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SUPREME COURT OF APPEALS

OF WEST VIRGINIA

Starcher, J., dissenting:

I dissent from the majority’s opinion because it is an affront to police officers, sheriff’s deputies, paramedics, firemen, school bus drivers, sanitation workers – and all other government employees who regularly drive for a living. Cities, counties and school boards across the State buy vehicle insurance to protect their employees from irresponsible drivers who have no insurance, or too little insurance. But the majority opinion says that very insurance, paid for with taxpayer dollars, is an illusion. The majority opinion says government employees injured on the job aren’t entitled to the same protection as private employees or average citizens. And to create that reward for insurance companies, the majority opinion blithely misinterpreted state law.¹

Everyone involved in this case – the plaintiffs, the insurance company, even the majority of this Court – concedes that the vehicle insurance policy in this case violates state law. *W.Va. Code*, 33-6-31(b) and (c) [1998] require every vehicle insurance policy to provide “any person . . . who uses . . . the motor vehicle to which the policy applies” with coverage that will pay the person “all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle.” The same statute also

¹The misinterpretation was, unfortunately, with the unwitting assistance of the appellants’ attorney. His brief – including the cover page, table of contents, and signature page – was only seven pitiful pages long. The totality of the law concerning uninsured motorist coverage was discussed in one sentence with two citations.

requires insurance companies to offer the same coverage against motor vehicles with too little insurance to cover the injured person's damages ("underinsured" motor vehicle coverage). There is nothing in this statute that allows an insurance company to eliminate coverage if the injured person happens to receive workers' compensation.

Yet, in *Trent v. Cook*, 198 W.Va. 601, 482 S.E.2d 218 (1996), this Court decided that insurance companies could eliminate coverage, if a local government was buying the policy. We said that if a political subdivision bought a "custom-designed" policy with exclusions that contradicted *W.Va. Code*, 33-6-31, those exclusions were acceptable. In *Trent*, we concluded that a sheriff's deputy maimed in the line of duty when he was hit by an uninsured driver wasn't entitled to coverage.

Then, in *Gibson v. Northfield Insurance Company*, 219 W.Va. 40, 631 S.E.2d 598 (2005), we dramatically pulled back from our reasoning in *Trent v. Cook*. As the majority opinion notes, we agreed that a political subdivision could buy a "custom-designed" policy that was contrary to state insurance law requirements. However, we specified that a custom-designed policy had to be an honest-to-goodness, deliberative act on the part of the local government; the insurance company couldn't just slip exclusions in one part of the policy that eliminated coverage provided for in other parts of the policy. In *Gibson*, we struck down policy language that was contrary to state law, because there was no proof that the *political subdivision* deliberated and specifically chose the exclusion language when it paid for the policy.

The majority's opinion turns *Gibson* on its head. The majority opinion ignored the needs and wants of the political subdivision in this case – the Logan County Board of Education – and the employee of that subdivision, plaintiff Yvonne Reed. The clock has been turned back to the wild days that preceded *Gibson* – and any local government employee who drives a vehicle on the job will pay the price.

Just the other day, the newspapers carried a story of a local sheriff's deputy who – while out patrolling for drunk drivers – was injured when a drunk driver veered into his patrol cruiser. A typical citizen injured by a drunk driver would be entitled to uninsured and underinsured motorist insurance coverage. But, under the majority's opinion, this local sheriff's deputy is on his own and isn't entitled to any coverage under his employer's automobile insurance policy. The sheriff's deputy might get some help from workers' compensation. But workers' compensation will only pay a small percentage of the deputy's wages – maybe enough to keep the wolves away from the door. If the deputy has to miss work for future doctor visits, he'll have to use his own sick leave or vacation time; workers' compensation doesn't pay for those losses. Assuming the deputy had the foresight to spend his hard-earned dollars to buy health insurance, he will at least have some freedom to choose the quality of his medical care. But, the deputy will be personally responsible for his co-pays and deductibles for his health insurance. As for remaining wages, future medical expenses, his pain, his suffering, his lost contributions to his pension and social security, his lost accrual of seniority toward promotion or retirement, the losses of his family, his future loss of income due to his injuries . . . the majority opinion says those losses – all the result of an

un- or under-insured drunk driver – aren't covered because the deputy had the misfortune of choosing to work in West Virginia.

This case isn't about a sheriff's deputy or a paramedic or a fireman. It's about a school bus driver. The last numbers I can find indicate that 2,800 bus drivers in West Virginia drove students almost 40 million miles in 1997-98, and were involved in at least 513 collisions.² The school bus drivers of West Virginia should take note that, with this decision, the members of the majority have assured that you and your families will have no protection if you are involved in an on-the-job collision with an un- or under-insured driver.

Of course, the majority opinion takes no responsibility for their actions. Instead, they place the blame on others. The Board of Risk and Insurance Management ("BRIM") is one culprit subject to blame, because one underwriting manager for BRIM said in an affidavit that someone at BRIM had "researched and investigated" and found a need to exclude people like school bus drivers from coverage.

I am baffled why any representative for BRIM – a government agency – would voluntarily supply an affidavit to an insurance company saying the government or its employees aren't entitled to coverage under a government-purchased insurance policy. It has always been my understanding that BRIM was supposed to help local governments and state agencies get the best coverage possible for the best price. In this case, BRIM went out of its

²See West Virginia Department of Education, "West Virginia Education Department Receives Commendations in Transportation Study," <http://wvde.state.wv.us/news/3/> (February 5, 1999).

way to claim a local government paid premiums to get no coverage for its employees. It makes me wonder: who is BRIM working for? The government, or the insurance industry?

Furthermore, the insurance policy purchased in this case wasn't for BRIM's benefit, it was for the benefit of a political subdivision. Yvonne Reed's employer, the Logan County Board of Education, was the beneficiary of the policy and the governmental entity that paid the insurance premiums. Under Syllabus Point 5 of *Gibson v. Northfield Insurance Company, supra*, the fact that some low-level functionary at BRIM "researched and investigated" and decided to buy a policy that didn't really include any coverage is irrelevant. The question to ask is, did the political subdivision purchasing the policy – the Logan County Board of Education – determine, in its discretion, to buy a policy that limited the coverage available to school drivers? Did the Logan County Board of Education, as the result of some choice, judgment, volition, wish or inclination as a result of investigation or reasoning decide to buy coverage contrary to state law? The answer to that question isn't in the record, so summary judgment in favor of the insurance company was totally improper.

The Legislature is another party the majority implicitly blames for passing a law that allows political subdivisions to buy insurance policies that are contrary to state law. *W.Va. Code*, 29-12A-16 [2003] allows a political subdivision to buy an insurance policy with "terms and conditions that are determined by the political subdivision in its discretion." Again, I think everyone concedes that the vehicle insurance policy at issue in this case violates state law, because it provides less coverage than is mandated by *W.Va. Code*, 33-6-31. But the majority opinion blames everyone but itself by presuming, without any real

evidence, that the terms and conditions of the policy in this case were determined by the Logan County Board of Education in its discretion.

In sum, government employees who drive on the job should beware: because of the majority's opinion, if you're injured in a collision with an irresponsible driver with too little or no insurance, then you'll be the one paying the bill.

Accordingly, I dissent.