

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0750

ROSE L. THOMAS, As Administratrix
of the Estate of Dennis L. Thomas,

Petitioner-Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Respondent-Appellee.

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT SHOULD HAVE RULED BASED UPON THE PERTINENT POLICY LANGUAGE, AND EDUCATED PREDICTION OF WEST VIRGINIA LAW, AND NOT BASED UPON LACK OF REASONABLE EXPECTATIONS AS TO WHICH NO EVIDENCE HAD BEEN TAKEN
2. THE CIRCUIT COURT SHOULD HAVE FOUND THAT THE “OBNI” EXCLUSION WAS NOT ENFORCEABLE FOR THE PURPOSE ASSERTED HERE
3. THE CIRCUIT COURT FAILED TO CONSIDER THE PLAIN LANGUAGE OF THE EXCEPTION TO STATE FARM’S “OBNI” EXCLUSION
4. THE CIRCUIT COURT SHOULD HAVE CONSIDERED THAT A MANDATORY OFFER OF UNDERINSURED MOTORISTS COVERAGE, ONCE ACCEPTED, IS JUST AS MANDATORY AS UNINSURED MOTORISTS COVERAGE, AND THE HOLDING OF IMGRUND V. YARBOROUGH SHOULD BE EXTENDED

STATEMENT OF THE CASE

This is an underinsured motorist claim arising out of an unusual motor vehicle-tractor/manure-spreader collision which tragically took the life of Petitioner’s husband. At issue is an Owned But Not Insured (hereinafter “OBNI”) motor vehicle exclusion contained in the underinsured motorist policies listing the family automobiles but not the farm equipment.

More specifically, on August 9, 2008, Mr. Thomas was operating the farm tractor, pulling the manure spreader, after having lent the spreader to a neighbor. He was nearly back to his son’s driveway¹, where the equipment was normally kept, when he was struck by a vehicle negligently operated by Charlotte Cain. The tractor overturned, pinning Mr. Thomas, and he later died from the injuries sustained.

¹ The Thomas’s and their son have adjoining properties.

Petitioner brought an action both for the pain and suffering while Mr. Thomas lived, and for his wrongful death. The liability carrier for Ms. Cain subsequently offered its liability policy limit and Respondent, State Farm, as underinsurer, consented to the liability settlement and waived any right to subrogation against Ms. Cain. State Farm protested, however, any entitlement to underinsured benefits. Following production of the policies and identification of the provisions relied upon, State Farm moved the Circuit Court for summary judgment. Petitioner responded, setting forth three heretofore unanswered questions of law preliminary to such determination [See Assignments of Errors 2, 3, and 4 herein and Response to State Farm Mutual Insurance Company's Motion for Summary Judgment Pages 89 through 98]. Unfortunately, the Circuit Court did not address any of them. Instead, without the benefit of any findings of fact or conclusions of law, and further without any determination that the policy was ambiguous, or evidence from the parties, the Circuit Court summarily concluded that there was no reasonable expectation of coverage, and granted State Farm's motion on that basis alone, albeit not asserted by either of the parties. [See Assignment of Error No. 4 herein]. Petitioner contends that the contractual language dictates otherwise. Further, the Petitioner says if the decedent were walking along the highway, riding his bicycle along the highway, or standing along the highway there would be no issue that the underinsured coverage would be applicable herein.

The Petitioner says that the Circuit Court could not have possibly known the reasonable expectations of the parties without taking testimony of the parties.

Further, the Circuit Court failed to consider the true purpose and application of the "OBNI" exclusion which has no application to the facts herein. Also, the Court ignored the explicit language of the exception which provides the petitioner coverage based upon the facts herein.

SUMMARY OF ARGUMENT

The Petitioner says that the underinsured motorist coverage bargained for and purchased by the deceased is applicable to the case herein.

Thus, the Respondent, State Farm, has a common law and contractual duty to pay the policy limits unto his Estate.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

ARGUMENT

1. THE CIRCUIT COURT SHOULD HAVE RULED BASED UPON THE PERTINENT POLICY LANGUAGE, AND EDUCATED PREDICTION OF WEST VIRGINIA LAW, AND NOT BASED UPON LACK OF REASONABLE EXPECTATIONS AS TO WHICH NO EVIDENCE HAD BEEN TAKEN

The Circuit Judge correctly determined that prior case law was not dispositive of these facts. Unfortunately, instead of deciding the novel issues based upon the pertinent policy language, and prediction of West Virginia law, she leap-frogged to the Doctrine of Reasonable Expectations, without any finding of ambiguity, or taking evidence of any kind, to-wit:

The bad news, Tiffany, is I don't believe Deel applies to this situation because in that case the person seeking coverage of the underinsured, that was a kid whose father had insurance which included underinsured, but the kid's car[it]self was insured by another company. So I think that's a distinction that we're not dealing with here today. So to that extent, I disagree with you. However, I am going to grant your motion because I believe in this case there was no expectation of coverage, John because the tractor wasn't insured at all.

(Page 16 of the Hearing Transcript made a part of the Appendix herein at Pages 144 through 149.

The Order which followed merely stated:

...the Court determined that, as a matter of law, State Farm had no duty to provide UIM benefits to the Plaintiff or her deceased husband as neither had a reasonable expectation of insurance coverage because the tractor driven by the deceased at the time of the accident at issue was never insured for coverage.

(Page 2 of the Order appealed from made a part of the Appendix herein at Pages 4 through 7).

Generally, this Court has limited the application of the Doctrine of Reasonable Expectations to cases in which the contract was found to be ambiguous, *National Mut. Ins. Co v. McMahan & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1997), abrogated on other grounds by *Potesta v. United States Fid. & Guar. Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998), but there was no such finding here. Indeed, the Doctrine is normally applied as a rule of construction, and unambiguous contracts are to be applied and not construed. *Luikart v. Valley Brook Concrete & Supply, Inc.*, 216 W.Va. 748, 613 S.E.2d 896 (2005)². The Circuit Court simply erred in raising that issue sua sponte.

Moreover, in order to determine the expectations of the parties, the Court would necessarily have to take evidence regarding the same.³

With respect to insurance contracts, the Doctrine of Reasonable Expectations is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

McMahon, supra, at Syl. Pt. 8. The record here is devoid of any such evidence and the Circuit Court exceeded its authority in making that executive determination.

² While *Luikart* notes limited exceptions, such as when promotional material creates a different impression, or overt representation contrary to the policy, no such inquiry was made here.

³ Inasmuch as neither side asserted the Doctrine of Reasonable Expectations, no discovery had been undertaken in that regard.

2. THE CIRCUIT COURT SHOULD HAVE FOUND THAT THE “OBNI” EXCLUSION WAS NOT ENFORCEABLE FOR THE PURPOSE ASSERTED HERE

Although Petitioner and her husband had two separate State Farm automobile policies, each contained the identical OBNI Exclusion:

THERE IS NO COVERAGE:

2. FOR AN **INSURED** WHO SUSTAINS **BODILY INJURY** WHILE **OCCUPYING** OR OTHERWISE USING A MOTOR VEHICLE OWNED BY YOU OR ANY **RESIDENT RELATIVE** IF IT IS NOT YOUR CAR OR A **NEWLY ACQUIRED CAR** AND IT IS:

- a. NOT INSURED FOR UNDERINSURED MOTOR VEHICLE COVERAGE; OR
- b. INSURED FOR UNDERINSURED MOTOR VEHICLE COVERAGE UNDER ANOTHER POLICY ISSUED BY **US**

OBNI exclusions, like the foregoing are not new. Professor Widiss⁴ notes that such exclusions existed from the time uninsured motorist coverage was first offered as an optional coverage in the late 1950s and early 1960s. He surmises that such exclusion would then have been deemed reasonable provided it was clear and unambiguous. That was before any such coverage, or coverage offer, was mandated. Alan I. Widiss, *Uninsured and Underinsured Motorist Insurance*, §4.19B (3rd Edition).⁵ The initial purpose of the exclusion, according to

⁴ An exception to the OBNI Exclusion is quoted and discussed *infra*.

⁵ The West Virginia Supreme Court has often cited Alan I. Widiss, *Uninsured and Underinsured Motorist Insurance* when analyzing matters pertaining to such coverage. See e.g., *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (2000), *Adkins v. Meador*, 201 W.Va. 148, 494 S.E.2d 915 (1997), *State ex rel. State Farm Mut. Auto. Ins. Co. v. Canady*, 197 W.Va. 107, 475 S.E.2d 107 (1996), *Barth v. Keffer*, 195 W.Va. 51, 464 S.E.2d 570 (1995), *Davis V. Foley*, 193 W.Va. 595, 457 S.E.2d 532 (1995), *State Farm Mut. Auto. Ins. Co. v. Norman*, 191 W.Va. 498, 446 S.E.2d 720 (1994), *State ex rel. Allstate Ins. Co. v. Karl*, 190 W.Va. 176, 437 S.E.2d 749 (1993), *Harman v. State Farm Mut. Auto. Ins. Co.*, 189 W.Va. 719, 434 S.E.2d 391 (1993), *Thomas v. Nationwide Mut. Ins. Co.*, 188 W.Va. 640, 425 S.E.2d 595 (1992), *Nadler v. Liberty Mut. Fire Ins. Co.*, 188 W.Va. 329, 424 S.E.2d 256 (1992), *Pristavec v. Westfield Ins. Co.*, 184 W.Va. 331, 400 S.E.2d 575 (1990), *State Auto Mut. Ins. Co. v. Youler*, 183 W.Va. 556,

Widiss, was simply to reduce risk, but, he contends, that reasoning no longer applies to the extent the coverage is mandatory.

Because uninsured motorist insurance is statutorily mandated, there is little, if any, justification for allowing insurers to include this coverage exclusion in order to reduce their potential liability. Once a State has decided it is in the public interest to assure a source of indemnification to persons who are injured by a negligent uninsured motorist, then the insurance ought to be available to an insured person at all times, including when the insured is occupying a vehicle owned by another “clause (a)” insured, walking down a street, or sitting in a rocking chair.

Id. This Court has also noted the difference between clause (a)/class one and clause (b)/class two insureds, see, *Starr v. State Farm Fire & Casualty Company*, 188 W.Va. 313, 423 S.E.2d 922 (1993) and, at least in a dissent to a per curiam opinion, the portable nature of first party coverage, *Cantrell v. Cantrell*, 213 W.Va. 372, 582 S.E.2d 819 (2003) (citing majority opinions elsewhere). Petitioner and her husband were both clause (a)/class one insureds under their respective policies; Starr and Cantrell were not. Any distinction between uninsured and underinsured coverages based on the coverage mandate is discussed *infra*.

Widiss notes that industry trade groups and companies that prepare insurance policy forms rarely publish explanations of the reasons for coverage limitations but goes on to speculate about all that he can fathom. He says one such rationale might be to encourage the acquisition of insurance. Viewed in that light, he says the exclusion serves both the industry’s interest in promoting the sale of insurance, and the public interest in having owners acquire insurance for all vehicles. He cites *Limpet v. Smith*, 56 Wis. 2d 632, 638, 203 N.W.2d 29, 32-33(1973), dealing with liability insurance, and which further quoted *Roe v. Larson*, at 99 Wis. 2d 332, 338, 298 N.W. 2d 580, 583-584 (1980), in relation to uninsured motorist coverage, to-wit:

396 S.E.2d 737 (1990), *Lee v. Saliga*, 179 W.Va. 762, 373 S.E.2d 345 (1988), *Bias v. Nationwide Mut. Ins. Co.*, 179 W.Va. 125, 365 S.E.2d 789 (1987), *Davis v. Robertson*, 175 W.Va. 364, 332 S.E.2d 819 (1985)

The purpose of defining and limiting the meaning of these terms with respect to these coverage provisions in the automobile liability policies (which terms exclude liability arising out of the use of another automobile owned by or regularly used by a member of an insured's household) is to avoid coverage for several vehicles owned by members of the same family who, by their close relationship, might be expected to use each other's cars without hindrance and with or without permission. Without this limitation a person could purchase just one policy on only one automobile and thereby secure coverage for all the other vehicles he may own or vehicles the members of his family may own while residents of the same household.

Widiss finds, however, that while those are laudable objectives, it is doubtful whether the OBNI exclusion has much impact in fulfilling them because most purchasers are probably unaware of the exclusion and its impact on uninsured [or underinsured] motorist coverage. Widiss, *supra*.

Another reason debated by Professor Widiss is that such exclusion encourages the acquisition of insurance from a single insurance company. He suggests that if an insured acquires coverage for all the vehicles he or she owns under a single policy then each of the vehicles is insured and the exclusion does not apply.⁶ Nonetheless, Widiss ultimately concludes that since most insurance companies make little, if any, effort to make this fact known to purchasers, it is unlikely that reasoning is sound either. Widiss, *supra*.

The next ostensible reason proffered by Professor Widiss is a limited form of intra-family tort immunity that would preclude coverage when a claim is based on the negligence of another family member. He cites *Automobile Club Insurance Co. v. Craig*, 328 F. Supp. 988 (E.D. Pa., 1971) wherein the claimant was a passenger in her husband's car. The Court concluded that there was no liability coverage because the bodily injury liability policy excluded coverage for the insured or any member of the family residing in the same household. Since no

⁶ Not applicable to State Farm, which writes separate policies for each vehicle.

liability insurance was available, the Court further considered the possibility of coverage under the uninsured motorist insurance required by the Kentucky statute. The Court observed that:

If the most literal reading of the statute were applied in the present case, one could logically conclude that because the family exclusion clause absolves the liability insurer from coverage as to the particular accident, the automobile is thus an uninsured motor vehicle as defined by the statute, the language of the policy notwithstanding and that, therefore, the insurer is liable to the estate of Mattie L. Craig under its uninsured automobile coverage.

Id., 328 F. Supp. At 990. The Court further observed, however, that:

If such a reading of the statute were applied, insurers would be effectively precluded from protecting themselves from liability arising from intra-family litigation.

Id., 328 F. Supp. At 990-991. The Court determined that since the language of the statute did not manifest such intent on the part of the legislature, the uninsured motorist statute did not dictate that result. Accordingly, there was no coverage under the uninsured motorist insurance. With respect to that reasoning, Professor Widiss concludes that in the context of [uninsured and underinsured] motorist coverage, the goal of providing indemnification has great importance and should be accorded a higher priority than the consideration that supports an intra-family immunity.⁷ Widiss also comments that although the insurance company's liability under the uninsured [and underinsured] motorist insurance depends on the negligence of a person –who in some instances may be a family member – the claim is against the insurance company under a first party insurance contract. Therefore, he concludes that the possibility of disrupting the family by litigation among family members, probably the most important justification for the intra-

⁷ Not applicable in West Virginia; Child versus Parent immunity abolished in auto liability case, *Lee v. Comer*, 159 W.Va. 585, 224 S.E.2d 721 (1976); Wife versus Husband immunity totally abolished, *Coffindaffer v. Coffindaffer*, 161 W.Va. 557, 244 S.E.2d 338 (1978); Parent versus Child immunity totally abolished, *Erie Indemnity Co. v. Kearns*, 179 W.Va. 305, 367 S.E.2d 774 (1988).

family immunity, does not exist in this context and the exclusion should not be justified on that basis. *Widiss, supra.*

Although he makes no reference to ambiguity, Professor Widiss next raises the justification implicit in Judge Tucker's decision in this case, namely, manifestation of the parties' intent or expectations. He notes that such enforcement has occasionally been urged on the basis that, so long as the coverage provisions are not in conflict with the State's uninsured [or underinsured] legislation, insurance policy terms should be treated as an agreement between the parties. He cites an Ohio Supreme Court decision wherein that Court initially held:

We hold, as did the Court of Appeals below, that there is a preponderance of merit in the insurance company's argument that the terms of the contract of insurance must be given due consideration, and that weight must be given to what was contemplated by the parties as to the coverage of the policy.

Orris v. Claudio, 63 Oh. St. 2d 140, 143, 17 Oh. Op. 3d 85 at 87-88, 406 N.E. 2d 1381,1383 (1980).

The *Orris* decision was overruled a year later by *Ady v. West American Insurance Company*, 69 Oh. St.2d 593, 433 N.E.2d 547 (1981) in which the Court concluded "that the exclusion in *Orris* is contrary to the purpose of the statute". *Id.*, 433 N.E. 2d 551. Professor Widiss concludes that although the exclusion is undoubtedly "contemplated" by the insurance company, the Ohio decision strains credulity in positing that the exclusion is specifically contemplated by the insurance purchaser. To demonstrate his point of view, he then cites this Court's reasoning in *Bell v. State Farm Mutual Automobile Insurance Company*, 157 W.Va. 623, 207 S.E.2d 147, 150-151 (1974). *Widiss, supra.*⁸

The final possible rationale considered by Professor Widiss is avoidance of multiple coverage. He cites Colorado's *Arguello v. State Farm Mutual Automobile Insurance*

⁸ This Court distinguished *Bell* in *Deel v. Sweeney*, 181 W.Va. 460, 383 S.E.2d 92 (1989) which is discussed below.

Company, 42 Colo. App. 372, 599 P.2d 266 (1979) and Florida's *State Farm Mutual Automobile Insurance Company v. Wimpee*, 376 S. 2d 20 (1979) cert. denied, 385 So. 2d 762 (1980).

Ultimately, he concludes that Courts should, and probably will, evaluate enforceability of the provision on that theory in the same way as they do other multiple coverage provisions. See, e.g., *Hedrick v. Motorist Mutual Insurance Company*, 22 Oh. St.3d 42, 488 N.E.2d 840, 842 (1986), wherein the majority noted that the Ohio legislature had allowed insurance companies to include provisions in their policies to prohibit the stacking of insurance and, to construe the statute otherwise would defeat the objectives of the legislature in amending the statute. *Widiss, supra*.

None of the various rationales suggested by Professor *Widiss* are applicable here. Mr. Thomas wasn't in any way encouraged to obtain underinsured motorists coverage on the tractor because it was not registered for road use to begin with; each of the Thomas's automobile policies were already written by State Farm; neither side contends that there was any specific negotiation or intent not to cover Mr. Thomas while operating the tractor; Petitioner is not suing another family member; and she does not seek to stack multiple policies. Mrs. Thomas simply seeks to collect one limit, under one policy, although she paid for two, and has been denied both.

This Court has never scrutinized or sanctioned any specific reasoning proffered by an insurer for the OBNI exclusion. It did generally uphold a UIM exclusion as contained in an underinsured motorists policy in *Deel v. Sweeney*, 181 W.Va. 460, 383 S.E.2d 92 (1989). Citing W.Va. Code 33-6-31(k). Specifically, Justice Workman wrote:

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 exclusions do not conflict with the spirit and intent of the uninsured and underinsured motorist statutes.

Id at Syl. pt. 3. Nonetheless, as Judge Tucker correctly noted below, the facts in *Deel* were significantly different, namely, a claimant operating a separately insured vehicle seeking to collect underinsured benefits from his father’s policy with respect to which the claimant was not named. Here, the tractor was not registered for road use, and was not insured, and so the underinsured coverage Petitioner seeks to collect is precisely the benefit Mr. Thomas, himself, bought and paid for, in case he was injured or killed by an underinsured motorist, as turned out to be the case. To exclude coverage in that context does conflict with the spirit and intent of underinsured motorist’s coverage. Specifically, in *Pristavec v. Westfield Insurance Company*, this Court determined the “preeminent public policy of the underinsured motorists statute [] is to provide full compensation, not exceeding coverage limits, for an injured person for his or her damage not compensated by negligent tortfeasor...” Syl. Pt 3, 184 W.Va. 331, 400 S.E.2d 575 (1990).

In the underinsured context, Professor Widiss notes the conundrum:

Coverage for clause/class (1) insureds generally exists without regarding to whether the individual is occupying a vehicle. However, when a clause/class (1) insured is injured while occupying a vehicle owned either by that individual or by a family member who resides in the same household, a claim for underinsured motorist coverage benefits may be subject to an exclusion which states:

- A. We do not provide Underinsured Motorist Coverage for bodily injury sustained by any person:
 - 1. While occupying, or when struck by, any motor vehicle or trailer of any type owned by you or any family member which is not insured for this coverage under this policy.

This type of provision is commonly referred to as a “family member” or “owned vehicle” exclusion. The enforceability of identical or similar limitations in the uninsured motorist coverage terms –as well as similar provisions in motor vehicle liability insurance – has been considered by courts in many jurisdictions. A substantial body of judicial decision is now developing as a result of disputes

about the enforceability and effect of this type of limitation in the underinsured motorist's insurance coverages. There are numerous precedents sustaining the validity of such coverage limitations, as well as many voiding such exclusions.

Widiss, *supra*, at §33.5. He then reviews the reasons. As to judicial decisions precluding the enforcement of, or voiding, the exclusion, he states:

In many states, judicial decisions have concluded that an "owned vehicle/family member" exclusion may not be used by insurers to preclude coverage when an insured has not been fully indemnified for injuries resulting from an accident caused by an unrelated tortfeasor operating an underinsured motor vehicle. The decisions in these cases have been based either (1) on judicial precedents established in coverage disputes involving this exclusion in uninsured motorist insurance coverages (that is, judicial precedents holding that such a provision is invalid and unenforceable because it violates the public policy of the state manifested by statutes establishing requirements for uninsured motorist insurance) or (2) on an assessment that such exclusions conflict with the public policy underlying the legislation which mandates underinsured motorist coverage be made available to the purchasers of motor vehicle insurance policies.

Id. He goes on to list no less than 22 such jurisdictions. Again, petitioner urges careful scrutiny of the purpose of the exclusion in further determining enforceability in West Virginia.

At risk of stating the obvious, it merits noting that underinsured motorist coverage is intended to provide coverage for that which the tortfeasor's liability policy would have covered if his or her limits had been sufficient to satisfy the full extent of the damages. From that perspective, it makes no difference what car the victim is in or, for that matter, whether the victim is even in a car. Assuming fault, proximate cause, and damages, the tortfeasor's liability policy pays. So, too, should the underinsured motorist coverage which is intended to augment the liability coverage when the latter is insufficient.

On the other hand, assuming proper policy language, liability coverages do not stack. *Shamblin v. Nationwide Mutual Insurance Co.*, 175 W.Va. 337, 332 S.E.2d 639 (1985). To the extent State Farm applies its underinsured OBNI exclusion to likewise preclude stacking it is

a proper application. To the extent that State Farm applies its OBNI exclusion to a class one insured, merely seeking to obtain a single limit of underinsured motorists' coverage, it is not. Specifically, it should not be applied where, as here, the victim was not even in a vehicle intended for use on the road but was struck by one that was.

3. THE CIRCUIT COURT FAILED TO CONSIDER THE PLAIN LANGUAGE OF THE EXCEPTION TO STATE FARM'S "OBNI" EXCLUSION

Even assuming that, after careful deliberation, this Court determines that OBNI exclusions are permissible beyond operation as an anti-stacking provision, as to all classes of insureds, Petitioner then asks the Court to focus its attention on the plain language of the exception to the exclusion not heretofore addressed. To that end, the Court needs to know that it is undisputed that, at the time of the subject collision, Mr. Thomas was operating a tractor owned by him, only. The significance of that fact, and its impact with respect to the exception to the specific OBNI exclusion in State Farm's policy, was overlooked both by the adjuster and the Circuit Court. The OBNI exclusion states:

THERE IS NO COVERAGE:

2. FOR AN **INSURED** WHO SUSTAINS **BODILY INJURY** WHILE **OCCUPYING** OR OTHERWISE USING A MOTOR VEHICLE OWNED BY YOU OR ANY **RESIDENT RELATIVE** IF IT IS NOT YOUR CAR OR A **NEWLY ACQUIRED CAR** AND IT IS:
 - a. NOT INSURED FOR UNDERINSURED MOTOR VEHICLE COVERAGE; OR
 - b. INSURED FOR UNDERINSURED MOTOR VEHICLE COVERAGE UNDER ANOTHER POLICY ISSUED BY **US**

This exclusion does not apply to the first *person* shown as a named insured on the Declaration Page and that name insured's spouse who resides primarily with that named insured, while *occupying* or otherwise using a motor vehicle not owned by one or both of them.⁹

State Farm applies its policy as if the underscored words were: not owned by [either] or both of them. It does not say that. The subject tractor was not owned by one of them, namely Mrs. Thomas. Likewise, it was not owned by both of them. It was simply owned by Mr. Thomas. Therefore, the exception, rather than the exclusion, applies. While this may appear to be semantical, this Court has been unequivocal. Either the words of the policy are clear, and are therefore strictly applied as written, *Kefer v. Prudential Insurance*, 153 W.Va. 813, 172 S.E.2d 714 (1970) or, if ambiguous, the ambiguity must be construed against the drafter and in favor of coverage. *National Mutual Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1997), abrogated on other grounds by *Potesta v. U.S. Fidelity & Guaranty Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998). Petitioner contends that strict application, as written, renders coverage. Alternatively, and at the very least, State Farm's wording renders it ambiguous and coverage still prevails.

4. THE CIRCUIT COURT SHOULD HAVE CONSIDERED THAT A MANDATORY OFFER OF UNDERINSURED MOTORISTS COVERAGE, ONCE ACCEPTED, IS JUST AS MANDATORY AS UNINSURED MOTORISTS COVERAGE, AND THE HOLDING OF IMGRUND V. YARBOROUGH SHOULD BE EXTENDED

In *Imgrund v. Yarborough*, 199 W.Va. 187, 483 S.E.2d 533 (1997) this Court allowed enforcement of an OBNI only in excess of minimum financial responsibility limits of

⁹ Bold Italics indicate words which are defined in the policy, but none are in dispute, and therefore are not addressed here. Underscoring, however is added here to draw the Court's attention to the operative words which are very much in dispute.

\$20,000.00. The facts in *Imgrund* involved an uninsured motorist.¹⁰ This Court has not had occasion to specifically say whether it would extend the same to underinsured motorists coverage. While there may be a distinction, because uninsured is mandatory whereas underinsured is only a mandatory offer, in the final analysis, it is a distinction without a difference. That is to say, once properly offered, if an insured accepts, which the Thomas's indisputably did, then the insurer is required to provide underinsured motorists coverage just the same as uninsured.¹¹ Under those circumstances, Petitioner argued that there was no reason not to apply the holding of *Imgrund* to underinsured as well, and asked the Court to find underinsured motorists coverage of at least \$20,000.00.¹² The Circuit Court did not answer. Petitioner now asks this Court to do so.

CONCLUSION

WHEREFORE, Petitioner asks this Court to answer the previously unanswered questions and reverse as a matter of law, or in the alternative, remand and direct the Circuit Court to make such rulings and/or take evidence on the issue of reasonable expectations of the parties.

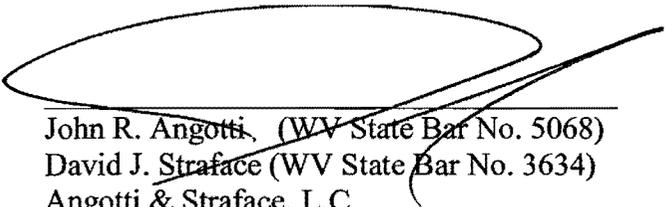
¹⁰ Like Mr. Deel and Ms. Cantrell, Mr. Imgrund sought recovery under his parents' policy on which he was not personally named.

¹¹ In *Deel*, supra, Justice Workman noted the distinction and further recognized the clear legislative intent to treat uninsured and underinsured motorist coverages differently. The disparate treatment, however, is limited to the right to waive underinsured coverage. As insured cannot entirely waive uninsured coverage. This case is not about waiver and where, as here, the insured affirmatively exercised the option to purchase coverage, it then became mandatory.

¹² The actual per person limit purchased by Mr. Thomas was \$100,000.

ROSE L. THOMAS, As Administratrix
of the Estate of Dennis L. Thomas,
Petitioner-Appellant,

BY COUNSEL



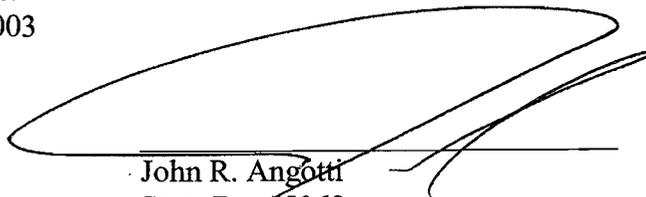
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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of July, 2011, I served a true and actual copy of the foregoing Petitioner's Brief, on the following counsel of record, by depositing the same in the United States Mail, postage prepaid and addressed to them as follows:

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A large, stylized handwritten signature in black ink, appearing to read 'John R. Angotti', is written over a horizontal line.

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