company's managing agents alleging the improper denial of liability coverage and the failure to defend a wrongful death action brought in state court. Id. at 862. The insurance company moved for summary judgment citing the expiration of the statute of limitation for a claim for violation of W. Va. Code § 33-11-4(9). Id. at 870. In granting summary judgment, the court, based on the faulty premise that post-suit acts could not be used to establish a breach of the UTPA, held that the statute ran from the denial of coverage to an insured.

Johnson is completely inapplicable to this case as it was decided under the premise that there is no post-suit bad faith. In Johnson, the court relied on Larck v. Wright, Civil Action No. 5:01CV81 for the proposition that "Acceptance's conduct subsequent to the filing of this civil action will not be considered. . . ." Id. at 869.

⁵ Johnson is not binding authority on this Court because it is a United States District Court case, and its holding is based on federal common law, which is not the law of West Virginia.

Subsequently, the West Virginia Supreme Court of Appeals held that post-suit breaches of the UTPA are actionable under West Virginia law. *See generally, Barefield v. DPIC Co., Inc.*, 215 W. Va. 544, 600 S.E.2d 256 (2004). The outcome in Johnson would necessarily have been different if the court considered post-suit acts breaches of the UTPA during the case upon which the UTPA was predicated, which would have required the application of Klettner. In sum, Johnson is no longer good law as it was based on a federal common law, Larck, which has since been overruled by Barefield.

Moreover, in this case, all of the breaches of the UTPA regarding the failure to properly investigate the claim, the failure to properly assign separate adjusters and the general favoring of one insured over another all occur during the pendency of the underlying case upon which this case is predicated. While there are alleged breaches of the UTPA regarding coverage, there are also alleged breaches of the UTPA regarding the post-suit acts themselves. The outcome of the currently pending medical malpractice case will assist the jury in determining damages in this case for the breaches of the UTPA. As such, the fundamental premise upon which Johnson was decided has not only been overruled by Barefield, but it has no application to this case as the alleged breaches of the UTPA in this case include post-suit acts that are not related to coverage issues.

E. THE FACTS OF THE COMPLAINT TAKEN IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF ILLUSTRATE A CONTINUING BREACH OF UTPA.

To date, the appellees continue to breach their duty of good faith and fair dealing and violate the UTPA to Mr. Noland. The Amended Complaint alleges that the appellees currently owe Mr. Noland a duty to defend. The Amended Complaint alleges that the appellees failed to properly investigate this claim. Amended Complaint at ¶ 38, 39 and 45. Record at _____. Specifically, clear testimony suggests that there are breaches of the standard of care by tortfeasors other than Mr. Noland, which his insurer completely failed to act upon in the underlying case. In pertinent part, the allegations in the Amended Complaint suggest that the appellees failed to obtain separate adjusters and failed to obtain separate counsel for Mr. Noland. Amended Complaint at ¶ 45; Record at _____. As of the date of the filing of this Brief, the appellees have yet to engage in any of these fundamental activities necessary to meet the minimum requirements under the UTPA or the duty of good faith and fair dealing, which the appellant intends to rely upon at trial.

In the underlying medical malpractice case, BARH v. Noland, the plaintiffs' expert testified that various other tortfeasors were negligent in their care and treatment of Mr. Noel, including Dr. El-Khatib and the radiologist. Instead of investigating their potential liability, the appellees choose to pursue a claim solely against Mr. Noland because he had an additional professional liability policy upon which they could possibly recover. In the underlying medical malpractice case,

counsel for BARH represented Mr. Noland in his deposition, advised him to sign an affidavit that misrepresented his testimony, and then turned around and sued him.

The appellees continue to violate the UTPA by pursuing claims against Mr. Noland but not Dr. El-Khatib or other potential tortfeasors in the case. Likewise, Mr. Noland alleges that up to the date of his Amended Complaint, the appellees never assigned a separate adjuster to evaluate his case and still has not assigned a separate adjuster to evaluate the case for Mike Noland. The allegations construed in a manner most favorable to Mr. Noland lead to the conclusion that even under the standard proposed by the appellees, the statute has not run because the appellees continue to breach the UTPA.

F. ALTHOUGH THERE IS NO NEED TO RULE ON THE DOCTRINE OF RELATION BACK BECAUSE *KLETTNER* CLEARLY ESTABLISHES WHEN THE STATUTE OF LIMITATIONS COMMENCES, THE DOCTRINE OF RELATION BACK APPLIES IN THIS CASE.

Under Rule 15 of the West Virginia Rules of Civil Procedure, an amendment to a complaint changing a defendant or the naming of a defendant will relate back to the date the plaintiff filed the original complaint if: (1) the claim asserted in the amended complaint arose out of the same conduct, transaction, or occurrence as asserted in the original complaint; (2) the defendant named in the amended complaint received notice of the filing of the original complaint and is not prejudiced in maintaining a defense by the delay in being named; (3) the defendant either knew or should have known that he or she would have been named in the

original complaint had it not been for a mistake; and (4) notice of the action, and knowledge or potential knowledge of the mistake, was received by the defendant within the period prescribed for commencing an action and service of process of the original complaint. Brooks v. Isinghood, 584 S.E.2d 531 (W. Va. 2003).

In applying the Brooks test, this Honorable Court should conclude that the Amended Complaint relates back. First, the claims asserted in the Amended Complaint arouse out of the same conduct, transactions, and occurrences as asserted in the original complaint. Secondly, the appellees, Lisa Hyman, Coverage Options Associates and Kentucky Hospital Association were not prejudiced by the filing of the Amended Complaint, and they have ample opportunity to formulate a defense. No injustice ensues from allowing the Amended Complaint to relate back to the original complaint, and its amendment is necessary to permit an adjudication of this case on its merits. Third, these appellees were not named in the original complaint because it was necessary for Mr. Noland to conduct an investigation to ascertain all the appropriate parties to this litigation. These appellees should have known that they would be parties to the suit once he conducted discovery in his case. Finally, these appellees had notice of the original action within the period prescribed for commencing an action and service of process of the original complaint. Therefore, Mr. Noland satisfied all of the factors set forth in Brooks.

Furthermore, Mr. Noland has proceeded prudently in pursuing his claims against the defendants under the understanding that pursuant to Klettner, the

statute of limitation begins to run four months after the appeal period in the underlying case expires. This interpretation was also accepted by the Circuit Court in its Memorandum dated June 27, 2005. Therefore, Mr. Noland's good faith interpretation of the present law is certainly enough to allow the relation back under the same doctrine. Accordingly, this Honorable Court should find that the Amended Complaint properly relates back to the date of the original complaint.

VI. CONCLUSION

The Raleigh County Circuit Court correctly ruled that Mike Noland is entitled to coverage and a defense for the third-party claims of BARH against him from May 24 through August 1, 2000. However, the Circuit Court erred when it declined to reconsider its ruling that Noland is not entitled to indemnity and a defense after August 1, 2000.

As an insured under the VIR Primary Policy, it is undisputed that petitioner Noland is also an insured under the VIR Umbrella Policy. In its July 25, 2003 Memorandum and Order, the Circuit Court mistakenly treated the VIR Umbrella Policy as an additional primary policy, rather than as an excess policy which takes effect upon the exhaustion of policy limits under the VIR Primary Policy. The Circuit Court's ruling negates the intended effect of the VIR Umbrella Policy. Assuming *arguendo* the limits of the VIR Primary Policy were exhausted by the August 1, 2000 settlement, plaintiff remains insured by the VIR Umbrella Policy and must be afforded a defense and indemnity under the provisions of that policy.

Moreover, the Circuit Court's ruling does not fully consider the effect of the

ambiguity of the exhaustion provision found in the VIR Primary Policy. The exhaustion provision not only does not address the issue of how policy limits are to be applied in claims where there are multiple insureds, and it does not address the issue of how policy limits are to be applied in favor of the insureds when there are also claims against the insurer itself which were paid out as part of this settlement. This ambiguity must be construed in favor of the insured, Mike Noland, and has created a reasonable expectation of coverage in favor of Mr. Noland.

The Circuit Court should have reconsidered and reversed its earlier ruling, and found that Mr. Noland is entitled to coverage and a defense under the VIR Umbrella Policy with respect to BARH's third-party claim from August 1, 2000 to the present. Because the Circuit Court did not do so, appellant now asks this Honorable Court to correct this clear mistake, by reversing the judgment of the Raleigh County Circuit Court.

The Circuit Court also erred in granting the motions to dismiss of appellees Stocks, Hyman, Coverage Options Associates, and the Kentucky Hospital Association. The Circuit Court applied an improper standard in granting appellees' motions to dismiss. The appellant asserted facts in his Amended Complaint upon which relief can be granted. He clearly stated a claim against the appellees. The Circuit Court should have viewed the facts asserted in the Amended Complaint in a light most favorable to appellant Noland and should have denied the motions to dismiss, which should rarely be granted.

Furthermore, the Circuit Court erroneously applied the applicable statute of limitations to the Amended Complaint. Although the statute of limitations clearly is one (1) year, that one-year statute of limitations does not begin to run until the appeal period has expired on the underlying cause of action upon which the statutory claim under the UTPA is predicated. At the time the Amended Complaint was filed and at the time the Amended Complaint was dismissed by the Circuit Court, the statute of limitations had not even begun to run on the UTPA claims asserted by petitioner. Moreover, the law establishing the applicable statute of limitations draws no distinction between a first-party bad faith action under the UTPA and a third-party bad faith action. The Circuit Court clearly erred when it held that Noland's Amended Complaint violated the applicable one-year statute of limitations.

Because the Circuit Court erred in a number of ways when it dismissed Noland's Amended Complaint, this Honorable Court must correct these mistakes by reversing the judgment of the Raleigh County Circuit Court.

WHEREFORE, for all of the foregoing reasons, appellant, by counsel, hereby respectfully requests that this Honorable Court reverse the judgments of the Raleigh County Circuit Court on the liability issues addressed herein, enter an order ruling in Noland's favor on VIR's duty to indemnify and defend and requiring the VIR to provide coverage and a defense to Noland from August 1, 2000 to present, and re-instating his Amended Complaint against Stocks, Hyman, Coverage Options Associates and the Kentucky Hospital Association, for an award

of his costs and attorney's fees incurred in the prosecution of this matter, and for such other relief as this Honorable Court deems just.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LLOYD MICHAEL NOLAND, R.N.

Petitioner,

v.

Appeal No.: 34702

VIRGINIA INSURANCE RECIPROCAL, and
THE RECIPROCAL GROUP, INC., a Virginia
Corporation, LISA HYMAN, individually,
COVERAGE OPTIONS ASSOCIATES a.k.a.
KENTUCKY HOSPITAL SERVICE COMPANY,
a Kentucky Limited Liability Company,
KENTUCKY HOSPITAL ASSOCIATION, a
Kentucky Corporation, and RICHARD STOCKS,

Respondents.

CERTIFICATE OF SERVICE

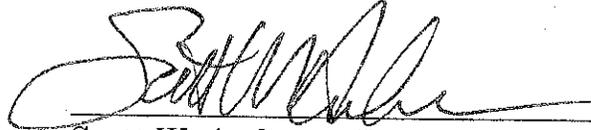
I, Scott W. Andrews, counsel for the petitioner, Lloyd Michael Noland, R.N., do hereby state that the foregoing "Brief of Appellant, Lloyd Michael Noland, R.N." was served upon counsel of record, via U. S. Mail, postage prepaid, this 23rd day of February, 2009:

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