

IN THE SUPREME COURT OF APPEALS

OF WEST VIRGINIA

No. 34702

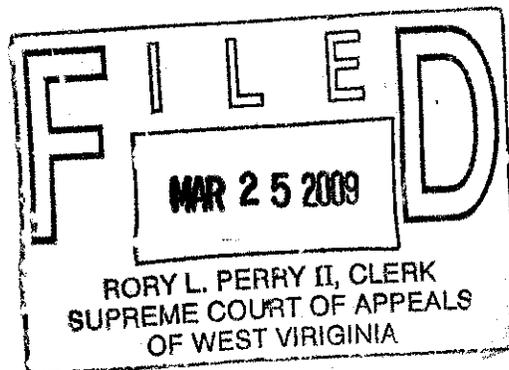
LLOYD MICHAEL NOLAND, R.N.,

Appellant/Plaintiff,

v.

**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/Defendants.



Appeal from the Circuit Court of Raleigh County, West Virginia

**BRIEF ON BEHALF OF APPELLEES
VIRGINIA INSURANCE RECIPROCAL,
THE RECIPROCAL GROUP, INC., LISA HYMAN,
COVERAGE OPTIONS ASSOCIATIONS a.k.a.
KENTUCKY HOSPITAL SERVICE COMPANY AND
KENTUCKY HOSPITAL ASSOCIATION**

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I.

Kind of proceeding and nature of ruling below

To the Honorable Justices of the

West Virginia Supreme Court of Appeals:

In this interlocutory¹ appeal, Plaintiff Lloyd M. Noland (Noland), who is a registered nurse, asserts he is aggrieved by multiple orders entered by the Honorable Judge Robert A. Burnside, Jr., in the Circuit Court of Raleigh County. Noland challenges the trial court's conclusion that Reciprocal of America (ROA)² owed Noland a duty to defend him from May 24, 2000, the date the Beckley Area Regional Hospital (BARH), Noland's employer, filed a third-party contribution and indemnity claim against him, to August 1, 2000, the date ROA paid Two Million Five Hundred Thousand (\$2,500,000) to Ireland J. and Charlene Noel to settle their underlying medical malpractice action.

The plaintiffs' primary theory against BARH was that Noland's negligent treatment of Mr. Noel rendered him a quadriplegic. The Noels as well as their expert witnesses asserted Noland's manipulation of the collar around Mr. Noel's neck during the ambulance ride was the primary cause of Mr. Noel's quadriplegia. This settlement resulted in the release of all defendants, including Noland.

Noland seeks a ruling that ROA's duty to defend and indemnify Noland extended beyond the date ROA settled with the plaintiffs because the contribution action filed by BARH against Noland

¹The orders appealed by Noland include the language required by Rule 54(b) of the West Virginia Rules of Civil Procedure, making them appealable. The record will reflect that Appellees Virginia Insurance Reciprocal, The Reciprocal Group, Inc., Lisa Hyman, Coverage Options Associations a.k.a. Kentucky Hospital Service Company and Kentucky Hospital Association opposed the granting of this appeal not only because the issues raised have no merit, but also because it is inevitable that one or more additional appeals will be filed in this same case in the future.

²The Beckley Appalachian Regional Hospital (BARH) originally was insured by ROA, formerly known as Virginia Insurance Reciprocal, which provided a primary insurance policy as well as a true excess insurance policy. On June 20, 2003, ROA declared insolvency. *See NOTICE OF ORDER OF INSOLVENCY AND REQUEST FOR STATUS CONFERENCE* filed on or about July 21, 2003. To simplify the facts, the insurer for BARH will be referred to as ROA.

continued to proceed after the settlement until October 22, 2007, when the Honorable Judge Tod Kaufman entered an interlocutory order holding that BARH **could not obtain** contribution from Noland.³ Thus, at this time, Noland has no exposure to any contribution claim filed by BARH.

Noland also challenges the trial court's orders dismissing as additional defendants Appellees Lisa Hyman, Coverage Options Associations a.k.a. Kentucky Hospital Service Company, Kentucky Hospital Association, and Richard Stocks, based upon either Noland's failure to state a claim for which relief can be granted as well as the applicable statute of limitations. Ms. Hyman is a claims manager employed by Coverage Options Associates, which contracted with ROA to provide adjuster services. Coverage Options Associates is a subsidiary of Kentucky Hospital Association. Mr. Stocks was Ms. Hyman's supervisor.

Due to the complexity of this litigation, where part of the case was in Kanawha County and the other part was in Raleigh County, it is very easy to overlook certain basic facts. First, Noland has never spent a penny toward the payment of any attorneys' fees or costs because another one of his insurers, ACE American (ACE), did provide Noland with a defense in the contribution action. In fact, the same law firm that represented Noland below and in this appeal also represented ACE throughout most of this litigation until Judge Kaufman entered an order on March 28, 2007,

³At one time, all of the various claims asserted in this case were pending in the Circuit Court of Kanawha County. However, over Appellees' objection, Judge Kaufman entered an order on February 8, 2002, transferring Noland's claims to Raleigh County, but keeping the equitable subrogation claim between ROA against ACE as well as the contribution claim asserted by BARH against Noland. On October 22, 2007, Judge Kaufman entered an order holding that BARH could not obtain contribution from Noland because the \$2,500,000 settlement extinguished that claim. In the same order, Judge Kaufman transferred the equitable subrogation claim asserted by ROA against ACE to Raleigh County. The equitable subrogation issue has been fully briefed before Judge Burnside, who has not issued a final ruling at this time. Once the Kanawha County case was transferred to Raleigh County, all of the pleadings filed in Kanawha County were made a part of the Raleigh County record.

substituting other counsel for ACE. While ACE refused to contribute **any** money to the settlement reached with the underlying medical malpractice plaintiffs, ACE did carry out its duty to defend Noland.⁴

Second, at no point in any of this litigation has Noland been unrepresented by counsel, paid for by one of his insurers, nor has Noland been exposed to any judgment, thanks to the settlement paid for, in full by ROA, without any contribution from ACE.⁵

Finally, with respect to the defendants Noland included in his amended complaint, but which were dismissed by the trial court, Ms. Hyman, Coverage Option Associates, and Mr. Stocks specifically were identified by name in Noland's original complaint. However, Noland simply made a strategic decision at that time not to name them as defendants. Although Kentucky Hospital

⁴Under these facts, where two insurers (ACE and ROA) potentially owed a duty to defend the same insured (Noland), there is a split of authority over whether the defending insurer (ACE) has the right to seek contribution from the other insurer (ROA). E. Holmes, 22 *Appleman on Insurance* 2d §136.10 (2003). The resolution of this issue is not necessary for purposes of this appeal because Noland is not seeking the recovery of these attorneys' fees or costs, but rather is objecting to the limited period of time during which the trial court found ROA had a duty to defend him. Furthermore, ACE has never filed any action seeking to recover any defense costs from ROA.

⁵The equitable subrogation claim asserted by ROA raises the question of whether a true excess insurer, which has paid One Million Five Hundred Dollars (\$1,500,000) to finalize a settlement, has the equitable right to recoup that money from a primary insurer, that refused to pay any money toward the settlement. It is well settled that all primary insurance must be exhausted before there is any obligation on the part of any excess insurance policy to pay. *Gauze v. Reed*, 219W.Va. 381, 633 S.E.2d 326 (2006); *Horace Mann Insurance Co. v. General Star National Insurance Co.*, 514 F.3d 327 (4th Cir. 2008). Under these facts, courts have recognized that equitable subrogation permits the excess insurer to recover from the primary insurer, which refused to contribute to the settlement. *Galen Health Care, Inc. v. American Cas. Co.*, 913 F.Supp. 1525 (M.D. Fla. 1996); *State Farm Mutual Auto Insurance Co. v. Northwestern National Insurance Co.*, 912 P.2d 983 (Utah 1996); *Truck Insurance Exchange of the Farmers Insurance Group v. Century Indemnity Co.*, 76 Wash.App. 527, 887 P.2d 455 (1995); *American Empire Surplus Ins. Co. v. Federal Ins. Co.*, Civil Action No. 3:74-0791 (S.D.W.Va., March 31, 1997).

Association was not named in the original complaint, its alleged vicarious liability was based upon the actions of its agents, Ms. Hyman and Coverage Option Associates. By the time Noland amended his complaint to add these defendants, the applicable statute of limitations had expired and under this Court's decisions, the amendment did not relate back to the date the complaint was filed.

Specifically, Noland appeals the following interlocutory orders:

1. July 25, 2003 order—Judge Burnside granted Noland's motion for summary judgment, holding that ROA had a duty to defend Noland during the period of May 24, 2000, through August 1, 2000, but denied Noland's motion seeking to require ROA to defend him after August 1, 2000;
2. December 20, 2006 order—Judge Burnside granted the motion to dismiss filed by newly added defendant Lisa Hyman;
3. December 27, 2006—Judge Burnside denied Noland's motion to reconsider the order dismissing Hyman;
4. March 12, 2007—Judge Burnside granted the motion to dismiss filed by newly added defendants Coverage Option Associates and Kentucky Hospital Association; and
5. March 28, 2008—Judge Burnside denied all pending motions for reconsideration filed by Noland and made all of the prior orders involving these particular parties appealable, under Rule 54(b) of the West Virginia Rules of Civil Procedure.

Appellees Virginia Insurance Reciprocal, The Reciprocal Group, Inc., Lisa Hyman, Coverage Options Associates a.k.a. Kentucky Hospital Service Company, and Kentucky Hospital Association respectfully submit the trial court correctly decided that ROA's obligation to defend Noland ended when ROA paid the full settlement to the underlying medical malpractice plaintiffs, releasing all defendants of any liability, and that Lisa Hyman, Coverage Options Associates a.k.a. Kentucky Hospital Service Company, Kentucky Hospital Association, and Richard Stocks must be dismissed, based upon the failure of Noland to state a valid claim against them as well as the expiration of the statute of limitations.

II.

Statement of relevant facts

On or about May 2, 2008, counsel for ACE and ROA filed a document entitled **JOINT STIPULATION OF FACTS**, with supportive documents attached, including copies ROA's primary insurance policy, ROA's true excess insurance policy, ACE's primary insurance policy, relevant Kanawha County and Raleigh County orders and pleadings, and the correspondence between the various insurers and counsel for BARH.⁶ All of these documents already were in the record before Judge Burnside attached to several different pleadings, but had not been put together and attached to one document. Although these stipulations and the attached documents were intended to provide a record for the equitable subrogation claim, which is still pending with the trial court, the Court may find this document with the attached exhibits a convenient reference point in understanding the facts of this appeal.

On or about August 12, 1998, Ireland J. and Charlene Noel filed a medical malpractice action against, among others, Beckley Appalachian Regional Hospital ("BARH"), alleging they sustained injuries caused by BARH and its employees on December 18, 1997. (¶3 of **JOINT STIPULATION OF FACTS**). In effect at the time of the Noels' injuries was a Comprehensive Hospital Liability Policy ("Hospital Policy") and an Umbrella Policy ("Umbrella Policy") issued by ROA to Appalachian Regional Healthcare, Inc., under which policy BARH was an insured facility by endorsement. (¶9 of **JOINT STIPULATION OF FACTS**). Pursuant to the Hospital Policy, ROA defended BARH against the Noels' claims.

⁶This **JOINT STIPULATION** was agreed to by counsel for ACE and for ROA. Noland did not file any pleading challenging or disagreeing with any of these stipulations, which largely are based upon various findings of fact included in the multiple orders entered in this litigation.

After the parties had been engaged in discovery for some time, the fact that Noland had additional professional malpractice liability insurance coverage through ACE was discovered. (§13 of **JOINT STIPULATION OF FACTS**). The discovery of this additional insurance triggered a series of letters involving counsel for BARH, an ACE claims representative, counsel for ACE, and a claims manager for Coverage Options Associates representing ROA. (§14 of **JOINT STIPULATION OF FACTS**).

In the May 17, 2000 letter from William F. Foster, II, counsel for BARH, to Terry Fox, senior claim representative for ACE, Mr. Foster explained that his review of the applicable insurance policies caused him to conclude that the ROA policy and ACE's policy are primary and must be exhausted before the ROA umbrella policy is required to contribute toward any settlement or judgment. (Exhibit E to **JOINT STIPULATION OF FACTS**). Attached to this letter was a draft of a third-party complaint Mr. Foster proposed to file on behalf of BARH against Noland for contribution.

Valerie Shea, counsel for ACE, responded to Mr. Foster in a letter dated May 22, 2000, in which she asserts the pending three million dollar demand asserted by counsel for the Noels "was not unreasonable." (Exhibit E to **JOINT STIPULATION OF FACTS**). She objected to the proposed third-party complaint against Noland and demanded that Mr. Foster settle the case with the plaintiffs within the policy limits. On May 24, 2000, Mr. Foster responded to Ms. Shea's letter by explaining he had obtained an advisory opinion from the Chief Disciplinary Counsel for the West Virginia State Bar to ensure that his actions in seeking to file a third party complaint against Noland complied with the ethical rules and further noting West Virginia law required any contribution action

to be filed in the original medical malpractice action.⁷ On this same date, BARH filed a third-party complaint against Noland, seeking contribution for any sums BARH might be required to pay the Noels. (¶18 of **JOINT STIPULATION OF FACTS**).

Discovery in the medical malpractice case demonstrated that the actions of Noland were the focus of the Noels' claims. When Noland originally was deposed, he did not recall any incident occurring when he was with Mr. Noel when he was being transported by ambulance. (¶8 of **JOINT STIPULATION OF FACTS**). About eight months later, Noland filed a NOTICE OF ADDITIONAL RECOLLECTION OF LLOYD MICHAEL NOLAND, R.N., advising in an affidavit that after further reflection, he recalled repositioning Mr. Noel on the backboard during the ambulance trip. The Noels' expert witnesses pointed to the actions of Noland in manipulating the collar around Mr. Noel's neck and repositioning him on the backboard as being the primary cause of Mr. Noel's permanent injuries, which rendered him a quadriplegic. (*Id.*). At this point, as noted in the letters from Ms. Shea, Noland already had developed an attorney-client relationship with Perry Oxley. Ms. Shea asked that ROA pay Mr. Oxley to defendant Noland in the contribution claim.

In the fall of 2000, the parties in the medical malpractice case scheduled a mediation. ACE was given notice of this mediation, which was attended by Mr. Oxley on behalf of Noland. (¶20 of **JOINT STIPULATION OF FACTS**). At this time, all parties understood the Noels' case. ROA was concerned the testimony of the Noels, who were very sympathetic witnesses and who were present during the ambulance ride when Noland manipulated the collar on Mr. Noel's neck, combined with their expert witnesses, all of whom cited Noland as the primary cause for Mr. Noel's permanent injuries, required ROA to carry out its obligations to resolve the case in good faith to

⁷Syllabus Point 4, *Howell v. Luckey*, 205 W.Va. 445, 518 S.E.2d 873 (1999).

protect its insureds. Although under the applicable insurance policies, ACE, as the next primary insurer once ROA's primary insurance exhausted its policy limits, should have contributed to the settlement from its Two Million Dollar policy limit, ROA could not take a chance and have the insureds hit with an excess verdict waiting around for ACE to carry out its obligations.

Consequently, on or about September 14, 2000, ROA and the Noels settled the underlying medical malpractice claim for \$2.5 million, without the participation of ACE. Of the \$2.5 million settlement, \$1 million was paid under the ROA Hospital Policy, exhausting that policy's limits of liability. Because the settlement amount exceeded the limits of liability of the Hospital Policy, ROA was forced to pay the additional \$1.5 million under the Umbrella Policy. ACE did not contribute any money toward this settlement and has never offered to pay any money. (*Id.*). By order entered October 6, 2000, the Circuit Court of Kanawha County found the settlement to be "a good faith settlement" and, accordingly, dismissed the Noels' claims against BARH and ROA. (¶23 of **JOINT STIPULATION OF FACTS**).

On August 22, 2001, BARH filed a Second Amended Third Party Complaint in the Circuit Court of Kanawha County. (¶24 of **JOINT STIPULATION OF FACTS**). In addition to the contribution and indemnification claims that BARH asserted against Noland, this second amended complaint sought declaratory relief, and also asserted the equitable subrogation right of ROA to recover against ACE for its failure to contribute to the settlement of the Noels' claims.⁸ Specifically,

⁸This equitable subrogation theory, which has not been specifically addressed by this Court, has been applied in a situation, very similar to the facts in the present case, where an excess insurer paid a settlement and then asserted an equitable subrogation claim against a nurse' primary insurance policy. In *Galen*, 913 F.Supp. at 1531, the District Court explained, "Florida law recognizes a cause of action for equitable subrogation between primary and excess insurers arising from the payment of a claim by the excess insurer. See *Ranger Ins. Co. v. Travelers Indemnity Co.*, 389 So.2d 272, 274-75 (Fla. 1st DCA 1980)(holding that excess insurer is subrogated to the insured's rights against a primary insurer for breach of the primary insurer's good-faith duty to settle)."

Count IV of the Second Amended Third-Party Complaint, alleges ROA is equitably subrogated to its insured's rights against ACE, based upon ACE's failure to attempt, in good faith, to negotiate and enter into a settlement with the Noels when it had the opportunity to do so.

Noland retaliated by filing a complaint against ROA in the United States District Court for the Southern District of West Virginia, alleging bad faith and seeking declaratory relief to determine whether ROA has a duty to defend and indemnify him against BARH's contribution claim under BARH's primary and umbrella policies. After ROA moved to dismiss for lack of diversity jurisdiction,⁹ Noland brought the same claims in the Circuit Court of Raleigh County, filed July 25, 2001. Noland then filed a motion in Raleigh County to consolidate the declaratory judgment claims in the Kanawha County case with the Raleigh County action.

On October 10, 2001, the Circuit Court of Raleigh County denied Noland's motion to consolidate the Kanawha County declaratory judgment claims with those filed in Raleigh County,

In *Truck Insurance Exchange*, 76 Wash.App. at ____, 887 P.2d at 530-31, the Washington Court of Appeals gave the following rationale for recognizing equitable subrogation under these facts:

Equitable subrogation is a legal fiction whereby a person who pays a debt for which another is primarily responsible is subrogated to the rights and remedies of the other. See *Newcomer v. Masini*, 45 Wash.App. 284, 286, 724 P.2d 1122 (1986). An excess insurer is subrogated to the rights of its insured to recover on claims the insured has against the primary insurer. *Millers Cas. Ins. Co. v. Briggs*, 100 Wash.2d 9, 665 P.2d 887 (1983). As *Millers*, at 14, 665 P.2d 887, pointed out, "Denying subrogation...could encourage primary insureds to hold out making payments and hope an excess insurer pays first; such a result is obviously undesirable."

⁹The District Court, by Order entered October 26, 2001, dismissed Noland's federal claim. Although Noland appealed to the Fourth Circuit, he has since dropped his appeal.

on the ground that the motion was properly directed to the Circuit Court of Kanawha County. By order entered February 8, 2002, the Circuit Court of Kanawha County transferred ROA's claim for declaratory relief to Raleigh County and consolidated it with Noland's claims for declaratory relief.

On May 6, 2002, ROA filed a motion for summary judgment in the Raleigh County action, arguing, as a matter of law, that ROA owes no duty to defend Noland under either the Hospital or Umbrella Policies; that ACE owes Noland a duty to defend and indemnify under the Nurses' Policy; and that ROA's settlement with the Noels has not prejudiced Noland with regard to BARH's contribution claim against him. Noland filed a response thereto, as well as his own motion for partial summary judgment.

On July 25, 2003, Judge Burnside issued a Memorandum Opinion and separate Order on the cross motions for summary judgment. In this ruling, Judge Burnside granted partial summary judgment to Noland against ROA, holding that ROA had a duty to defend Mr. Noland up until the primary Hospital Policy was exhausted, but also granted partial summary judgment against Noland for the period thereafter, holding that ACE had the sole duty to defend and indemnify after ROA's primary Hospital Policy was exhausted.

On October 22, 2007, the Circuit Court of Kanawha County entered an order granting summary judgment to Noland on the contribution claim asserted by BARH, but transferring the remaining issues in the case, including ROA's equitable subrogation claim, to the Circuit Court of Raleigh County. (Exhibit L to **JOINT STIPULATION OF FACTS**).

III.

Argument

A.

The trial court correctly concluded any duty to defend owed by ROA to Noland ceased when ROA's primary insurance company paid its policy limits to settle the underlying medical malpractice action

The main substantive issue raised by Noland is whether ROA had a duty to defend and indemnify him once he was brought into the medical malpractice action as a third party defendant. Pursuant to its policy, ACE provided a lawyer for Noland, who represented him, but for reasons that have never been made clear in the record, Noland insists he should have been defended by a lawyer paid for by ROA. Since Noland is not required to pay for the lawyer provided to him by either of his insurers, ACE or ROA, it is curious that Noland would make such a fuss over the fact that ACE provided him a lawyer.

ROA's position, in its cross motion for summary judgment, was that it did not have any duty to defend Noland, once the third party complaint was filed, because the ROA policy was excess to any other primary policy, including ACE, and because Noland did not request ROA to tender a defense until after August 1, 2000, when the settlement had been reached. Furthermore, ROA contended that since Noland was, in fact, represented by counsel supplied by ACE, which clearly had a duty to defend him, ROA was not required to supply Noland with additional counsel.¹⁰

¹⁰A number of courts have resolved this issue consistent with ROA's position by holding that where a primary insurer, such as ACE, undertakes the insured's defense, it is responsible for its own costs and may not later seek reimbursement from the other primary insurer. *Sloan Construction Co., Inc. v. Central National Insurance Company of Omaha*, 269 S.C. 183, 187, 236 S.E.2d 818, 820 (1977); *Wooddale Builders, Inc. v. Maryland Casualty Co.*, 722 N.W.2d 283, 302 (Minn. 2006); *Barton & Ludwig, Inc. v. Fidelity & Deposit Company of Maryland*, 570 F.Supp. 1470, 1472 (N.D.

Finally, since ROA protected Noland's interests by having him released from any liability to the Noels as a result of the settlement, ROA had done everything it was obligated to do.

Judge Burnside adopted a middle position. He concluded ROA had a duty to defend Noland from the date Noland was added as a third party defendant, May 24, 2000, to the date the medical malpractice case settled, August 1, 2000. Once the settlement was reached, Judge Burnside concluded ROA no longer had a duty to defend Noland and that obligation then rested with ACE. It is this latter decision that Noland seeks to challenge in this appeal.

In reaching this decision, the trial court, on pages 11 through 13 of its July 25, 2003 memorandum, examined the relevant provisions in the insurance policies. ROA's Hospital Liability policy (primary insurance) provides, "Our right and duty to defend ends when we have exhausted the applicable limit of liability stated in Section III of the Declarations in the payment of judgments or settlements of the policy." The limit of liability under ROA's primary insurance policy was One Million Dollars. Thus, once ROA's primary insurance policy paid its policy limit of One Million Dollars, ROA's duty to defend ceased, under the clear and unambiguous language of this provision.

ROA's Hospital Umbrella Policy (excess insurance) provides, "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 damage to which this coverage applies. This coverage only applies to injury or damage covered by the primary insurance. This coverage is

Ga. 1983); *John Burns Construction Co. v. Indiana Insurance Co.*, 189 Ill.2d 570, 727 N.E.2d 211 (2000); *Aetna Casualty & Surety Co. v. Mutual of Enumclaw Insurance Co.*, 121 Idaho 603, 826 P.2d 1315 (1992). Since Noland already had counsel defending him, the only legal question arising from this situation, as mentioned in footnote 4, is whether or not ROA might be responsible to ACE for a portion of these defense costs. However, no such claim has ever been asserted by ACE.

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.” This umbrella insurance policy also provides, “If other insurance or self-insurance applies to claims not covered by this policy, coverage provided by this policy is excess and we will not make any payments until the other insurance is used up.”

In the July 25, 2003 memorandum, the trial court, after reviewing ROA’s Hospital Liability policy (primary insurance), ROA’s Hospital Umbrella Policy (excess insurance), and ACE’s Nurse’s Policy (primary insurance), explained the “exhaustion of coverage” language in ROA’s Hospital Liability Policy and concluded:

The ROA Hospital Liability 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 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.

The “other insurance clause” in the ACE policy cannot now be invoked because upon the termination of ROA’s duty to defend under the Hospital Policy and the Umbrella Policy, no “other insurance” existed as to the liability, if any, of Noland. The duties to defend and indemnify now rests upon ACE American under the Nurse’s Policy. (July 25, 2003 **MEMORANDUM**, p. 13).

Thus, Judge Burnside found no ambiguity in the “exhaustion of coverage” provision contained in ROA’s Hospital Liability Policy. Furthermore, in examining all three policies, Judge Burnside concluded that ACE had the obligation to defend and indemnify Noland after the August 1, 2000 settlement.¹¹

The trial court’s ruling concerning the Umbrella Policy is based on clear policy language, and is supported by relevant case law and pure common sense. Noland misconstrues the trial court’s holding by implying that the trial court left some uncertainty about the excess nature of the umbrella policy. The language of the umbrella policy is clear that it operates as an excess policy, and it is specifically excess as to other insurance. In that capacity, it cannot confer a right or duty to defend on the part of ROA until ACE’s coverage has been exhausted. *See State ex rel. Allstate Insurance Company v. Karl*, 190 W.Va. 176, 181, 437 S.E.2d 749, 754 n. 8. (1993). Thus, once ROA not only had paid the policy limits of its primary insurance coverage, but also had paid One Million Five Hundred Thousand Dollars of its excess coverage, at a time when ACE had Two Million Dollars of primary insurance coverage available, ROA’s excess insurer already had gone above and beyond its contractual obligations in an effort to protect its insureds and obtain releases of liability.

¹¹Judge Burnside’s order focused on whether or not ROA had a duty to defend Noland. Although this order specifically found ACE had a duty to defend and indemnify Noland after August 1, 2000, the order is silent as to ACE’s duty to defend Noland from May 24, 2000, through August 1, 2000. Since ACE actually represented Noland during this time period, thus carrying out its duty to defend Noland, there is no dispute that ACE did owe a duty to defend Noland for this same time period.

In fact, on page 16 and 17 of Noland’s **RESPONSE TO DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**, served on June 2, 2002, Noland stated, “The plaintiff, Mike Noland will stipulate with the VIR that ACE American owes Mike Noland a duty to defend and duty to indemnify. In fact, ACE American is currently defending Mike Noland in the medical malpractice case, which is the subject matter of this case.”

In challenging the July 23, 2003 memorandum and order, Noland first asserts the trial court's ruling makes no sense and presents the following argument:

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 ruling does not make sense logically. It cannot be explained, and must be corrected. (Appellant's brief, at 17).

What Noland fails to address is the language relied upon by the trial court from ROA's umbrella policy, which provides, "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." The trial court correctly concluded this provision incorporates into ROA's umbrella policy the provision in ROA's primary policy that "Our right and duty to defend ends when we have exhausted the applicable limit of liability stated in Section III of the Declarations in the payment of judgments or settlements of the policy." Thus, once the policy limits under ROA's primary insurance policy were exhausted in the settlement paid to the plaintiffs, ROA's duty to defend Noland ceased. This decision is consistent with the policy language, is logical, and correct under these facts.

Under Noland's analysis, the trial court would have been required to ignore this language to reach the bizarre result he wants. Somehow, Noland wants to convince this Court that ROA's umbrella policy actually had a duty to defend Noland **after** the full policy limits of ROA's primary insurance had been paid **and** ROA's umbrella policy paid One Million Five Hundred Thousand

Dollars, which it was not required to do because ACE provided primary insurance to Noland and had not paid a penny yet. Clearly, the policy language does not support the result Noland wants.

Noland next argues the “exhaustion of coverage” provision in ROA’s primary insurance policy somehow is ambiguous. First, Noland argues 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.” (Appellant’s brief, at 18). This provision clearly and unambiguously applies to all insureds. Thus, once the policy limits were exhausted, ROA no longer had any duty to defend any of the insureds. There is nothing ambiguous about this provision in this regard.

Second, Noland suggests ROA may not have exhausted the policy limits of its primary insurance coverage and argues “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.” (Appellant’s brief, at 18). This argument is directly refuted by Joint Stipulation of Fact No. 21, where the new counsel for ACE, previously represented by the same counsel who continues to represent Noland, and counsel for ROA stipulated, “Of the \$2.5 million settlement, **\$1 million was paid under ROA’s Hospital Liability Policy and this payment exhausted ROA’s primary insurance policy’s limits.** The remaining \$1.5 million of the settlement was paid under the Hospital Umbrella Policy issued by ROA and this payment did not exhaust that insurance policy.” (Emphasis added).

The exhaustion of the policy limits is a very precise event not subject to any ambiguity. Stated simply, the insurer either has or has not paid the full One Million Dollar policy limits. Once

the policy limits have been exhausted, the duty to defend ends. Despite his best efforts, there simply is no ambiguity in the phrase “when we have exhausted the applicable limit of liability.” Once ROA paid the policy limits under its primary insurance policy in a good faith settlement, regardless of how many insureds there may be, ROA’s duty to defend Noland ceased.¹²

Third, Noland makes another attempt to assert that this “exhaustion of coverage” provision is ambiguous and relies upon *Brown v. Lumbermens Mutual Casualty Co.*, 390 S.E.2d 150 (N.C. 1990). The trial court’s decision finding no ambiguity in this provision is consistent with the vast majority of cases, where similar “exhaustion of coverage” provisions were found to be clear and unambiguous. *Millers Mutual Ins. Assoc. of Ill. v. Shell Oil Co.*, 959 S.W.2d 864 (Mo. Ct. App. 1998); *Underwriters Guarantee Ins. Co. v. Nationwide Mut. Fire Ins. Co.*, 578 So.2d 34 (Fla. Ct. App. 1991); *Zurich Ins. Co. v. Raymark Industries, Inc.*, 514 N.E.2d 150, 164-65 (Ill. 1987); *Maguire v. Ohio Casualty Ins. Co.*, 602 A.2d 893 (Pa. Super. Ct.), *appeal denied by*, 615 A.2d 1312 (Pa. 1992); *Paretti v. Sentry Indemnity Co.*, 536 So.2d 417 (La. 1988); Annot., “Liability Insurer’s Duty to Defend Action Against Insured After Insurer’s Full Performance of its Payment Obligations Under Policy Expressly Providing that Duty to Defend Ends on Payment of Policy Limits,” 16 A.L.R.6th 603 (2006).

¹²Noland also makes some bold assertions regarding the broad release entered into between the Noels and the defendants, which included the release of all possible claims, including any claims of bad faith. Noland asserts the parties do not know how much of the \$2,500,000 settlement went toward settling the bad faith claim and even argues it is possible the \$1,000,000 policy limit may not have been exhausted, depending on how much of the settlement went toward resolving the bad faith claim. In a case where Mr. Noel was rendered a quadriplegic and where his life care costs alone exceeded one million dollars, it is absurd for Noland to suggest that more than \$1,500,000 of this settlement went toward the payment of this alleged bad faith claim.

In *Paretti*, the defendant's insurer paid its policy limits to the plaintiff and obtained a release of the insurer and a partial release of the insured. Pending at the time of this settlement was a cross-claim against this same insured for indemnity. The insurer informed its insured that it no longer had a duty to defend after exhausting its policy limits. The insured objected and the issue was presented to the Supreme Court of Louisiana.

The Supreme Court of Louisiana, 536 So.2d at 420-21, first examined the "exhaustion of coverage" provision and concluded:

When the paragraph of the policy containing this language (cited in full at the outset of this discussion) is read as a whole, there is no ambiguity. The promise to defend "any" covered claim is clearly qualified, almost immediately thereafter in the same paragraph, by the statement, "Our duty to defend or settle ends when our limit of liability...has been exhausted." Read as a whole, the only reasonable interpretation of this section is that the insurer will defend any claim, *but* the defense obligation will terminate if and when the insurer's policy limits are exhausted. These provisions are not subject to more than one reasonable interpretation. The policy in this regard is not ambiguous.

In concluding the insurer's duty to defend ceased once it had paid its policy limits, the Supreme Court of Louisiana, 536 So.2d at 418-19, held:

The policy's limitation on the insurer's duty to defend is not ambiguous. Further, there is no indication from the record that the insurer did not act in good faith when it settled the personal injury claim for the limits of its liability policy. Nor do we accept the insureds' argument that the express contractual limitation on the insurer's duty to defend should be stricken for reasons of public policy.

We hold, therefore, that once the liability insurer exhausted its policy limits through a good faith settlement, it was no longer obligated to defend the insured in the separate action based on the same accident.

Noland's reliance on *Brown v. Lumbermens Mutual Casualty Co.*, 390 S.E.2d 150 (N.C. 1990), is misplaced and, in any event, *Brown's* suggestion that these "exhaustion of coverage" provisions are ambiguous has been rejected by most courts. In *Brown*, although the insurer had tendered its policy limits to the plaintiff, pursuant to a procedure available under North Carolina law, the insurer had not obtained a full release from the plaintiff and, in fact, the case was tried before a jury with this insured unrepresented by any counsel. Under these peculiar facts, the Supreme Court of North Carolina held the insurer had not exhausted its coverage and, therefore, owed a duty to its insured to continue representing him. Thus, *Brown* factually is very distinguishable from the present case.

The holding in *Brown* that these "exhaustion of coverage" provisions are ambiguous is contrary to the clear weight of authority, a point made in some detail by the Justices who dissented in *Brown*. In *Rubrich v. Piotruszewicz*, 259 Wis.2d 481, 655 N.W.2d 546, 2002 WL 31554157 (2002)(unpublished opinion), the Wisconsin Court of Appeals noted that this holding in *Brown* is not universally accepted. After considering *Brown*, as well as other decisions consistent with ROA's arguments, the Wisconsin Court of Appeals rejected *Brown* and concluded that this "exhaustion of coverage" language was clear and unambiguous. Appellees respectfully submit the trial court's ruling is consistent with the majority of courts which have analyzed these provisions.

Noland's final argument seeks to apply the doctrine of reasonable expectations. However, this doctrine does not apply where the language of the insurance policy is clear and unambiguous. Syllabus Point 2, *Robertson v. Fowler*, 197 W.Va. 116, 475 S.E.2d 116 (1996). Therefore, because the "exhaustion of coverage" language correctly was found by the trial court to be clear and unambiguous, the doctrine of reasonable expectations is inapplicable.

The trial court's analysis of the various insurance policies was correct and supported by the law in West Virginia and other jurisdictions. Noland simply has not presented any compelling factual or legal reason to reverse the trial court's July 25, 2003 order and memorandum.

B.

The trial court was correct in concluding Noland's attempt to bring in additional defendants in 2005, about four years after the medical malpractice case had settled, was barred because he failed to assert any valid claims, the applicable statute of limitations had expired, and there was no basis for these amended claims to relate back to the date the original complaint was filed

In 2005, Noland amended his complaint and added Ms. Hyman, Coverage Options Associates a.k.a. Kentucky Hospital Service Company, Kentucky Hospital Association, and Richard Stocks, claiming they also had violated the West Virginia Unfair Trade Practices Act and breached their duty of good faith and fair dealing. Although these additional defendants had been identified in the original complaint, Noland at that time had made a deliberate decision not to include them as defendants. The claim against Kentucky Hospital Association is based upon the actions of Ms. Hyman, as its agent, and upon Noland's attempt to pierce the corporate veil for the actions of Ms. Hyman and Coverage Option Associates. Noland also asserted generally a breach of contract claim, even though none of these newly added defendants is a party to any contract with him.

Judge Burnside addressed the motions to dismiss filed by Richard Stocks as well as these additional defendants in separate memoranda and orders. The first memorandum, issued on December 18, 2006, granted the motion to dismiss filed by Mr. Stocks. Ms. Hyman was dismissed in a memorandum issued December 20, 2006. Finally, Coverage Options Associates and Kentucky Hospital Association were dismissed in a memorandum issued March 12, 2007.

In dismissing Noland's claim for breach of the common law duty of good faith and fair dealing against Ms. Hyman, Judge Burnside held:

Upon these considerations, it is the court's opinion that the principles stated in *Elmore*, above, apply with equal vigor to either a first party or a third party common law bad faith claim, and that there exists in West Virginia no general common law duty of good faith and fair dealing, whether characterized as first-party or third-party, in the absence of a contractual relationship or contractual setting in which that duty arises. In the absence of a duty, there can be no cause of action for the breach thereof. (December 20, 2006 **MEMORANDUM**, p. 5).

With respect to the motion to dismiss filed by Coverage Option Associates and Kentucky Hospital Association, Judge Burnside found there may be a theoretical claim against them for the violation of the duty of good faith and fair dealing, under the New Mexico Supreme Court's analysis in *Dellaira v. Farmers Ins. Exch.*, 102 P.3d 111 (N.M. Ct. App. 2004). (March 12, 2007 **MEMORANDUM**, p. 5). However, with respect to all these defendants, Judge Burnside held all claims were barred by the applicable statute of limitations and incorporated, by reference, his analysis of this issue made in the December 18, 2006 **MEMORANDUM** involving Mr. Stocks.

Judge Burnside concluded the one year statute of limitations¹³ for any first party statutory bad faith action began to run at the time the insurer failed to provide a defense. Thus, "if a first party bad faith claim is grounded on the failure of the insurer to offer a defense, an insured knows at the time the defense is refused everything he needs to know to determine whether a bad faith claim can be asserted." (December 18, 2006 **MEMORANDUM**, p. 7). As applied to these facts, this one-year

¹³The statute of limitations for a claim under the West Virginia Unfair Trade Practices Act is one year. Syllabus Point 1, *Klettner v. State Farm Mutual Automobile Insurance Co.*, 205 W.Va. 587, 519 S.E.2d 870 (1999); Syllabus Point 1, *Wilt v. State Automobile Mutual Insurance Co.*, 203 W.Va. 165, 506 S.E.2d 608 (1998).

statute of limitations began to run on October 23, 2000, which is the date of the letter denying any coverage to Noland.

Next, Judge Burnside rejected Noland's argument that the alleged breach of the statutory duty of good faith and fair dealing was a continuing breach. In rejecting this argument, Judge Burnside held, after noting that Noland cited no authority for this proposition, "If that argument were accepted, the statute of limitations would never run on a contract claim or a statutory bad faith claim." (December 18, 2006 **MEMORANDUM**, p. 8).

Noland's final argument is that the amended complaint, adding Mr. Stocks and the other Defendants, should relate to the date the original complaint was filed. In *Brooks v. Isinghood*, 213 W.Va. 675, 584 S.E.2d 531 (2003), this Court made an extensive analysis of Rule 15(c)(3), which permits an amended complaint to relate back to the date the original complaint was filed under certain conditions. In Syllabus Point 4 of *Brooks*, this Court summarized the elements that have to be met by a plaintiff seeking such an amendment:

Under Rule 15(c)(3) 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 that 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.

In Syllabus Point 7 of *Brooks*, this Court elaborated on the meaning of “mistake” in determining whether the amendment of a complaint naming a new defendant should relate back to the date the original complaint was filed:

Under Rule 15(c)(3)(B) of the *West Virginia Rules of Civil Procedure*, a “mistake concerning the identity of the proper party” can include a mistake by a plaintiff of either law or fact, so long as the plaintiff’s mistake resulted in a failure to identify, and assert a claim against, the proper defendant. A court considering whether a mistake has occurred should focus on whether the failure to include the proper defendant was an error and not a deliberate strategy.

Thus, when a plaintiff knows all of the facts at the time the original complaint was filed and chooses, as a matter of deliberate strategy, to name only certain defendants, when other possible defendants were known at the time, that deliberate strategic decision does not qualify as a mistake. In this case, Noland simply chose not to sue these defendants when he filed his complaint.

In Syllabus Point 9 of *Brooks*, this Court made it clear that where there are questions regarding the expiration of the applicable statutes of limitations, the amendment to the complaint should be denied, unless the plaintiff can prove the following:

Under the 1998 amendments to Rule 15(c)(3) of the *West Virginia Rules of Civil Procedure*, before a plaintiff may amend a complaint to add a new defendant, it must be established that the newly-added defendant (1) received notice of the original action and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the newly-added defendant, prior to the running of the statute of limitation or within the period prescribed for service of the summons and complaint, whichever is greater. To the extent that the Syllabus of *Maxwell v. Eastern Associated Coal Corp.*, 183 W.Va. 70, 394 S.E.2d 54 (1990), conflicts with this holding, it is hereby modified.

Under *Brooks*, Noland must establish that these newly added defendants “received notice of the original action” and “knew or should have known that, but for a mistake concerning the identify of the proper party, the action would have been brought against the newly-added defendant, prior to the running of the statute of limitation or within the period prescribed for the service of the summons and complaint, whichever is greater.” The amended complaint contains no allegations asserting that these defendants received notice of the original action nor any allegations explaining that somehow Noland made a mistake as to the identify of the defendants.

Judge Burnside rejected Noland’s attempt to relate back to the date of the original complaint because Noland had no argument that the failure to join Mr. Stocks or these other defendants in the original complaint arose from a mistake of fact or law and the circumstances did not support the application of the discovery rule. (December 18, 2006 **MEMORANDUM**, p. 9).

Appellees respectfully submit Noland has not raised anything in his appeal that warrants the reversal of any of the many many rulings issued by Judge Burnside in this protracted litigation.

IV.

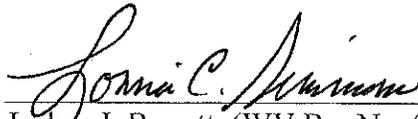
Conclusion

For the foregoing reasons, Defendants Virginia Insurance Reciprocal, The Reciprocal Group, Inc., Lisa Hyman, Coverage Options Associates a.k.a. Kentucky Hospital Service Company, and Kentucky Hospital Association respectfully ask this Court to affirm the orders challenged by Plaintiff Lloyd Michael Noland, R.N., and to remand this case to the Circuit Court of Raleigh County so that

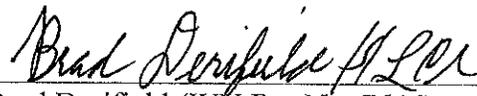
all of the remaining issues can be resolved and then, once final orders are entered, additional appeals can be filed.

**VIRGINIA INSURANCE RECIPROCAL, and
THE RECIPROCAL GROUP, INC., a Virginia
corporation, LISA HYMAN, COVERAGE
OPTIONS ASSOCIATES a.k.a. KENTUCKY
HOSPITAL SERVICE COMPANY, and
KENTUCKY HOSPITAL ASSOCIATION,
Defendants,**

--By Counsel--



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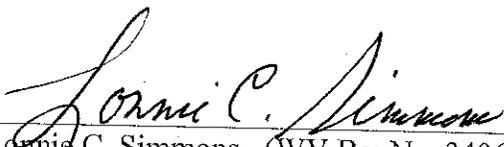
CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify that service of the foregoing **BRIEF ON BEHALF OF APPELLEES VIRGINIA INSURANCE RECIPROCAL, THE RECIPROCAL GROUP, INC., LISA HYMAN, COVERAGE OPTIONS ASSOCIATIONS a.k.a. KENTUCKY HOSPITAL SERVICE COMPANY AND KENTUCKY HOSPITAL ASSOCIATION** was made by mailing a true copy thereof to the below listed counsel of record with postage prepaid, in a properly addressed envelope, this 25th day of March, 2009:

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