

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SEP 16 2011

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.

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On April 1, 2011, The Circuit Court of Monongalia County entered an order granting summary judgment to the Respondent, State Farm Mutual Automobile Insurance Company (“State Farm”), finding that State Farm had no obligation to provide underinsured motorist (“UIM”) benefits to the Petitioner, or the Petitioner’s decedent. It is from that order that the Petitioner appeals.

On or about August 9, 2008, Petitioner’s decedent, Dennis Thomas (hereinafter sometimes referred to as “Mr. Thomas”), was operating a Ford 6100 Workmaster multi-wheel tractor upon a public highway known as Route 7, Mason-Dixon Highway, in Monongalia County, West Virginia. *See* Joint Appendix (“J.A.”) at pages 22-33, 36. The Ford 6100 Workmaster was owned by Mr. Thomas at the time of the subject accident. *See* J.A. at 22-33. On the aforesaid date, the Defendant below, Charlotte Cain (hereinafter sometimes referred to as “Defendant Cain”), was operating a 1999 Ford Explorer, also traveling on Route 7, Mason-Dixon Highway, in Monongalia County, West Virginia. *See Id.*

On the aforesaid date, the vehicle being operated by the Defendant, Charlotte Cain, collided with a hay trailer, which was being pulled behind the tractor operated by Mr. Thomas. *See* J.A. at 22-33. The impact with Defendant Cain’s vehicle caused the Ford 6100 Workmaster to overturn and entrap Mr. Thomas. As a result of the August 9, 2008 accident, Mr. Thomas suffered fatal injuries. *See Id.*

At the time of the August 9, 2008 motor vehicle accident, Defendant Cain was insured under a policy of automobile liability insurance issued by Nationwide Insurance Company. Also at that time, Petitioner’s decedent was insured under two (2) policies of

automobile insurance issued by State Farm, the first being Policy Number 156 36782-B27-48J, insuring a 2002 GMC K2500 pickup truck, with UIM limits of One Hundred Thousand Dollars (\$100,000.00) per person and Three Hundred Thousand Dollars (\$300,000.00) per accident. *See* J.A. at 39-58. In addition, State Farm also issued a policy of automobile insurance, Policy Number 3170-447-48D, insuring a 2004 Oldsmobile Silhouette, with UIM limits of Twenty-Five Thousand Dollars (\$25,000.00) per person and Fifty Thousand Dollars (\$50,000.00) per accident. *See* J.A. at 59. No other policies of automobile insurance were issued by State Farm to either Petitioner or Petitioner's decedent at the time of the August 9, 2008 motor vehicle accident.

The automobile policies of insurance issued by State Farm to the Petitioner and/or Petitioner's decedent, which were in effect at the time of the August 9, 2008 accident, contain the following terms in Policy Form 9848A:

UNDERINSURED MOTOR VEHICLE COVERAGE

This policy provides Underinsured Motor Vehicle coverage if "W" is shown under "Symbols" on the Declarations Page.

Additional Definitions

Insured means:

1. *you*;
2. *resident relatives*;
3. any other *person* while *occupying* or otherwise using:
 - a. *your car*;
 - b. *a newly acquired car*; or
 - c. *a temporary substitute car*.Such vehicle must be used within the scope of *your* consent. Such other *person occupying* or otherwise using a vehicle used to carry *persons* for a charge is not an *insured*; and
4. any *person* entitled to recover compensatory damages as a result of *bodily injury* to an *insured* as defined in items 1., 2., or 3. above.

See J.A. at 49. The automobile insurance policy also contains the following:

Insuring Agreement

We will pay compensatory damages for *bodily injury* and *property damage* an *insured* is legally entitled to collect from the owner or driver of an *underinsured motor vehicle*. The *bodily injury* must be sustained by an *insured*. The *bodily injury* and *property damage* must be caused by an accident that involves the operation, maintenance, or use of an *underinsured motor vehicle* as a motor vehicle.

See J.A. at 49. The State Farm policy also contains certain exclusions from coverage under the UIM coverage of said policy. In fact, the policy unambiguously provides the following:

Exclusions

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 IF 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 Declarations Page and that named 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.

See J.A. at 50.¹ The term "*occupying*" is further defined as "in, on, entering, or exiting."

See J.A. at 43.

¹"*Your Car*" is defined in the subject policy as "the vehicle shown under YOUR CAR on the Declarations Page. *Your Car* does not include a vehicle that *you* no longer own or lease." J.A. at 43. In this case, "*Your Car*" on Policy Number 156 3672-B27-48J was a 2002 GMC K2500

The undisputed facts in this case demonstrate that Petitioner's decedent, Mr. Thomas, was occupying a motor vehicle owned by him at the time of the August 9, 2008 fatal accident. *See* J.A. at 22-33. The undisputed facts further demonstrate that the motor vehicle involved in the subject accident, *i.e.*, the Ford 6100 Workmaster, was not insured for UIM coverage.

SUMMARY OF ARGUMENT

Pursuant to the plain language of the insurance policy at issue, and further pursuant to established West Virginia precedent, the Petitioner is not entitled to benefits from the policy, and therefore, the Circuit Court did not err in granting summary judgment in favor of the Respondent.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In the event that this Court decides that oral argument is necessary, this case is proper for a Rule 19 argument.

ARGUMENT

I. **THE CIRCUIT COURT WAS PROPER TO GRANT SUMMARY JUDGMENT AS THE RECORD BELOW SHOWED SUFFICIENT LEGAL GROUNDS FOR THE DECISION, NOTWITHSTANDING THE CIRCUIT COURT'S STATED REASONING.**

In her brief, the Petitioner argues that the Circuit Court erred in granting State Farm's motion for summary judgment because the Court based the ruling on whether the insured had a reasonable expectation of coverage. The Petitioner then goes on to cite

pickup, while on Policy Number 3170-447-48D it would have been the 2004 Oldsmobile Silhouette.

case law suggesting that the doctrine of reasonable expectations is typically applied as a rule of construction when an insurance contract is found to be ambiguous. *See Luikart v. Valley Brook Concrete & Supply, Inc.*, 216 W. Va. 748, 613 S.E.2d 896 (2005); *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1997), overruled on other grounds by *Potesta v. United States Fid. & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998). The Petitioner contends that because the Circuit Court failed to find the insurance contract at issue to be ambiguous, the Court therefore erred by granting summary judgment on the theory of reasonable expectations.

Notwithstanding the contentions of the Petitioner, in West Virginia, it is a “well settled principle that this Court may affirm the judgment of the trial court where it is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the trial court for its judgment.” Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965); *see also Cumberland Chevrolet Oldsmobile Cadillac, Inc. v. Gen. Motors Corp.*, 187 W. Va. 535, 538, 420 S.E.2d 295, 298 n. 4 (1992).

In the present case, the record fully developed below discloses sufficient legal grounds for the Circuit Court’s decision, notwithstanding the Court’s statement that the insured had no reasonable expectation of coverage. In fact, as State Farm thoroughly briefed in the record below, the plain and unambiguous language of the insurance policy at issue provided no coverage for the Petitioner or her deceased husband based upon the undisputed facts of the case. Further, the record below shows that the material facts of the case were not in dispute and that the only issue to be determined was whether the policy language provided for underinsured motorist coverage, which was clearly a question of law to be decided by the Court. As a result, notwithstanding the stated reason

for the Court's ruling, the finding was nonetheless correct based upon a review of the record below, and consequently, the Circuit Court's ruling should be affirmed.

II. THE CIRCUIT COURT WAS PROPER IN GRANTING SUMMARY JUDGMENT AS THE "OWNED BUT NOT INSURED" EXCLUSION WAS AND IS ENFORCEABLE IN THE INSTANT CASE.

The State Farm automobile policy of insurance at issue in this case requires payment of UIM benefits for bodily injury that an insured is legally entitled to recover from the owner operator of an underinsured motor vehicle. Such payment, however, is not absolute as the policy of insurance also contains a policy exclusion, which exclusion is clear and unambiguous, and was properly applied by the Circuit Court as written. The policy provides the following clear and unambiguous exclusion:

Exclusions

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 IF 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 Declarations Page and that named 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.

See J.A. at 50.

The record below shows that the Petitioner never refuted that the tractor which the decedent was occupying at the time of the accident was a motor vehicle, that the decedent owned the motor vehicle, and that the motor vehicle was not insured under any policy of insurance. Pursuant to the above referenced exclusion in the policy, UIM coverage is not afforded for an insured, *i.e.*, the decedent, as he sustained bodily injury, including death, while occupying a motor vehicle he owned which was not insured for UIM coverage.

The above-referenced policy exclusion has been typically referred to in the jurisprudence of this State as the “owned but not insured” exclusion. Such exclusion has been addressed by this Court on a number of occasions in the context of both uninsured motorist coverage and underinsured motorist coverage. In the context of uninsured motorist coverage (a coverage not at issue in the case *sub judice*), this Court has held such exclusion valid and enforceable only above the mandatory minimum limits of W. Va. Code § 33-6-31. *See, e.g.*, Syl. Pt. 4, *Imgrund v. Yarborough*, 199 W. Va. 187, 483 S.E.2d 533 (1997)(An “owned but not insured” exclusion to uninsured motorist coverage is valid and enforceable above the mandatory limits of uninsured motorist coverage required by W. Va. Code §§ 17D-4-2 (1979) and 33-6-31(b). To the extent that an “owned but not insured” exclusion attempts to preclude recovery of statutorily mandated minimum limits of uninsured motorist coverage, such exclusion is void and ineffective consistent with this Court’s prior holding in Syllabus Point 2 of *Bell v. State Farm Mutual Automobile Insurance Company*, 157 W.Va. 623, 207 S.E.2d 147 (1974)).

As noted above, however, the policy coverage at issue in this case is underinsured motorist coverage, not uninsured motorist coverage, as the Defendant in the case below was insured under a policy of automobile liability insurance issued by Nationwide

Insurance Company at the time of the August 9, 2008 accident. Consequently, this Court's discussion in *Bell* and *Imgrund* is clearly distinguishable from the facts of this particular case.

To the contrary, this Court's discussion in *Deel v. Sweeney*, 181 W. Va. 460, 383 S.E.2d 92 (1989) is applicable to the case *sub judice*. Unlike the plaintiff in *Bell*, Deel attempted to recover UIM benefits. Plaintiff Deel was involved in an accident with Sweeney. Sweeney was an uninsured motorist, but the vehicle he was driving at the time of the accident, which was owned by Ramsey, was insured. Additionally, Deel owned the vehicle he was driving at the time of the accident and insured the same, but he did not carry UIM coverage. After recovering insurance benefits from Ramsey's insurer, Deel attempted to recover UIM benefits from his father's policy of motor vehicle insurance. This policy, like the ones at issue in *Bell*, contained an "owned but not insured" exclusion upon which the issuing insurer based its declination of UIM coverage. *Deel*, 181 W. Va. at 461-62, 383 S.E.2d at 93-94. In deciding *Deel*, this Court considered its prior decision in the *Bell* case and reiterated those tenets by holding that "[s]tatutory provisions mandated by the Uninsured Motorist Law, W. Va.Code § 33-6-31 [1988] may not be altered by insurance policy exclusions." *Deel* at syl. pt. 1. Despite this admonition, this Court recognized the substantial impact of the Legislature's adoption of subsection (k) to W. Va.Code § 33-6-31, the practical effect of which was the allowance of motor vehicle insurance exclusions. Based upon this permissive provision and the fact that UIM coverage is optional, and not mandatory, as is the case with UM coverage, this Court ultimately held the "owned but not insured" exclusion valid and quashed Deel's attempt to recover UIM benefits under his father's insurance policy.

In her brief, the Petitioner repeatedly cites to a treatise by Professor Alan I. Widiss, which purportedly speaks on the issue of uninsured and underinsured motorist coverage as well as “owned but not insured” exclusions to such policies. However, the Petitioner’s brief is wholly devoid of any West Virginia precedent stating that “owned but not insured” exclusions are invalid in West Virginia with respect to underinsured motorist coverage. This is because no such precedent exists. Notwithstanding the fact that the Circuit Court believed the *Deel* decision to be distinguishable from the present case, the holding in *Deel* is in fact applicable in this situation. Although the facts of *Deel* are somewhat different than the facts of the case *sub judice*, it is a distinction without a difference. The *Deel* decision upheld the “owned but not insured” exclusion in the context of underinsured motorist coverage, and no other decision of this Court has ever overruled that holding.

III. THE PLAIN LANGUAGE OF THE POLICY SHOWS THAT THE EXCEPTION TO STATE FARM’S “OWNED BUT NOT INSURED” EXCLUSION DOES NOT APPLY IN THE INSTANT CASE, AND FURTHER SUPPORTS THE CIRCUIT COURT’S GRANT OF SUMMARY JUDGMENT TO STATE FARM.

As noted above, the policy language at issue stated:

Exclusions

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 IF 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 Declarations Page and that named 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.

See J.A. at 50.

While State Farm certainly acknowledges the foregoing policy language and the fact that the same is an exception to the "owned but not insured" exclusion, the exception only applies to those situations where the named insured and his/her spouse are occupying a motor vehicle not owned by one or both of them. The undisputed facts in this case plainly demonstrate that the decedent, Mr. Thomas, at the time of the tragic August 9, 2008 accident, was in fact occupying a motor vehicle owned by him. The Petitioner has never disputed that the tractor was in fact owned by Mr. Thomas. With that fact, then, the exclusion for UIM coverage would apply. If, on the other hand, Mr. Thomas had been occupying a motor vehicle not owned by him or his wife, the Petitioner, at the time of the accident, then the exclusion would not be applicable. The undisputed facts of this case do not support the latter factual scenario and, thus, the policy exclusion is applicable in the present case, thereby entitling State Farm to summary judgment as was properly granted by the Circuit Court.

The Petitioner attempts to argue that an ambiguity exists in the exception to the above exclusion, asserting that "State Farm wants to read its policy as if the underscored words read: not owned by [either] or both of them. It does not say that." Petitioner goes on to assert that the exception, rather than the exclusion applies because "[t]he 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. However, the Petitioner's application of the disjunctive "or" contained within the exception is neither supported by the plain policy language nor by applicable West Virginia legal authority.

Admittedly, the applicable policy of insurance does contain an exception to the "owned but not insured" exclusion. In that regard, the following policy language is pertinent:

This exclusion does not apply to the first *person* shown as a named insured on the Declarations Page and that named 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.

See J.A. at 50. Petitioner would have this Court adopt the position that the policy language is ambiguous with the use of "or" because the Ford 6100 Workmaster tractor was not owned by Mrs. Thomas and because it was not owned by both Mrs. Thomas and Mr. Thomas. However, the tractor was not required to be owned by both Mr. Thomas and Mrs. Thomas, hence the use of the word "or."

Indeed, this Court has recognized that "[t]he word 'or' denotes an alternative between the two phrases it connects." *State v. Elder*, 152 W. Va. 571, 577, 165 S.E.2d 108, 112 (1968).² Elaborating further on application of the disjunctive "or," this Court, in *State v. Saunders*, 219 W. Va. 570, 574-75, 638 S.E.2d 173, 177-78 (2006), cogently explained:

It is axiomatic that "where the disjunctive "or" is used, it ordinarily connotes an alternative between the two [or more] clauses it connects." *State v. Taylor*, 176 W.Va. 671, 675, 346 S.E.2d 822, 825 (1986) (citations omitted). We expounded on the legislative use of a disjunctive clause in *Tennant v. Smallwood*, 211 W.Va. 703, 568 S.E.2d 10 (2002):

²See also, www.merriam-webster.com/dictionary/or which defines "or" as a "function word to indicate an alternative <coffee or tea> <sink or swim>." J.A. at 136-37. Likewise, <http://dictionary.reference.com/browse/or> defines "or" as being "used to connect words, phrases, or clauses representing alternatives): *books or magazines; to be or not to be*[,] J.A. at 138-43.

This Court has previously observed that “the word ‘or’ is ‘a conjunction which indicate[s] the various objects with which it is associated are to be treated separately.’” *Holsten v. Massey*, 200 W.Va. 775, 790, 490 S.E.2d 864, 879 (1997) (quoting *State v. Carter*, 168 W.Va. 90, 92 n. 2, 282 S.E.2d 277, 279 n. 2 (1981)). Moreover, the use of this term “ordinarily connotes an alternative between the two clauses it connects.” *Albrecht v. State*, 173 W.Va. 268, 271, 314 S.E.2d 859, 862 (1984) (citing *State v. Elder*, 152 W.Va. 571, 577, 165 S.E.2d 108, 112 (1968)); *accord Carper v. Kanawha Banking & Trust Co.*, 157 W.Va. 477, 517, 207 S.E.2d 897, 921 (1974) (“Recognizing the obvious, the normal use of the disjunctive ‘or’ in a statute connotes an alternative or option to select”); *see also Smith v. Godby*, 154 W.Va. 190, 199, 174 S.E.2d 165, 171 (1970) (stating that “[i]t is significant that the statute uses the words ‘fail’ or ‘refuse’ in the disjunctive and manifestly attaches a different meaning to each word”).

Consequently, in *Saunders*, this Court recognized that the longstanding use of the disjunctive signifies an alternative between at least two (2) separate clauses. *Saunders*, 219 W. Va. at 575, 638 S.E.2d at 178.

While State Farm acknowledges the foregoing policy language and the fact that the same is an exception to the “owned but not insured” exclusion, the exception only applies to those situations where the named insured and his/her spouse are occupying a motor vehicle not owned by one of them *or* not owned by both of them. If one of them owns the motor vehicle or both of them own the motor vehicle, then the exception to the exclusion is not applicable. Application of these alternative scenarios is clearly appropriate under established West Virginia judicial precedent, as set forth above, as well as the plain, ordinary dictionary definition of the word “or” inasmuch as “or” is a function word used to indicate an alternative. *See* Syl. Pt. 3, *Blake v. State Farm Mutual Automobile Insurance Company*, 224 W. Va. 317, 685 S.E.2d 895 (2009) (“Language in an insurance policy should be given its plain, ordinary meaning.” Syl. Pt. 1, *Soliva v. Shand, Morahan & Co.*, 176 W. Va. 430, 345 S.E.2d 22 (1986), *overruled, in part, on*

other grounds by *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987)). Additionally, the fact that the Petitioner may disagree with regard to application of the policy language, particularly application of the disjunctive “or,” does not create an ambiguity in the policy. *See Blake* at syl. pt. 4 (“The mere fact that parties do not agree to the construction of a contract does not render it ambiguous.”). Thus, the contract language is clear that the exception to the exclusion does not apply in this instance, therefore affording no underinsured motorist coverage to the Petitioner or her decedent. As such, the Circuit Court’s grant of summary judgment was proper and, therefore, said ruling should be affirmed.

IV. THE CIRCUIT COURT DID NOT ERR IN REFUSING TO EXTEND THE HOLDING IN *IMGRUND V. YARBOROUGH*.

In her brief, the Petitioner alleges that underinsured motorist coverage, once accepted, is just as mandatory as uninsured motorist coverage, and further, she alleges that the Circuit Court should have “extended” the holding in *Imgrund v. Yarborough*, 199 W. Va. 187, 483 S.E.2d 533 (1997). However, the Court in *Imgrund* specifically discussed the issue of “owned but not insured exclusions” in the context of underinsured motorist coverage, and found that this Court had already addressed the issue in *Deel v. Sweeney, supra*, when it held that such exclusions are valid with respect to underinsured motorist coverage. *Imgrund*, 199 W. Va. at 192, 483 S.E.2d at 538. In fact, in *Imgrund*, this Court specifically noted that the decision in *Deel* was reasoned largely upon the distinction between uninsured motorist coverage, which, by statute is mandatory, and underinsured motorist coverage, which is optional and not required by law. *Id.* The Court in *Imgrund* then went on to state that the statute which required mandatory

uninsured motorist coverage controlled the outcome of that appeal. *Id.* Thus, one can reason that because no statute exists which requires a mandatory minimum amount of underinsured motorist coverage, the holding in *Imgrund* cannot logically be extended to the issue of underinsured motorist coverage as the Petitioner would suggest.

Prior to *Imgrund v. Yarborough, supra*, in *Bell v. State Farm Mutual Automobile Insurance Company, supra*, this Court had previously held that “[a]n exclusionary clause within a motor vehicle insurance policy issued by a West Virginia licensed insurer which excludes uninsured motorist coverage for bodily injury caused while the insured is occupying an owned-but-not-insured motor vehicle is void and ineffective under Chapter 33, Article 6, Section 31, Code of West Virginia, 1931, as amended.” *Bell* at syl. pt. 2. Voiding the exclusionary clause in *Bell*, this Court determined that Ms. Bell was entitled to recover the statutory uninsured motorist coverage in lieu of the void exclusionary clause. *Bell*, 157 W. Va. at 627, 207 S.E.2d at 150.

Subsequent to this Court’s opinion in *Bell*, however, the West Virginia Legislature amended W. Va. Code § 33-6-31 by including additional language to subsection (b) and adding a new subsection (k). *See Imgrund*, 199 W. Va. at 191, 483 S.E.2d at 537. Consequently, even though this Court had previously decided in *Bell* that the “owned but not insured” exclusion was valid and enforceable in the context of uninsured motorist coverage only over and above the statutorily mandated minimum limits, this Court was required to revisit the issue in *Imgrund* in light of the statutory amendments to W. Va. Code § 33-6-31. In *Imgrund*, after giving due consideration to the amendments to W. Va. Code § 33-6-31, this Court again found the “owned but not

insured” exclusion to be valid and enforceable in the context of uninsured motorist coverage only in certain circumstances. Specifically, in *Imgrund*, this Court held that

An “owned but not insured” exclusion to uninsured motorist coverage is valid and enforceable above the mandatory limits of uninsured motorist coverage required by W. Va. Code §§ 17D-4-2 (1979) (Repl.Vol.1996) and 33-6-31(b) (1988) (Supp.1991). To the extent that an “owned but not insured” exclusion attempts to preclude recovery of statutorily mandated minimum limits of uninsured motorist coverage, such exclusion is void and ineffective consistent with this Court's prior holding in Syllabus Point 2 of *Bell v. State Farm Mutual Automobile Insurance Company*, 157 W.Va. 623, 207 S.E.2d 147 (1974).

Imgrund at syl. pt. 4.

As noted by State Farm in the record below, the policy coverage at issue in this case is underinsured motorist coverage, not uninsured motorist coverage, as Defendant Charlotte Cain was insured under a policy of automobile liability insurance issued by Nationwide Insurance Company at the time of the August 9, 2008 accident. Consequently, the Court’s holdings in *Bell* and *Imgrund* are not dispositive to the facts of this particular case. To the contrary, this Court’s discussion in *Deel v. Sweeney, supra*, is applicable to the case *sub judice*. And, despite Petitioner’s representation to the Circuit Court that this Court has not decided the issue regarding applicability of the “owned but not insured” exclusion in the context of UIM coverage, the *Imgrund* court, an opinion relied on by Petitioner in her Response, clearly recognizes that the Court had addressed the issue in the context of underinsured motorist coverage in *Deel*. *Imgrund*, 199 W. Va. at 191-92, 483 S.E.2d at 537-38 (“*Deel* considered the issue of whether ‘owned but not insured’ exclusions are valid with respect to underinsured motorist coverage.”); Court also recognized that the *Deel* court ruled that the “owned but not insured” exclusion was valid with respect to the underinsured motorist coverage at issue).

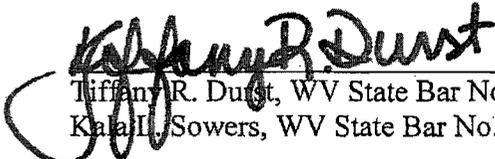
In *Deel*, this Court distinguished its earlier *Bell* decision upon the differences between uninsured motorist coverage, which is required by law, and underinsured motorist coverage (the coverage at issue in this case), which is optional and not required by law. 181 W. Va. at 463, 383 S.E.2d at 95. In *Deel*, this Court further declined to extend *Bell* as a result of the subsequent amendments to W. Va. Code § 33-6-31 (which were at issue in *Imgrund*), which amendments had specifically added subsection (k) to allow an insurer to include exclusions within an insurance policy “as may be consistent with the premium charged.” Ruling unequivocally that the “owned but not insured” exclusion was valid with respect to the underinsured motorist coverage at issue in *Deel*, this Court held that “[i]nsurers 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.” *Deel* at syl. pt. 3. Importantly, in *Deel*, this Court did not find that the “owned but not insured” exclusion in the context of underinsured motorist coverage conflicted with the spirit and intent of W. Va. Code § 33-6-31.

The foregoing unquestionably establishes that this Court has decided that the “owned but not insured” exclusion is valid and enforceable in the context of underinsured motorist coverage, such as the coverage at issue in this case. Further, because this Court’s decision in *Imgrund* deals only with uninsured motorist coverage, the decision in *Imgrund* cannot logically be extended to apply to underinsured motorist coverage as the Petitioner would request. Therefore, based upon this Court’s holding in *Deel*, and further based upon the undisputed facts of this case, the Circuit Court properly granted summary judgment in favor of State Farm, and therefore, said ruling should be affirmed.

CONCLUSION

WHEREFORE, the Respondent, State Farm Mutual Automobile Insurance Company, respectfully requests that this Court affirm the April 1, 2011 Order of the Circuit Court of Monongalia County granting summary judgment to State Farm Mutual Automobile Insurance Company.

**RESPONDENT, STATE FARM
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COMPANY, By Counsel:**



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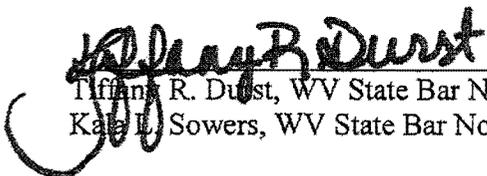
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CERTIFICATE OF SERVICE

The undersigned, counsel of record for the Respondent, State Farm Mutual Automobile Insurance Company, hereby certifies that on the 16th day of September, 2011, a true copy of the *Respondent's Brief* was served upon the following counsel of record by depositing the same to them via facsimile and by first class mail, postage prepaid and addressed as follows:

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