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No. ~~11-1142~~

72011

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

JEFFREY JENKINS and M. JEAN MCNABB,

Petitioners,

v.

CITY OF ELKINS, a Municipal Corporation,
STEPHEN P. STANTON, WESTFIELD INSURANCE
COMPANY, NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA, and
BOMBARDIER AEROSPACE CORPORATION,

Respondents.

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

RESPONDENT, WESTFIELD INSURANCE COMPANY'S RESPONSE BRIEF

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COMES NOW the Respondent, Westfield Insurance Company (hereinafter "Westfield"), by and through its counsel, Susan R. Snowden and Martin & Seibert, L.C., and submits the following in response to the Petitioners' Brief:

I. **STATEMENT OF THE CASE**

In addition to Petitioners' Statement of the Case, Respondent, Westfield, would add:

At all times relevant herein, Westfield issued a policy of insurance (policy WN 5047 09/07) to Plaintiffs, insuring against certain losses as more fully set forth in the insurance policy, including declaration page.

Pursuant to the policy of insurance, the Plaintiffs had uninsured motorist coverage of \$500,000.00 for each accident and underinsured motorist coverage of \$500,000.00 for each accident, subject to certain terms, conditions and exclusions.

The Westfield policy of insurance at issue herein contains the provision:

C. We do not provide Auto Medical Payments Coverage for *bodily injury*:

3. Occurring during the course of employment if workers' compensation benefits are required or available for the *bodily injury*.

The Westfield policy of insurance issued to the Plaintiffs in this matter contains an endorsement for uninsured motorist coverage which states in pertinent part:

However, "*uninsured motor vehicle*" does not include any vehicle or equipment:

3. Owned by any governmental unit or agency including, but not limited to:
 - a. the United States of America or any of its agencies; or
 - b. the State of West Virginia or any of its political subdivisions or agencies.

The Westfield policy of insurance issued to the Plaintiffs in this matter contains an underinsured motorist coverage endorsement which provides in pertinent part:

- D. "Underinsured motor vehicle" means a land motor vehicle or trailer or any type 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 or equipment:

1. Owned or operated by a self-insurer under any applicable motor vehicle law.

3. Owned by any governmental unit or agency including, but not limited to:
 - a. the United States of America or any of its agencies; or
 - b. the State of West Virginia or any of its political subdivisions or agencies.

8. That is an *uninsured motor vehicle*.

The Westfield policy of insurance issued to the Plaintiffs in this matter contains an "other insurance clause" which provides as follows:

OTHER INSURANCE

If there is other applicable insurance available under one or more policies or provisions of coverage that is similar to the insurance provided by this endorsement:

- A. Any recovery for damages under all such policies or provisions of coverage may equal but not exceed the highest applicable limit for any one vehicle under any insurance providing coverage on either a primary or excess basis.
- B. Any insurance we provide with respect to:
 1. A vehicle you do not own; or

2. Any amounts paid or payable to or for an insured under any workers' compensation, disability benefits or similar law;

shall be excess over any collectible insurance.

II. SUMMARY OF ARGUMENT

The Circuit Court of Harrison County, West Virginia was correct in ruling that the uninsured motorist coverage under the Westfield policy of insurance issued to the Petitioners herein, did not afford coverage to the Petitioners' claims based upon the "governmental vehicle exclusions"¹ contained therein (*J. Appx., pp. 566, 608*). Therefore, the applicable coverage available to the Petitioners was the statutory minimum of \$20,000.00.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate in this matter as the applicability of the "owned by government agency" exclusion is one of first impression in this State.

IV. ARGUMENT

A. Rulings Upon Motions For Summary Judgment By A Trial Court Are Reviewed *De Novo*.

Pursuant to *Painter v. Peavy*, 192 W.Va. 189, 192, 451 S.E.2d 755, 758 (1994), the standard of review concerning a summary judgment order is *de novo*. Summary judgment should be granted where "it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Id.* Summary judgment is appropriate when the nonmoving party has the burden of proof on an essential element of his or her case and does not make, after adequate time for discovery, a showing sufficient to establish that element. *Poweridge Unit Owners Ass'n v. Highland Properties, Inc.*, 196 W.Va. 692, 698-99, 474 S.E.2d 872, 878-79 (1996).

¹ As referenced by the Harrison County Circuit Court Order of June 8, 2011.

"The interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination which, like the court's summary judgment, is reviewed *de novo* on appeal." *Dairyland Ins. Co. v. Fox*, 209 W.Va. 598, 601, 550 S.E.2d 388, 391 (2001), quoting *Payne v. Weston*, 195 W.Va. 502, 506-7, 466 S.E.2d 161, 165-66 (1995). "Determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law." *Id.*, quoting *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 483, 509 S.E.2d 1, 7 (1998), quoting *Pacific Indemnity Co. v. Linn*, 766 F.2d 754, 760 (3d Cir.1985). "Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

B. Insurance Policies Are Contracts Which Must Be Enforced As Written.

An insurance policy is a contract. It is therefore entitled to the same principles governing interpretation and application of language as any other contract. The Legislature made this clear in W.Va. Code § 33-1-16, defining an insurance policy as "the contract effecting insurance...and *includes all clauses, riders, endorsements and papers attached thereto and a part thereof.*" (emphasis added.) See *Horace Mann Ins. Co. v. Shaw*, 175 W.Va. 671, 676 fn. 5, 337 S.E.2d 908, 913 fn. 5 (1985). "This Court has consistently held that the language of an insurance policy contract, like any other contract, must be accorded its plain meaning, and, where plain, the language must be given full effect, no construction or interpretation being permissible." *White v. Washington Nat'l Ins. Co.*, 162 W.Va. 829, 831, 253 S.E.2d 144, 146 (1979); *Stone v. Nat'l Surety Corp.*, 147 W.Va. 83, 85, 125 S.E.2d 618, 619 (1962).

Insurance policy contracts are enforceable and the provisions will be applied and not construed unless they are contrary to a statute, regulation, or public policy. Syl. Pt. 2,

Shamblin v. Nationwide Mut. Ins. Co., 175 W.Va. 337, 332 S.E.2d 639 (1985). See also *Deel v. Sweeney*, 181 W.Va. 460, 462, 383 S.E.2d 92, 94 (1989).

C. The Circuit Court of Harrison County's Refusal To Find That The National Union Coverage Applied To The Incident Up To Its Limits, Or At A Minimum, To The Financial Minimum Requirement Of West Virginia Law, Was In Error.

The City of Elkins is responsible for meeting West Virginia's minimum financial responsibility requirements such that the National Union coverage must apply up to the minimum statutory requirement prescribed in W.Va. Code §17D-4-12(b)(2). It is undisputed that Defendant Stanton was driving a vehicle owned by the City of Elkins when the accident at issue occurred. It is also undisputed that National Union Fire Insurance Company issued a policy of insurance that was in force on the subject vehicle.

As this Court is aware, W.Va. Code §17D-4-12(b)(2) provides that an automobile owner's liability insurance policy:

Shall insure the person named therein and any other person, as insured, using any such vehicle or vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, operation, maintenance or use of such vehicle or vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each such vehicle, as follows: Twenty thousand dollars because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, forty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and ten thousand dollars because of injury to or destruction of property of others in any one accident.

W.Va. Code, §17D-4-2 operates to require mandatory minimum coverage to protect the citizens of West Virginia. Therefore, a policy insuring a motor vehicle must contain minimums of \$20,000 for bodily injury or death of one person and \$40,000 for two or more persons injured or killed in any one accident. *Id.*; *Miller v. Lambert*, 195 W.Va. 63, 66-7, 464 S.E.2d

582, 585-86 (1995). This effectuates one of the central purposes of the Motor Vehicle Safety Responsibility Law in providing a minimum level of financial security to third-parties who might suffer bodily injury or property damage from negligent drivers. *Blake v. State Farm Mut. Auto. Ins. Co.*, 224 W.Va. 317, 322, 685 S.E.2d 895, 900 (2009).

The Circuit Court agreed with the City of Elkins and National Union's position that the Defendants City of Elkins and Stanton were immune from the Plaintiffs' claims due to the applicability of W.Va. Code §29-12A-5(a)(11). The Petitioner argued below and in their Brief before this Court that such an application of the law, as articulated in the case of *O'Dell v. Town of Gauley Bridge*, 188 W.Va. 596, 425 S.E.2d 551 (1992), creates an "unfair and harsh result" that is not in accord with current public policy of this State. See Petitioners' Brief at pp. 16.

This Court most recently addressed the issue of whether qualified immunity would bar a negligence complaint in *Hess v. W.Va. Dept. of Corrections*, 705 S.E.2d 125 (W. Va. 2010). There, this Court noted that the pertinent issue to consider is whether the policy of insurance waived the defense of the qualified immunity as set forth in *Parkulo v. W.Va. Bd. of Probation and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996). *Hess*, 705 S.E.2d at 130. The *Hess* Court went on to hold that the insurance policy did not waive the defense of qualified immunity, as the policy and its associated documents expressly reserved that defense. Specifically, the certificate of liability in question stated, "the additional insured (Division of Corrections) does not waive any statutory or common law immunities conferred upon it," and the Court found that this statement was sufficient to preserve the defense of sovereign immunity. *Id.*

In the instant case, the Circuit Court found that the language contained in the "certificate of insurance" issued to the City of Elkins was indeed a preservation of the immunities in

accordance with *Bender v. Glendenning*, 219 W.Va. 174, 632 S.E.2d 330 (2006), (*J. Appx.*, pp. 559, 601). The certificate of insurance provided in pertinent part that “it is a condition precedent of coverage under the policy that the additional insured does not waive any statutory or common law immunity conferred upon it.” *Id.* The Circuit Court then extrapolated the endorsement to be incorporated into the terms of the policy of insurance, and applying the *Hess* case, found that the immunity had been preserved and, therefore, the policy of insurance was not applicable to the instant case. *Id.* It is important to note that the Petitioners are correct in their position that the “immunity preservation does not appear in the policy of insurance issued by National Union herein.” See Petitioners’ Brief at p. 21. Instead of expressly and patently providing that the sovereign immunity was preserved under *Bender*, the policy issued stated simply that sovereign immunity was not waived.

As this Court noted in *Bender*, the purchase of insurance does not *per se* waive immunity, and the subject policy must contain appropriate language and/or exclusions to specifically preserve the statutory immunity. It is the Petitioners’ position that the Circuit Court was presented with a conflict of interpretation of the policy and that the language in the certificate of insurance is not part of the contract of insurance. The Petitioners also assert that the Circuit Court erred by not applying the National Union insurance policy to the instant case.

Defendants, City of Elkins and National Union, proffer that policy exclusions bar all claims against them. This is inapposite with West Virginia law, which makes clear that exclusions cannot override the mandatory limits imposed under the State’s financial responsibility law. *Jones v. Motorists Mutual Insurance Co.*, 177 W.Va. 763, 356 S.E.2d 634 (1987) (holding that “‘named driver exclusion’ endorsement in motor vehicle liability insurance policy was of no force or effect up to the limits of financial responsibility required by

W.Va. Code §17D-4-2 but that exclusion was valid above those mandatory limits). In other words, "provisions in an insurance policy that are more restrictive than statutory requirements are void and ineffective as against public policy." *Adkins V. Meador*, 201 W.Va. 148, 153, 494 S.E.2d 915, 920 (1997), citing Syl. Pt. 2, *Universal Underwriters Ins. Co. v. Taylor*, 185 W.Va. 606, 408 S.E.2d 358 (1991). Where a vehicle registered in this State has limits of insurance which are less than those required by West Virginia law, its limits will be enhanced to meet this state's minimum financial responsibility requirements. *Miller v. Lambert*, 195 W.Va. at 67, 464 S.E.2d at 586. Therefore, the National Union policy must provide liability limits which at a minimum meet our state's legal requirements. Where a vehicle registered in a State whose minimum financial responsibility limits are less than those of West Virginia is operated in this State, the financial responsibility limits will be deemed to be enhanced to meet this state's minimum financial responsibility requirements. *Id.* Further illustrating this procedure is W.Va. Code §33-6-17 which directs how an unduly restrictive provision is to be reconciled with respect to the offending policy as a whole:

[a]ny insurance policy, rider, or endorsement hereafter issued and otherwise valid which contains any condition or provision not in compliance with the requirements of this chapter, shall not be thereby rendered invalid but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider, or endorsement been in full compliance with this chapter.

Had the Legislature intended for the State of West Virginia to be excluded from the minimum financial responsibility requirements set forth in W.Va. Code §17D-4-2, or the mandatory policy reformation requirements of W.Va. Code §33-6-17, it would have specifically stated so in the statutes themselves. Further, there is no case that the City of Elkins or National Union have cited for the proposition that the City of Elkins' vehicles should be allowed to operate in the state uninsured and in contravention of the intent of the legislature. As such,

at the minimum, National Union's policy applies its liability limits as required by W.Va. Code §17D-4-2.

D. The Circuit Court Of Harrison County, West Virginia Was Correct In Finding That Uninsured Motorist Coverage Was Not Afforded To Plaintiffs' Claims Due To The Owned By Governmental Agency Exclusion In The Westfield Policy.

The Petitioners urge this Court to find that excluding the UM or UIM claims of an injured insured because the insured's vehicle was struck by a government vehicle is offensive to West Virginia public policy. See Petitioners' Brief at pp. 30. They ask that the government vehicle exclusion in West Virginia be rendered void and unenforceable. *Id.*² The Circuit Court below was presented with the clear and unambiguous language of the Westfield policy which provides as follows:

[H]owever, "**uninsured motor vehicle**" does not include any vehicle or equipment

* * *

3. Owned by any governmental unit or agency including, but not limited to:
 - a. the United States of America or any of its agencies; or
 - b. the State of West Virginia or any of its political subdivisions or agencies.

Id. (emphasis in original) at Bates No. 77 (*J. Appx.*, pp. 229). This is the same policy exclusion found in the Bombardier policy issued by Greenwich. See Motion for Summary Judgment Filed on Behalf of Bombardier Aerospace Corporation and Gallagher Basset Services, Inc. and Memorandum in Support thereof (*J. Appx.*, pp. 340-359).

² It should be noted that the Westfield policy contains an identical exclusion applicable to underinsured motorist coverage.

The Plaintiffs have alleged in the Complaint that at the time of the accident, the vehicle driven by Mr. Stanton was owned by the City of Elkins. Therefore, under the plain and unambiguous language of the policy, the accident falls outside the definition of an uninsured vehicle under the Westfield policy. However, as noted by Westfield in its Motion for Summary Judgment, the endorsement goes on to state that the exclusion applies only to the extent the limits of liability for uninsured motorist coverage exceeds the limits of liability required by the West Virginia Safety Responsibility Law.

The Circuit Court addressed Petitioners' argument that the governmental vehicle exclusion from the definition of an uninsured motorist vehicle was against public policy in its order issued below. That Court analyzed the provisions of W.Va. Code §33-6-31 and held that "the governmental vehicle exclusion is valid and enforceable above the mandatory limits of uninsured motorist coverage required by W.Va. Code §33-6-31. To the extent that a governmental vehicle exclusion attempts to preclude recovery of statutorily mandated minimum limits of uninsured motorist coverage, such exclusion is void and ineffective." (*J. Appx., pp. 570, 612.*) The Court recognized the axiom that insurers can incorporate such terms, conditions and exclusions in automobile insurance policies as may be consistent with the premium charged so long as exclusions do not conflict with the spirit and intent of uninsured and underinsured motorist statutes. *Syl. Pt. 3, Deel v. Sweeny*, 181 W.Va. 460, 383 S.E.2d 92 (1989), (*J. Appx. Pp. 569*). The Court specifically found that the definitions were conspicuous and unambiguous (*J. Appx., pp. 572, 614*), and, further found that Westfield's uninsured coverage requirements "have a preclusive effect..." (*J. Appx., pp. 573, 615*). Accordingly, the Circuit Court opined that the governmental vehicle exclusion was valid and

enforceable above the mandatory limits of uninsured motorist coverage required by W.Va. Code §33-6-31. (*J. Appx .pp. 570, 612*).³

The Petitioners cite to no West Virginia case in support of their position that such an exclusion is against public policy in this jurisdiction. In the cases cited by Petitioners, courts of other jurisdictions have found that the governmental vehicle exclusion is at odds with the mandatory uninsured or underinsured motorist coverage required by the statute in their particular State. However, the policies of insurance at issue herein were approved by the Commissioner of Insurance as required by W.Va. Code §33-6-31(i), and as such were deemed to be consistent with the West Virginia Code by the Commissioner. Further, as held by the Circuit Court below, the uninsured motorist statute specifically references the financial responsibility requirements of §17D-2-4, and thus does not allow for a complete exclusion of benefits for government-owned vehicles under the policies in question. (*J. Appx. pp. 573, 615*).

There is no language in W.Va. Code §33-6-31(b) that specifically precludes a governmental owned vehicle exclusion such as the one included in the Westfield policy. W.Va. Code §33-6-31(b). More importantly, W.Va. Code §33-6-31(b) allows for coverage to be purchased for sums to which “he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle...”. In the instant case, if this Court upholds the sovereign immunity as ruled upon by Judge Beddell herein, the Petitioners are not “legally entitled” to recover from the Defendant City of Elkins or its employee Stanton. As such, uninsured motorist coverage would not apply based upon the legislative definition supplied in §33-6-31(b). However, it should be noted that the Trial Court below did not completely

³ Should this Court find that National Union is responsible for \$20,000.00 of coverage, then the Westfield underinsured exclusion would apply above the mandatory limits.

preclude any recovery of uninsured motorist coverage, but instead required the insurance carrier to pay the minimum financial responsibility requirements pursuant to §17D-2-4. Accordingly, the Respondent asks that this Court find that the purpose of an Uninsured Motorist Act is to protect insureds against negligent, financially irresponsible motorists, but that it should not function as a system for providing relief to those who are precluded from recovery by law under the doctrine of sovereign immunity. See *Francis v. Intern. Serv. Ins. Co.*, 546 S.W.2d 57 (Texas 1976). The Respondent Westfield requests that its clear and unambiguous exclusion be upheld.

V. CONCLUSION

In conclusion, the Respondent, Westfield, respectfully requests that the Court find as follows:

1. That the National Union policy applies due to a failure to properly preserve the government immunity afforded by W.Va. Code §29-12A-5(a)(11) and uphold the governmental vehicle exclusion for underinsured coverage in the Westfield policy; or, in the alternative,

2. To find that the Circuit Court erred in failing to require the City of Elkins' insurance carrier, National Union, to provide the minimum financial responsibility requirement; or, alternatively,

3. If this Court were to uphold the sovereign immunity of the City of Elkins, Mr. Stanton, and their insurance carrier, National Union, that the Court find that the Circuit Court of Harrison County, West Virginia, was correct in its holding that Petitioners were not entitled to the proceeds of the Westfield insurance policy based upon a governmental vehicle exclusion contained therein and were entitled to the statutory minimum coverage of uninsured motorist insurance in the amount of \$20,000.00.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Susan R. Snowden, counsel for Respondent, Westfield Insurance Company, do hereby certify that I served the foregoing **Respondent, Westfield Insurance Company's Response Brief** upon the following counsel, by first class mail, postage pre-paid, on this the **16th day of November, 2011**.

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