

No. 31971 – *Tom Collins v. Karen Heaster, as Administratrix for the Estate of David Heaster, and John Doe*

**FILED**

**July 14, 2005**

Starcher, J., concurring, in part, and dissenting, in part:

released at 3:00 p.m.  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

I grudgingly concur with the outcome of this case. The facts of this case are certainly unique, but I think the outcome is correct for this reason: the insurance company could not have predicted, and therefore insured against, this risk. I just do not think it likely that a total stranger, without express or implied permission, is going to jump in a car next to a burning building, move the car and while doing so run over a fireman responding to the fire, and then flee. I therefore do not think, under these circumstances, that the insurance company is responsible for providing liability coverage for the total stranger.

I dissent, however, to the draftsmanship of Syllabus Point 4 that states:

Where a person alleges injuries caused by a John Doe defendant in a motor vehicle accident, recovery for damages caused by the John Doe is limited to recovery under the insured person's own uninsured motorist policy of insurance.

This rule seems to be backwards from what the majority intended to say. Instead of saying a plaintiff can't make a John Doe claim against a third-party tortfeasor's uninsured motorist coverage – which is the question before the Court – Syllabus Point 4 inverts the answer and says a plaintiff can ONLY collect damages from his own uninsured motorist coverage. This language is therefore likely to be fertile soil in which crafty lawyers will sow litigation.

I believe that Syllabus Point 4 should have read:

Where a person alleges injuries caused in a collision with a motor vehicle driven by a “John Doe” defendant who did not have the express or implied permission of the named insured or the insured’s spouse to operate the motor vehicle, the person may not recover damages under the uninsured motorist policy of insurance on that motor vehicle.

With this language the majority opinion would have reached the same result, but without the likely mischief.

I therefore respectfully concur, in part, and dissent, in part.