

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

NOV 23 2011

Jeffrey Jenkins and M. Jean McNabb,
Plaintiffs Below, Petitioners

No. 11-1059

vs.

City of Elkins, a Municipal Corporation, Stephen P.
Stanton, Westfield Insurance Company, National Union
Fire Insurance Company of Pittsburgh, PA, and
Bombardier Aerospace Corporation, Defendants Below,
Respondents

*Appeal from the Circuit Court of Jefferson County, West Virginia
Civil Action No. 10-C-164 (J. Matish)*

**RESPONDENT, BOMBARDIER AEROSPACE CORPORATION'S BRIEF
AND CROSS-ASSIGNMENTS OF ERROR**

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I. PETITIONERS' ASSIGNMENTS OF ERROR

(As related to respondent Bombardier Aerospace Corporation)

...

2. The Circuit Court of Harrison County erred when it reduced the UM coverage (or UIM coverage) available to the plaintiffs under Bombardier's policy of insurance issued by Greenwich from One Million Dollars (\$1,000,000.00) to Twenty Thousand Dollars (\$20,000.00), based upon a "governmental vehicle" exclusion contained in the policy, as such an exclusion offends substantial West Virginia public policy and has been found to be void in a majority of jurisdictions that have similarly addressed the issue.

...

4. The Circuit Court of Harrison County erred when it found that the plaintiffs' auto medical payments coverage claims were excluded from their employer's policy issued by Greenwich by an exclusion for injuries sustained by employees in the scope and course of their employment.

II. RESPONDENT BOMBARDIER'S CROSS-ASSIGNMENTS OF ERROR

1. The Circuit Court of Harrison County committed plain error when it failed to rule as a matter of law that petitioners are not entitled to uninsured or underinsured motorist coverage benefits under the Greenwich policy because petitioners are not "legally entitled to recover" damages against Stanton or the City of Elkins, a prerequisite to recovery of such benefits under both the West Virginia uninsured and underinsured motorist statutes and the express terms of the Greenwich policy.

2. The Circuit Court of Harrison County erred when it ruled that Stanton falls within the definition of an uninsured motorist under W. Va. Code § 33-6-31(c).

3. The Circuit Court of Harrison County erred when it ruled that government-owned vehicles are subject to the mandatory limits of uninsured motorist coverage required by *W. Va. Code § 33-6-31*, and thereby declared the government-owned vehicle exclusion contained in the Greenwich policy as void and ineffective below the \$20,000 statutory minimum imposed by the West Virginia uninsured motorist statute

III. STATEMENT OF THE CASE

Respondent Bombardier adds the following facts to Petitioners' Statement of the Case:

Plaintiff Jenkins has been compensated for the injuries he sustained in the collision through workers' compensation in the following amounts: \$73,016.16 for indemnity; \$81,131.98 for medical; \$12,443.01 for rehabilitation; and \$4,232.77 for expenses. (J. App. 357-59). As the time summary judgment motions were filed, petitioner's workers' compensation benefit payments totaled \$170,823.92. (J. App. 357-59). In addition, petitioner's workers' compensation claim is reserved for an additional \$110,587 in claim benefit payments for damages extending into the future as a result of the injuries he sustained in the accident at issue in this lawsuit. (J. App. 357-59).

Petitioners do not seek property damage or punitive damages. (J. App. 6-8, 60-66).

No allegations are directed toward Gallagher Bassett, a notice defendant, in this lawsuit. Gallagher Bassett is not an insurer, and does not issue insurance policies. Rather, Gallagher Bassett is a third party administrator, which administers insurance claims.

Petitioners incorrectly alleged that Bombardier is self-insured. (J. App. 63). Petitioners have abandoned such claim, and now contend that they are entitled to recover uninsured motorist benefits under a commercial auto policy issued to Bombardier. (J. App. 389-93).

The Circuit Court directed the parties involved to file copies of the insurance policies which were in effect at the time of the accident for the purpose of determining which policies, if any, provided coverage for the claims asserted by plaintiffs.

In compliance with the Circuit Court's order, Bombardier filed a copy of a commercial lines policy which was issued by Greenwich Insurance Company ("Greenwich") to Bombardier

under policy No. RAC9437349, with effective dates of June 30, 2008 through June 30, 2009 (“the Greenwich policy”). (J. App. 379-80). The Greenwich policy includes a commercial auto part that contains a business auto coverage form, an auto medical payments coverage form, and additional forms and endorsements pertaining to particular states in which Bombardier conducts operations, including West Virginia. (J. App. 628-969).¹

One such additional form is a West Virginia Uninsured and Underinsured Motorist Coverage form (“UM/UIM Coverage Form”) which provides uninsured and underinsured motorist coverage in the amount of \$1,000,000 per accident, when coverage applies. The insuring clause of the UM/UIM Coverage Form provides as follows:

We will pay all sums that the “insured” is legally entitled to recover as compensatory damages from the owner or driver of an “uninsured” or “underinsured motor vehicle.” The damages must result from “bodily injury” sustained by the “insured,” or “property damage” caused by an “accident.” The owner’s or driver’s liability for these damages must result from the ownership, maintenance or use of the “uninsured” or “underinsured motor vehicle.”

(J. App. 880, Form CA 21 22 03 06, at p. 2).

The UM/UIM Coverage Form defines “insureds” as follows when the named insured is a corporation, such as Bombardier:

Anyone “occupying” or using a covered “auto” or temporary substitute for a covered “auto.” The covered “auto” must be out of

¹ A complete copy of the Greenwich policy was filed with the Circuit Court. (J. App. 379-80). A copy of the Greenwich policy was also attached to Bombardier’s motion for summary judgment and brief in support thereof as Exhibit B. (J. App. 340 -59). The parties to this appeal agreed that a copy of the Greenwich policy would be included in the Joint Appendix. However, the party which undertook to prepare the Joint Appendix, as agreed to by the parties, inadvertently omitted the Greenwich policy from the Joint Appendix. A motion has been filed by respondent Bombardier to supplement the Joint Appendix with a copy of the Greenwich policy. None of the parties to this appeal contest the motion to supplement the Joint Appendix by adding the Greenwich policy.

service because of its breakdown, repair, servicing, “loss” or destruction.

(J. App. 880, Form CA 21 22 03 06, at Section B.2., at p. 2).

The UM/UIM Coverage Form contains the following pertinent exclusions:

This insurance does not apply to any of the following:

...

2. The direct or indirect benefit of any insurer or self-insurer under any workers’ compensation, disability benefits or similar law.

(App. 880, Bates No. GB-A-247, Form CA 21 22 03 06, at p. 2).

The UM/UIM Coverage Form includes the following pertinent definitions:

As used in this endorsement:

...

4. “Uninsured motor vehicle” means a land motor vehicle or “trailer:”

...

However, “uninsured motor vehicle” does not include any vehicle:

...

- b. Owned by a governmental unit or agency.

...

5. “Underinsured motor vehicle” means a land motor vehicle or “trailer” to which a liability bond or policy applies at the time of the “accident” but the amount paid for “bodily injury” or “property damage” to an “insured” under that bond or policy is not enough to pay the full amount the “insured” is legally entitled to recover as damages.

However, “underinsured motor vehicle” does not include any vehicle:

...

- b. Owned by a governmental unit or agency.

(J. App. 882, Form CA 21 22 03 06, at p. 4).

Additionally, the Greenwich Policy includes an Auto Medical Payments Coverage form which provides coverage for expenses incurred for medical services to an insured who sustains bodily injury caused by an accident. (J. App. 666, Form CA 99 03 03 06, at p. 1). However, the coverage provided by the Auto Medical Payments Coverage form does not apply when the bodily injury in question is sustained by an employee arising out of and in the course of employment by Bombardier, as follows:

This insurance does not apply to any of the following:

. . .

- 4. “Bodily injury” to you or your “employee” arising out of and in the course of employment by you.”

(J. App. 666, Exclusion 4 at Form CA 99 03 03 06, at p. 1).²

² The Greenwich policy defines “you” as the named insured, which is Bombardier. (J. App. 909).

IV. SUMMARY OF ARGUMENT

No uninsured or underinsured motorist coverage benefits are owed to petitioners under the Greenwich policy because petitioners are not “legally entitled to recover” damages against Stanton or the City of Elkins, a prerequisite to recovery of such benefits under both the West Virginia uninsured and underinsured motorist statutes and the express terms of the Greenwich policy.

Additionally, no uninsured or underinsured motorist coverage benefits are owed to petitioners under the Greenwich policy because the vehicle driven by Stanton at the time of the collision does not qualify as an “uninsured” or “underinsured” vehicle due to the fact that it was owned by the City of Elkins, thereby triggering a clear and unambiguous policy exclusion for government-owned vehicles.

The clear and unambiguous government-owned vehicle exclusion, as contained within the Greenwich policy, does not conflict with the spirit or intent of the West Virginia uninsured and underinsured motorists statutes and, as such, full effect should be given to the plain meaning of the exclusion as intended by the parties to the insurance contract.

The Circuit Court correctly ruled that no auto medical payment benefits are owed to petitioners under the Greenwich policy because petitioner’s injuries were sustained during the course of his employment with Bombardier, thereby triggering a clear and unambiguous policy exclusion for bodily injury sustained during the course of employment.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate in this matter as this appeal involves several issues of first impression in this State, including whether the phrase “legally entitled to recover,” as included in the West Virginia uninsured and underinsured motorist statutes and in standard insurance policy language, means damages that the insured would be entitled at the time of injury to recover through legal action against the tortfeasor.

As a corollary thereto, this case requires the Court to decide whether, a matter of law, an insured is not “legally entitled to recover” damages against a defendant, as that phrase is to be construed within the West Virginia uninsured and underinsured motorist statutes and in standard insurance policy language, when the defendant is immune from suit by the insured.

This appeal also requires the Court to decide as a matter of first impression whether a government-owned vehicle exclusion, as contained within a standard automobile insurance policy issued with approval in the State of West Virginia, violates the spirit and intent of the West Virginia uninsured and underinsured motorists statutes.

VI. ARGUMENT

A. IF THE IMMUNITY DEFENSES ASSERTED BY STANTON AND THE CITY OF ELKINS ARE UPHELD, THEN NO UNINSURED MOTORIST COVERAGE IS OWED UNDER THE GREENWICH POLICY BECAUSE PETITIONERS ARE NOT “LEGALLY ENTITLED TO RECOVER” ANY DAMAGES FROM STANTON OR THE CITY OF ELKINS

Both the West Virginia uninsured motorist statute and the uninsured motorist provisions of the Greenwich policy clearly and expressly require that, as a prerequisite to recovery of uninsured motorist benefits, the insured must be “legally entitled to recover” damages from an uninsured motorist.³

The West Virginia uninsured motorist statute, *W. Va. Code § 33-6-31(b)*, provides in relevant as follows:

[No policy or contract of bodily injury liability insurance, or of property damage liability insurance, covering liability arising from the ownership, maintenance or use of any motor vehicle, shall be issued or delivered in this state] unless it shall contain an endorsement or provisions undertaking to pay the insured all sums which he shall be *legally entitled to recover* as damages from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than the requirements of section two [*§ 17D-4-2*], article four, chapter seventeen-d of this code, as amended from time to time[.]

(Emphasis supplied).

³ For the sake of brevity, respondent Bombardier has limited its arguments herein to *uninsured* motorist benefits because petitioners’ appeal is limited to the denial of uninsured motorist benefits under the Greenwich policy. However, Bombardier contends that the Greenwich policy also excludes *underinsured* motorist benefits for plaintiffs’ claims in the same manner and for the same reasons as it excludes uninsured motorist benefits.

Similarly, the insuring clause in the UM/UIM Coverage Form of the Greenwich policy requires that the insured be “legally entitled to recover” damages against the uninsured motorist in order to claim entitlement to underinsured motorist benefits, as follows:

We will pay all sums that the “insured” is *legally entitled to recover* as compensatory damages from the owner or driver of an “uninsured” or “underinsured motor vehicle.” The damages must result from “bodily injury” sustained by the “insured,” or “property damage” caused by an “accident.” The owner’s or driver’s liability for these damages must result from the ownership, maintenance or use of the “uninsured” or “underinsured motor vehicle.”

(J. App. 880, Form CA 21 22 03 06, at p. 2, emphasis supplied).

As the provisions of the West Virginia uninsured motorist statute and the insuring clause of the Greenwich policy make clear, in order to trigger uninsured motorist coverage, the claim in question must pertain to sums that the insured is “legally entitled to recover” as compensatory damages from the owner or driver of an uninsured motor vehicle. Thus, if the insured is not “legally entitled to recover” damages from the owner or driver of an uninsured motor vehicle, then the claim does not fall within the scope of the West Virginia uninsured motorist statute or trigger the uninsured motorist coverage provided by the Greenwich policy.

In this case, the Circuit Court dismissed petitioners’ claims against Stanton and the City of Elkins on the basis of the government tort immunity defense. (J. App. 555-562). Based on such ruling, the petitioners are not “legally entitled to recover” any damages against Stanton or the City of Elkins. Accordingly, petitioners’ claims do not fall within the scope of the West Virginia uninsured motorist statute or the uninsured motorist coverage provided by the Greenwich policy because such claims do not pertain to sums that the insured is “legally entitled to recover” as compensatory damages from the owner or driver of an uninsured motor vehicle.

The Supreme Court of Appeals of West Virginia has not yet construed the phrase “legally entitled to recover” in the context of a claim for uninsured motorist benefits pertaining to damages caused by a tortfeasor who is immune from suit. Thus, this appeal presents an issue of first impression.

However, the overwhelming majority of courts addressing the issue have ruled that, when the tortfeasor is immune from suit, the insured is not “legally entitled to recover” any sums from the tortfeasor within the meaning of uninsured motorist statutes and standard uninsured motorist policy language, thereby precluding a claim for uninsured motorist coverage.

The Fifth Circuit Court of Appeals in *Perkins v. Ins. Co. of N. America*, 799 F.2d 955, 958-9 (5th Cir. 1986) upheld the district court’s grant of summary judgment in favor of the plaintiff’s insurer, which denied the plaintiff’s claim for uninsured motorist benefits on the basis that the plaintiff-insured was not “legally entitled to recover” against the tortfeasor-driver or the tortfeasor’s employer because both were cloaked with statutory immunity.

The Supreme Court of Texas observed that “the purpose of the [uninsured motorist statute] is to protect insureds against negligent, financially irresponsible motorists. It was not designed as a system for giving relief to people who cannot recover from a tortfeasor because of sovereign immunity.” *Francis v. Intern. Serv. Ins. Co.*, 546 S.W.2d 57, 61 (Tex. 1976).

The Ohio Supreme Court similarly construed the phrase “legally entitled to recover” in *Snyder v. American Family Ins. Co.*, 114 Ohio St.3d 239, 249 (2007), wherein it ruled that a policy provision limiting the insured’s recovery of uninsured or underinsured motorist benefits to amounts which the insured is “legally entitled to recover” is clear, unambiguous and enforceable, and its effect will be to preclude recovery when the tortfeasor is immune. This ruling was consistent with prior rulings of the Ohio Supreme Court on the interpretation of the phrase

“legally entitled to recover,” wherein it held that uninsured motorist statutes are not implicated when there is a lack of liability due to immunity. *York v. State Farm Fire and Cas. Co.*, 64 Ohio St. 2d 199, 202, 414 N.E.2d 423 (1980) (“It is the legal defense, and not the status of insurance, that warrants our decision herein. The uninsured motorist coverage is to apply only in those situations in which the ‘*lack of liability insurance*’ is the reason the claim goes uncompensated, and not when the claim goes uncompensated because of the *lack of liability* due to the substantive laws of Ohio.”); *State Farm Mut. Auto. Ins. Co. v. Webb*, 54 Ohio St. 3d 61, 64, 562 N.E.2d 132 (1990). See also *Middleton v. State Farm Mutual Auto. Ins. Co.*, 1997 Ohio App. LEXIS 5153 at *9 (*Butler Co.*, November 17, 1997) (plaintiffs were not “legally entitled” to collect damages for bodily injury from either the city or its employee/driver based on their immunity defenses and, as such, plaintiffs have no right to receive uninsured motorist coverage under either the uninsured motorist statute or the express language of their insurance policy).

The Supreme Court of New Hampshire noted in *Matarese v. New Hampshire Mun. Ass’n. Prop.-Liab. Ins. Trust, Inc.*, 147 N.H. 396, 404, 791 A.2d 175, 181 (2002) that “[m]ost courts reason, as we do today, that the language ‘legally entitled to recover’ is clear and unambiguous, and that because the insurer stands in the shoes of the uninsured motorist, the claimant cannot prevail against the insurer if the action against the uninsured motorist is barred [by immunity].” (String citations omitted). The *Matarese* court noted the further opinion of some courts that “the purpose of the uninsured motorist statute is to protect insureds from financially irresponsible motorists. That purpose is fulfilled by placing the insured in the same position as if the uninsured motorist had been insured, not a better position” and “there is no reason why insurers should be refused the right to assert the very same rights and defenses available to the person whose alleged negligence they are required to indemnify.” *Id.*

Similarly, the Supreme Court of Kentucky has ruled that proof of legal liability is a prerequisite to recovery of underinsured motorist coverage, noting as follows:

Uninsured motorist insurance is a fault-based coverage obligating insurers to provide indemnification for injuries caused ... by uninsured ... motorists. This type of insurance coverage is neither an all-risk insurance designed to provide coverage for all injuries incurred, nor is it a no-fault motor vehicle insurance that provides coverage without regard to whether a plaintiff is *legally entitled to recover* damages from an uninsured ... motorist.

Masler v. State Farm Mutual Automobile Insurance Co., Ky., 894 S.W.2d 633, 635 (1995) (*emphasis added*). See also *Phillips v. Robinson, 548 S.W.2d 511, 513 (Ky. 1976)* (“The purpose of uninsured vehicle coverage is to insure against loss resulting from *liability imposed by law* and no special contract is created which would circumvent legal liability on the part of the owner or operator of the uninsured motor vehicle.”) (*emphasis added, internal quotation omitted, rev’d on other grounds, 557 S.W.2d 202 (1977)*).

The Oregon Supreme Court in *Vega v. Farmers Insurance Co., 323 Ore. 291, 918 P.2d 95 (1996)* interpreted the phrase “legally entitled to recover” to require the UM/UIM claimant to demonstrate not only fault on the part of the tortfeasor and consequent damages, but also that the claimant had a viable tort claim against the tortfeasor and could have obtained a favorable judgment against the tortfeasor. *Id. at 103-04*.

The Supreme Court of Mississippi, when interpreting its uninsured motorist statute and standard uninsured motorist insurance policy language, similarly ruled that, when the plaintiff cannot recover against the tortfeasor due to statutory immunity, the plaintiff cannot recover uninsured motorist benefits from his own insurer because he is not “legally entitled to recover” damages from the tortfeasor. *Wachler v. State Farm Mut. Auto Ins. Co., 835 So.2d 23 (Miss. 2003)* (affirming that the phrase “legally entitled to recover” in an insurance policy means

damages that the insured would be entitled at the time of injury to recover through legal action against the tortfeasor); *Medders v. U.S. Fidelity and Guaranty Co.*, 623 So. 2d 979, 989 (Miss. 1993) (there is no statutory mandate to provide coverage in instances when the alleged tortfeasor is immune from liability).

This Court has declared that “[t]he primary, if not sole purpose of mandatory uninsured motorist coverage is to protect innocent victims from the hardships caused by negligent, financially irresponsible drivers.” *Perkins v. Doe*, 177 W. Va. 84, 87, 350 S.E.2d 711, 714 (1986) (internal quotations and citation omitted). Unless we consider that the government entities in question (here, the State of West Virginia and the City of Elkins) have indulged in fiscal policies so irresponsible as to be unable to satisfy claims made against them, they would not seem to be the type of entities contemplated by the West Virginia uninsured motorist law. See 8C John A. Appleman, *Insurance Law and Practice* § 5080.65, at 276 (1981).

If petitioners cannot recover for their injuries from Stanton and the City of Elkins, it is not because Stanton or the City were “financially irresponsible” in not insuring the vehicle which Stanton was driving. Rather, the reason would be because the doctrine of sovereign immunity protects Stanton and the City in the performance of governmental functions. See e.g., *Francis*, 546 S.W.2d at 61, citing *City of Port Arthur v. Wallace*, 141 Tex. 201, 171 S.W.2d 480 (1943) (that a governmental unit is protected by the doctrine of sovereign immunity would certainly preclude recovery from that unit, but that does not mean that the unit is “financially irresponsible” for purposes of an uninsured motorist statute).

At the time of the collision that gave rise to this suit and at the time the Greenwich policy was issued, the West Virginia Legislature had not relaxed in any way the doctrine of sovereign immunity, codified at *W. Va. Code* § 29-12A-5(a)(11). The doctrine, as it then existed, protected

municipalities such as the City of Elkins from liability for the torts of their employees committed when the municipality was performing a governmental function.

Moreover, the doctrine of immunity can be invoked by insurers which issue liability insurance policies to the State of West Virginia and its political subdivisions, including insurers of the City of Elkins, so long as the intention to rely on such immunity is stated in the insurance policy so issued. *Bender v. Glendinning*, 219 W.Va. 174, 632 S.E.2d 330 (2006). When such immunity is relied upon by the insurers, the government entity and its employees (such as Stanton the City of Elkins) are not uninsured motorists but, rather, immune motorists.

Notably, the West Virginia Legislature did not include the term “immune motorist” in the uninsured motorist statute. If it had intended to do so, the Legislature could have expressly stated that the purpose of the uninsured motorist statute is to protect insureds against negligent, financially irresponsible motorists *and immune motorists*. However, the Legislature chose not to do so.

Nor did the Legislature require that the insured merely show “some evidence of fault” on the part of the uninsured motorist in order to recover uninsured motorist benefits. Instead, the West Virginia Legislature specifically required that the insured be “legally entitled to recover” damages against the uninsured motorist. Clearly, the Legislature intended the phrase “legally entitled to recover” to have meaning and purpose, such that something more than merely showing “some evidence of fault” was required in order to be entitled to uninsured motorist benefits.

The Legislature also did not include an “immune motorist” in the statutory definition of uninsured motor vehicle codified at *W. Va. Code § 33-6-31(c)*, which defines uninsured motor vehicle as follows:

[a] motor vehicle as to which there is no: (i) Bodily injury liability insurance and property damage liability insurance both in the amounts specified by section two [§ 17D-4-2], article four, chapter seventeen-d of this code, as amended from time to time; or (ii) there is such insurance, but the insurance company writing the same denies coverage thereunder; or (iii) there is no certificate of self-insurance issued in accordance with the provisions of said section. A motor vehicle shall be deemed to be uninsured if the owner or operator thereof be unknown[.]

Nor did the Legislature include an “immune motorist” in the additional statutory definition of uninsured motor vehicle codified at *W. Va. Code § 33-6-31(j)*, which further defines uninsured motor vehicle as follows:

A motor vehicle shall be deemed to be uninsured within the meaning of this section, if there has been a valid bodily injury or property damage liability policy issued upon such vehicle, but which policy is uncollectible, in whole or in part, by reason of the insurance company issuing such policy upon such vehicle being insolvent or having been placed in receivership.

Although the Legislature could have included “*a vehicle driven by an immune motorist*” in these statutory definitions of an “uninsured motor vehicle,” the Legislature chose not to do so.

Therefore, the inescapable conclusion is that the West Virginia uninsured motorist statute was not designed as a system for giving relief to people who cannot recover from a tortfeasor because of sovereign immunity. This conclusion is consistent with the recognition by a majority of courts that an immune motorist is not an uninsured motorist.

For these reasons, petitioners are not entitled to uninsured motorist benefits under either the West Virginia uninsured motorist statute or the Greenwich policy because petitioners are not “legally entitled to recover” compensatory damages from Stanton or the City of Elkins, who are immune from legal liability to petitioners based on sovereign immunity. Accordingly, petitioners’ assignment of error number 2 should be overruled.

B. THE GREENWICH POLICY CLEARLY AND UNAMBIGUOUSLY PRECLUDES UNINSURED MOTORIST COVERAGE FOR CLAIMS ARISING FROM ACCIDENTS INVOLVING GOVERNMENT-OWNED VEHICLES

Under West Virginia law, insurers may incorporate such terms, conditions and exclusions in an automobile insurance policy as may be consistent with the premium charged, so long as any such terms conditions and exclusions do not conflict with the spirit and intent of the uninsured and underinsured motorists statutes. *Syllabus Point 3, Deel v. Sweeney, 181 W. Va. 460, 383 S.E.2d 92 (1989)*. An unambiguous insurance policy provision, which does not conflict with the intent and purpose of the uninsured motorist statute, will be given full effect. *Id.*

This case involves the application of clear and unambiguous insurance policy terms. The insuring clause of the UM/UIM Coverage Form of the Greenwich policy limits uninsured motorist coverage to injuries caused by an “uninsured” vehicle, as follows:

We will pay all sums that the “insured” is legally entitled to recover as compensatory damages from the owner or driver of an “uninsured” or “underinsured motor vehicle.” The damages must result from “bodily injury” sustained by the “insured,” or “property damage” caused by an “accident.” The owner’s or driver’s liability for these damages must result from the ownership, maintenance or use of the “uninsured” or “underinsured motor vehicle.”

(J. App. 880, Form CA 21 22 03 06, at p. 2).

According to the last sentence of the above insuring clause, in order to trigger uninsured motorist coverage under the Greenwich policy, the claim in question must pertain to damages resulting from the ownership, maintenance or use of an “uninsured” motor vehicle. Thus, if the

claim for damages does not result from an “uninsured” motor vehicle,” the claim does not fall within the scope of the uninsured motorist coverage provided by the Greenwich policy.

In this regard, the Greenwich policy defines an “uninsured” vehicle as a “land motor vehicle or ‘trailer:’” (J. App. 882, Form CA 21 22 03 06, at p. 4). However, the Greenwich policy definition of “uninsured vehicle” expressly states that it does not include any vehicle “[o]wned by a governmental unit or agency.” (J. App. 882, Form CA 21 22 03 06, at p. 4). Thus, a vehicle owned by a government unit or agency does qualify as an “uninsured” vehicle under the Greenwich policy

In this case, it is undisputed that the vehicle driven by Stanton at the time of the accident was owned by the City of Elkins. It is equally undisputed that the vehicle driven by Stanton at the time of the accident was a “[o]wned by a governmental unit or agency” within the meaning of the Greenwich policy. Hence, there is no dispute that the vehicle driven by Stanton does not qualify as an “uninsured” vehicle as that term is defined by the Greenwich policy.

When the provisions of an insurance policy contract are clear and unambiguous, they are not subject to judicial construction or interpretation, and full effect will be given to the plain meaning intended. *Syllabus, Keffer v. Prudential Ins. Co., 153 W. Va. 813, 172 S.E.2d 714 (1970)*. In this case, petitioners do not dispute that the uninsured motorist provisions in the Greenwich policy are clear and unambiguous. Hence, such provisions should be given their full effect, and petitioners’ error number 2 should be overruled.

C. THE GOVERNMENT-OWNED VEHICLE EXCLUSION CONTAINED WITHIN THE GREENWICH POLICY DOES NOT VIOLATE PUBLIC POLICY BECAUSE GOVERNMENT-OWNED VEHICLES ARE EXEMPTED FROM COMPLIANCE WITH REGISTRATION AND LICENSING RELATED OBLIGATIONS IMPOSED BY THE WEST VIRGINIA MOTOR VEHICLE CODE

As noted above, petitioners do not contend that the language of the Greenwich policy is unclear or ambiguous. Rather, petitioners contend that the Greenwich policy definition of “uninsured” vehicle is contrary to the spirit and intent of the uninsured motorist statute because it excludes government-owned vehicles from the definition of an “uninsured vehicle.”

However, petitioners’ argument is misplaced because the West Virginia statutory scheme excepts government-owned vehicles from compliance with certain registration and licensing related obligations imposed by the motor vehicle code, including the requirement of mandatory uninsured motorist coverage.

In *Boniley v. Kuchinski*, 223 W. Va. 486; 677 S.E.2d 922 (2009) the Supreme Court of Appeals of West Virginia ruled that a motor vehicle that is excepted from registration and licensing related obligations under the West Virginia motor vehicle code is also excepted from the mandatory security provisions in the Motor Vehicle Safety Responsibility Law, including uninsured motorist coverage mandated by *W. Va. Code § 17D-4-2. Syllabus, p. 7, 223 W. Va. 486; 677 S.E.2d 922 (2009)*.

Boniley involved a claim for uninsured motorist benefits under the plaintiff’s auto policy for injuries she sustained when riding off-road as a passenger on an ATV. Plaintiff’s insurer denied her claim for uninsured motorist coverage based on its policy definition of an “uninsured vehicle,” which specifically excluded off-road vehicles, including ATVs. Like plaintiff herein, the *Boniley* plaintiff claimed that the exclusion of ATVs from uninsured motorist coverage under

her policy violated the letter and spirit of the West Virginia uninsured motorist statute, *W.Va. Code § 33-6-31(b)*. The Supreme Court of Appeals disagreed, and ruled that the policy exclusion was valid and enforceable because an ATV is not an “uninsured motor vehicle” within the meaning of *W. Va. Code § 33-6-31(b)*. *Boniley*, 223 *W. Va.* at 486; 677 *S.E.2d* at 922.

In reaching its conclusion, the *Boniley* Court relied on its prior pronouncements, wherein it held that “the uninsured motorist statute is intended to protect victims who are injured by the negligence of drivers who have *failed to comply with the liability insurance requirements of W. Va. Code § 17D-4-2* (1979).” 223 *W. Va.* at 491, 677 *S.E.2d* at 927 (*emphasis supplied*). Thus, the *Boniley* Court concluded, the uninsured motorist statute was *not* intended to protect victims who are injured by the negligence of drivers who *are not required to comply* with the liability insurance requirements of *W. Va. Code § 17D-4-2*. *Id.*

In this regard, the *Boniley* Court noted that the West Virginia Legislature has *not* required all motor vehicles to maintain security in the form of an insurance policy within the limits of *W. Va. Code § 17D-4-2*. 223 *W. Va.* at 491, 677 *S.E.2d* at 927. Instead, the Legislature has expressly indicated that the security requirement is limited to “[e]very owner or registrant of a motor vehicle *required to be registered and licensed in this state.*” *W. Va. Code § 17D-2A-3(a)* (*emphasis added*). *See also W. Va. Code § 17D-2A-2* (1982) (applying proof of security in article 2A to “the operation of all motor vehicles *required to be registered*” (*emphasis added*)); *W. Va. Code 17D-2A-1* (purpose of article 2A “is to promote the public welfare by requiring every owner or registrant of a motor vehicle *licensed* in this State to maintain certain security *during the registration period for such vehicle*” (*emphasis added*)). *Boniley*, 223 *W. Va.* at 491, 677 *S.E.2d* at 927.

The *Bonney* Court ruled that certain vehicles are expressly excepted from the mandatory security provisions in the Motor Vehicle Safety Responsibility Law, including those listed in *W. Va. Code § 17A-3-2(a)*. In particular, *W. Va. Code § 17A-3-2(a)(6)* expressly states that ATVs are excepted from the requirements of annual registration, license plates and fees. Based on these exceptions, the *Bonney* Court ruled that a motor vehicle that is excepted from registration and licensing related obligations is excepted from the mandatory security provisions in the Motor Vehicle Safety Responsibility Law, including motor vehicle liability insurance coverage mandated by *W. Va. Code § 17D-4-2*. *Bonney*, 223 *W. Va.* at 492, 677 *S.E.2d* at 928.

In so ruling the *Bonney* Court noted that:

[U]ninsured motorist coverage is intended to provide the equivalent of motor vehicle liability coverage under our financial responsibility law. In other words, uninsured motorist coverage is intended to place a motorist who is injured by the negligence of an uninsured motorist in the position he or she would have been in if the negligent motorist had complied with the financial responsibility law and procured the required amount of liability insurance. Where no liability insurance coverage is required on a motor vehicle under the financial responsibility law, obviously no uninsured motorist coverage is mandated to provide the equivalent of such coverage. *Consequently it would not further the purpose of the uninsured motorist statute to construe the statute to require uninsured motorist insurance to cover those motor vehicles which are not required by the financial responsibility law to have liability insurance coverage.*

Bonney, 223 *W. Va.* at 492, 677 *S.E.2d* at 928(*emphasis supplied*).

Because an ATV is excepted from certain registration and licensing related obligations imposed by the West Virginia motor vehicle code, the *Bonney* Court determined that an ATV is not an “uninsured motor vehicle” for the purposes of *W. Va. Code § 33-6-31(b)*. *Bonney*, 223 *W. Va.* at 492, 677 *S.E.2d* at 928. Accordingly, the *Bonney* Court concluded that an insurance policy

provision excluding ATVs from the uninsured motorist coverage mandated by *W. Va. Code § 33-6-31(b)* does not violate the intent and purpose of the uninsured motorist statute. *Id.*

Notably, the same code section relied upon by the Court in *Boniey*, *W. Va. Code § 17A-3-2(a)*, also excepts certain government-owned vehicles from registration and licensing related requirements. Specifically, *W. Va. Code § 17A-3-2(a)(4)* provides as follows:

- (a) Every motor vehicle . . . is subject to the registration and certificate of title provisions of this chapter except:
 - ...
 - (4) Any vehicle of a type subject to registration which is owned by the government of the United States;

As the provisions of *W. Va. Code § 17A-3-2(a)(4)* make clear, federal governmental vehicles are exempt from West Virginia registration requirements. Therefore, pursuant to the Court's reasoning in *Boniey*, vehicles owned by the federal government, as referenced in *W. Va. Code § 17A-3-2(a)(4)*, are *not* required to have uninsured motorist liability insurance coverage pursuant to the financial responsibility law at *W. Va. Code § 17D-4-2*. *Boniey*, 223 *W. Va.* at 492, 677 *S.E.2d* at 928. Further, under *Boniey*, an insurance policy provision excluding vehicles owned by the federal government from the uninsured motorist coverage mandated by *W. Va. Code § 33-6-31(b)* does not violate the intent and purpose of the uninsured motorist statute.

An additional class of vehicles, identified in *W. Va. Code § 17A-10-8(1)*, are exempted from payment of registration fees under the Motor Vehicle Safety Responsibility Law, including vehicles owned by the United States government, the State of West Virginia and any of its political subdivisions. In this regard, *W. Va. Code § 17A-10-8(1)* provides as follows:

- The following specified vehicles shall be exempt from the payment of any registration fees:
- (1) Any vehicle owned or operated by the United States government, the State of West Virginia *or any of their political subdivisions*;

W. Va. Code § 17A-10-8(1) (emphasis supplied).

As the provisions of *W. Va. Code § 17A-10-8(1)* make clear, federal governmental vehicles and vehicles owned by the State of West Virginia or a political subdivision of the State of West Virginia, such as the City of Elkins, are exempt from payment of any registration fees under the motor vehicle code. Therefore, pursuant to the Court's reasoning in *Boniey*, vehicles owned by the City of Elkins are *not* required to have uninsured motorist liability insurance coverage pursuant to the financial responsibility law at *W.Va. Code § 17D-4-2*. *Boniey*, 223 *W. Va. at 492, 677 S.E.2d at 928*. Further, under *Boniey*, an insurance policy provision excluding vehicles owned by the City of Elkins from the uninsured motorist coverage mandated by *W. Va. Code § 33-6-31(b)* does not violate the intent and purpose of the uninsured motorist statute.

Petitioners' reliance upon case law from other jurisdictions is misplaced, since the present dispute is controlled by existing authority provided by the Supreme Court of Appeals of West Virginia in *Boniey*.

Moreover, the cases cited by petitioners are distinguishable on the basis that they involve statutory schemes which differ materially from the West Virginia motor vehicle code. Notably, the cases relied upon by petitioners involve statutes which do not exempt government-owned vehicles from motor vehicle code requirements and obligations, unlike West Virginia's motor vehicle code which excludes government-owned vehicles from the certain registration and licensing related obligations.

As noted by the Supreme Court of Nebraska in *Continental Western Ins. Co. v. Conn*, 262 *Neb. 147, 155, 629 N.W.2d 494, 500 (2001)*, a state's particular statutes are of critical importance to judicial decisions regarding the government-owned vehicle exclusion. Indeed, the *Conn* court noted that the *absence* of exceptions pertaining to government-owned vehicles in a particular state's statutes was fundamental to judicial decisions finding that the government-

owned vehicle exclusion was unenforceable under such statutes. *Id.* In this regard, those states which do not have statutory exceptions for government-owned vehicles have voided policy exclusions for government-owned vehicles, while states with statutes providing exceptions for government-owned vehicles uphold insurance policy exclusions for government-owned vehicles. *Conn*, 262 *Neb.* at 155, 629 *N.W.2d* at 500.

Courts with statutory schemes similar to West Virginia's motor vehicle code, have upheld insurance policy exclusions for government-owned vehicles in the context of uninsured motorist coverage claims. *See e.g. Conn, supra, Jones v. Southern Farm Bureau Cas. Co.*, 251 *S.C.* 446, 163 *S.E.2d* 306 (1968), *Commercial Union Ins. Co., Delaney*, 550 *S.W.2d* 499 (Ky. 1997), and *Francis v. Intern. Serv. Ins. Co.*, 546 *S.W.2d* 57 (Tex. 1976).

In *Jones*, the South Carolina Supreme Court held that a government-owned vehicle exclusion in the uninsured motorist coverage provisions of an insurance policy was valid because South Carolina's Motor Vehicle Safety Responsibility Act, which generally required that motor vehicles be insured, excluded government-owned vehicles from the scope of the act, and the uninsured motorist insurance statutory provisions were a component of this act. The South Carolina Supreme Court held that such exclusion also excluded government-owned vehicles from the definition of "uninsured motor vehicle." 251 *S.C.* at 455, 163 *S.E.2d* at 310.

In *Francis*, the Texas Supreme Court held that a government-owned vehicle exclusion in a standard insurance form approved by the Texas State Board of Insurance was valid because the Texas uninsured motorist statutes authorized the board to exclude certain motor vehicles from the definition of "uninsured motor vehicle." 546 *S.W.2d* at 61.

The reason for an insurers' inclusion in its policy of the government-owned vehicle exclusion is to protect its subrogation rights. An insurance company cannot exercise its subrogation rights against an immune tortfeasor.

Under West Virginia law, insurers may incorporate terms, conditions and exclusions in an automobile insurance policy "consistent with the premium charged." *Syllabus Point 3, Deel v. Sweeney*, 181 W. Va. 460, 383 S.E.2d 92 (1989). In this case, no premium was assessed and no premium was paid to Greenwich to cover the risk of loss associated with accidents caused by immune motorists driving government-owned vehicles. No doubt the underwriters fixed rates for the uninsured motorist coverage provided by Greenwich policy based on the inclusion of the government-owned vehicle exclusion due to the lack of subrogation rights against immune government entities, and neither petitioner nor his employer, Bombardier, paid for coverage beyond this exclusion. Thus, imposing a responsibility upon Greenwich to pay uninsured motorist benefits for petitioners' claims will result in a benefit that was not bargained for by the parties to the insurance contract.

The West Virginia uninsured motorist statute is intended to protect victims who are injured by the negligence of drivers who have *failed to comply* with the liability insurance requirements of *W. Va. Code § 17D-4-2. Boniey*, 223 W. Va. at 491, 677 S.E.2d at 927. The City of Elkins was not required to comply with certain registration and licensing related obligations of the motor vehicle code and, under the reasoning employed in *Boniey*, the vehicle driven by Stanton is not an "uninsured" vehicle for the purposes of *W. Va. Code § 33-6-31(b). Boniey*, 223 W. Va. at 492, 677 S.E.2d at 928. Accordingly, under *Boniey*, the provisions of the Greenwich policy that exclude government-owned vehicles from uninsured motorist coverage do

not violate the intent and purpose of the uninsured motorist statute. *Id.* Petitioners assignment of error number 2 should be overruled.

D. IN THE EVENT THAT THE COURT RULES THAT THE GOVERNMENT-OWNED VEHICLE EXCLUSION OFFENDS WEST VIRGINIA LAW, THE COURT SHOULD UPHOLD THE CIRCUIT COURT'S DECISION TO ENFORCE THE EXCLUSION ABOVE THE MINIMUM LIMITS OF UNINSURED MOTORIST COVERAGE REQUIRED BY W. VA. CODE § 17D-4-2

As explained above, respondent Bombardier submits that the government-owned vehicle exclusion contained within the Greenwich policy does not offend the spirit or intent of the West Virginia uninsured motorist statutes and, further, that no mandatory uninsured motorist coverage is contemplated under the West Virginia statutory scheme for accidents involving immune motorists driving government-owned vehicles.

For these reasons, respondent Bombardier submits that the government-owned vehicle exclusion should be upheld by the Court as a valid and enforceable policy exclusion. Bombardier further submits that the Circuit Court erred by imposing the minimum limits of uninsured motorist coverage required by W. Va. Code § 17D-4-2 into the Greenwich policy.

However, should the Court rule otherwise, Bombardier submits that the Court should uphold the ruling by the Circuit Court that the government-owned vehicle exclusion contained in the Greenwich policy is effective and enforceable above the \$20,000 statutory minimum imposed by the West Virginia uninsured motorist statute.

E. THE CIRCUIT COURT CORRECTLY RULED THAT NO AUTO MEDICAL PAYMENTS COVERAGE BENEFITS ARE OWED UNDER THE GREENWICH POLICY DUE TO AN EXCLUSION FOR INJURIES SUSTAINED BY A BOMBARDIER EMPLOYEE DURING THE COURSE OF SUCH EMPLOYMENT

Bombardier submits that the Circuit Court correctly ruled that the Greenwich policy provides no auto medical payments coverage for petitioners' claims because petitioner Jenkins was injured during the course of his employment for Bombardier.

In this regard, the Auto Medical Payments Coverage Form of the Greenwich policy provides coverage for expenses incurred for medical services to an insured who sustains bodily injury caused by an accident, subject to the following exclusion:

This insurance does not apply to any of the following:

. . .

4. "Bodily injury" to you or your "employee" arising out of and in the course of employment by you."

(J. App. 666, Exclusion 4 at Form CA 99 03 03 06, at p. 1).⁴

Even assuming that plaintiff qualifies as an insured under the Greenwich policy, the coverage provided by the Auto Medical Payments Coverage Form does not apply when the bodily injury in question is sustained by an employee arising out of and in the course of employment by Bombardier. (J. App.666, Exclusion 4 at Form CA 99 03 03 06, at p. 1).

In this case, petitioners affirmatively allege in their complaint that Jenkins was an employee of Bombardier and that, *at the time of the accident, Jenkins was acting within the*

⁴ The Greenwich policy defines "you" to mean the named insured, which here is plaintiff's employer, Bombardier. (App. 909).

course and scope of his employment for Bombardier. These facts are undisputed by the parties to this appeal.

Based on these undisputed facts, the Circuit Court properly held that no coverage is afforded under the Auto Medical Payments Coverage Form of the Greenwich policy due to the clear and unambiguous exclusion for bodily injuries sustained by Bombardier employees in the course of their employment. (J. App. 570).

Petitioners contest the Circuit Court's ruling on the basis of *Henry v. Benyo*, 203 W.Va. 172, 506 S.E.2d 615 (1998). However, petitioners' reliance upon *Henry* is misplaced because *Henry* is factually and legally distinguishable from this case.

In this regard, petitioners concede that *Henry* "did not involve the interpretation of a policy exclusion regarding injuries received in the course of employment." (Petition for Appeal, at p. 33). Here, the sole basis for the Circuit Court's denial of auto medical payment benefits under the Greenwich policy was premised upon a clear and unambiguous exclusion for claims relating to injuries "arising out of and in the course of employment." Thus *Henry* is inapplicable.

Moreover, *Henry* did not involve a claim for uninsured motorist benefits. Nor did the *Henry* case involve a tortfeasor that was immune from suit, as is presented in this case.

These factual and legal differences supported the *Henry* court's ruling that, if the plaintiff was able to obtain a judgment in his separate action against the tortfeasor, then such judgment, if insufficient to compensate him for his injuries, would activate the underinsured motorist coverage under his employer's policy.

In this case, petitioner cannot bring suit, let alone obtain a judgment as contemplated by the *Henry* Court, against Stanton or the City of Elkins due to their immunity defenses.

Therefore, no judgment, as contemplated by *Henry*, can be obtained by petitioners which could potentially trigger an uninsured motorist benefit under the Greenwich policy.

Moreover, any such claim would still be subject to the “course of employment” exclusion contained within the Greenwich policy, which exclusion was *not* contained within the employer’s policy in *Henry*. Thus, as did the Circuit Court below, the Court should disregard *Henry* as inapplicable to the issues presented in this appeal.

For these reasons, the Court should uphold the Circuit Court’s summary judgment ruling regarding the absence of any auto medical payments coverage for petitioners’ claims under the Greenwich policy, and overrule petitioners’ assignment of error number 4.

VII. CONCLUSION

In conclusion, respondent Bombardier respectfully requests that the Court find as follows:

1. No uninsured motorist benefits are owed to petitioners under the West Virginia uninsured or underinsured motorist laws or under the Greenwich policy because petitioners cannot satisfy the requirement that they be “legally entitled to recover” damages for bodily injury against defendant Stanton or defendant City of Elkins due to the fact that these defendants are cloaked with government immunity; and

2. The government-owned vehicle exclusion contained within the Greenwich policy is clear, unambiguous and consistent with the spirit and intent of the West Virginia motor vehicle code and accordingly, operates to exclude petitioners’ claim for uninsured motorist benefits under the Greenwich policy; or

3. If the Court declines to rule as requested by respondent Bombardier in numbers 1 and 2 above, then Bombardier requests that the Court uphold the ruling by the Circuit Court that the government-owned vehicle exclusion contained in the Greenwich policy is effective and enforceable above the \$20,000 statutory minimum imposed by the West Virginia uninsured motorist statute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BOMBARDIER AEROSPACE CORPORATION'S BRIEF AND CROSS-ASSIGNMENTS OF ERROR** was served upon counsel for Appellant via Federal Express, and upon all other counsel of record via First Class United States Mail, postage prepaid, this 22nd day of November, 2011, as follows:

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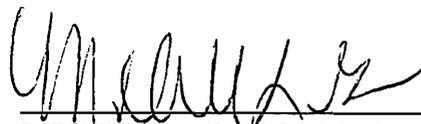
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