

No. 33310

*Collett L. Keefer, II, v. Angela Mae Ferrell, a/k/a Angela Mae White,  
Kenneth D. Hess and Farm Family Casualty Insurance Company*

**FILED**

**December 19,  
2007**

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SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**Benjamin, Justice, dissenting:**

*“Obviously I’m very excited to stay here and I plan on being here a long time.”*

-Rich Rodriguez, December 8, 2006

An intention. A determination to do a certain thing, an intention is characterized not by what will happen, but by the potential for what *might* happen. Here, we have a claimed intention to use or occupy an insured vehicle at some future time. That potentiality, no matter how far removed from the present, is apparently all that is now necessary to trigger uninsured motorist coverage under the majority opinion in this matter.

The facts of this matter are relatively simple. Appellant Farm Family Casualty Insurance Company (hereinafter “Farm Family”) insured a 2002 Dodge truck under a business auto policy issued to Kenneth D. Hess.<sup>1</sup> On September 2, 2002, the insured Dodge truck, with an attached trailer, was parked in a driveway approximately 25-30 feet away from the intersection of the driveway with State Route 87 in Leon, Mason County, West Virginia.

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<sup>1</sup>As acknowledged by the majority, the policy designated the insured business as an individual and identified the type of business as farmer.

Appellee, Collett L. Keefer, II, (hereinafter “Mr. Keefer”) was driving a 1972 Allis-Chamber 180 farm tractor on State Route 87 when the tractor was struck from behind by a vehicle driven by Angela Mae Farrell (hereinafter “Ms. Ferrell”). According to Mr. Keefer’s own testimony, he was slowing down and getting ready to turn into the driveway when the collision occurred. He remained 25-30 feet away from the truck-trailer assembly after the collision.

Apparently, Ms. Ferrell was uninsured at the time of the collision. Therefore, Mr. Keefer sought to recover uninsured motorist coverage under the Farm Family policy on the Dodge truck arguing that he was using or occupying the insured Dodge truck while he was driving the tractor on State Route 87. This argument is so imaginative, I think it bears repeating: Mr. Keefer sought to recover uninsured motorist coverage under the Farm Family policy on the Dodge truck arguing that he was using or occupying the insured Dodge truck (parked some 25-30 feet away on the driveway) while he was driving the tractor on State Route 87.

Under the Farm Family policy, an individual must be “using” or “occupying” a covered auto at the time of injury in order to qualify for uninsured motorist coverage. The policy defines the term “occupying” as “*in, upon, getting in, on, out or off*” a covered auto. I simply cannot agree with the majority’s charitable conclusion that the coverage term

“getting on” is satisfied by an intention to at some time in the future load the tractor which Mr. Keefer was driving on a state roadway onto the trailer which was attached to the insured Dodge truck some 25-30 feet away on a private driveway. *See*, Majority slip opinion, p. 9. No suggestion has been made that Mr. Keefer also intended to drive the insured Dodge truck after loading the tractor onto the trailer which was attached to the insured Dodge truck. Also it is not clear that Mr. Keefer himself would have loaded the tractor onto the trailer which was attached to the insured Dodge truck or if someone else may have taken over the operation of the tractor prior to loading it onto the trailer. Notwithstanding the majority’s reach for a contrived meaning of the phrase, the undisputed evidence simply does not, and by common sense cannot, support the majority’s finding herein that Mr. Keefer was “getting on” the insured Dodge truck. *See*, Majority slip opinion, p. 11.

I must also dispute the majority’s conclusion that Mr. Keefer was “using” the insured Dodge truck at the time of the collision. It is undisputed that Mr. Keefer did not drive the insured Dodge truck into the driveway and did not lower the trailer ramps to prepare the trailer for the loading of the tractor. Kenneth D. Hess performed those actions. At the time of the collision, Mr. Keefer was operating an entirely different motor vehicle, the tractor, not the insured Dodge truck. Under our law, “[u]se’ of an insured vehicle implies employing the vehicle for some purpose or object of the user.” Syl. Pt. 3, in part, *Adkins v. Meador*, 201 W. Va. 148, 494 S.E.2d 915 (1997). An injury must be “causally connected

to the use of the [insured] vehicle, and foreseeably identifiable with the normal use of the [insured] vehicle” before uninsured motorist coverage under a policy insuring the vehicle is triggered. Syl. Pt. 4, in part, *Adkins*.<sup>2</sup> This “*causal connection must be more than incidental, fortuitous or but for.*” *Baber v. Fortner*, 186 W. Va. 413, 417, 412 S.E.2d 814, 818 (1991) (emphasis in original), quoting, *Detroit Automobile Inter-Insurance Exchange v. Higginbotham*, 290 N.W.2d 414, 419 (1980). Apparently lost on the majority is the fact that Mr. Keefer was both “using” and “occupying” a vehicle *other than* the insured Dodge truck at the time of the collision. Any causal connection between Mr. Keefer’s driving of the tractor on State Route 87 was merely incidental or fortuitous to any potential future use

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<sup>2</sup> In Syllabus Point 2, of *Cleaver v. Big Arm Bar & Grill, Inc.*, 202 W. Va. 122, 502 S.E.2d 438 (1998), this Court held:

When the “use” of a vehicle is in question for insurance purposes due to the separation of an individual from a vehicle at the time of an accident, the court must determine whether there is a causal connection between the motor vehicle and the injury. In making that determination, the court may consider, but is not limited by, the following factors: a) whether the individual was in reasonably close proximity to the insured vehicle at the time of the accident; b) whether the individual was vehicle oriented as opposed to highway or sidewalk oriented; c) whether the individual had relinquished control of the vehicle; and d) whether the individual was engaged in a transaction reasonably related to the use of the vehicle at the time of the accident.

The majority’s generous construction of the facts of the instant case in order to justify its finding that the *Cleaver* factors for “use” have been satisfied evidences the stretch that must be made to find that Mr. Keefer was “using” the insured truck at the time of the collision, when, in reality, he was operating and thereby “using” a different vehicle at least 25-30 feet away from the trailer that was attached to the insured vehicle.

of the insured Dodge truck. Moreover, the majority simply assumes a normal use of the insured Dodge truck was to pull a trailer hauling farm equipment, and does not point to any evidence in the record to support this finding other than the fact that the Dodge truck was insured under a business policy of insurance issued to a farmer.

Because the majority opinion is founded upon speculation and assumed connections between Mr. Keefer and the insured vehicle, gives to the coverage definition at issue a definition which is at best fanciful, and is contrary to our existing law on uninsured motorist coverage, I respectfully dissent.