IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JANUARY 1996 TERM

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No. 23077

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STEVIE RAY TRENT AND PAMELA E. TRENT,
Plaintiff Below, Appellees

v.

TAMMY L. COOK,
Defendant Below, Appellant

Appeal from the Circuit Court of Wyoming County
Honorable John S. Hrko, Circuit Judge
Civil Action No. 92-C-247

REVERSED AND REMANDED

Submitted: April 30, 1996
Filed: July 12, 1996

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JUSTICE WORKMAN delivered the Opinion of the Court.

SYLLABUS

When an insurer issues a custom-designed insurance policy to a governmental entity pursuant to the Governmental Tort Claims and Insurance Reform Act, West Virginia Code §§ 29-12A-1 to -18 (1992), that entity may incorporate language absolutely limiting liability under the policy, even if such language would otherwise violate the provisions of West Virginia Code § 33-6-31(b) (1996).

Workman, J.:

This case is before the Court upon the appeal of Continental Casualty Company from the March 8, 1995, final order of the Circuit Court of Wyoming County, denying the Appellant's post-trial motions to set aside a jury verdict finding the Appellee, Stevie Ray Trent, forty percent negligent and the tortfeasor, Tammy L. Cook, sixty percent negligent. The Appellant argues that the trial court erred in denying its post-trial motion to set aside the jury verdict because: 1) the Appellee was not "occupying" the insured vehicle at the time of the accident and is not an "insured" under the terms of the state's insurance policy; 2) the Appellee is precluded from coverage pursuant to the workers' compensation exclusion contained in the state's insurance policy or in the alternative, the exclusion operates to reduce the amount of coverage available to him; 3)

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[1]Continental Casualty Company defended this case at trial in the name of Tammy L. Cook.

[2]The jury awarded the Appellee $200,000 in general damages, $331,196.76 in special damages, and $2,622 for "loss of 38 days sick leave and vacation." The jury awarded nothing to the Appellee's wife, Pamela Trent, for her loss of consortium claim. In addition to the jury verdict, the Appellee filed a claim for workers' compensation benefits. His claim was ruled compensable and workers' compensation has paid most of his medical bills along with his claim for time lost from work. The Appellee's claim for disability benefits was still pending at the time of this appeal.

the Appellee elicited no testimony at trial establishing his future medical expenses to a reasonable degree of medical certainty; and 4) the Appellant is not required to reimburse the Appellee for damages already awarded to him through workers' compensation payments. Based on our review of the record, the parties' briefs, and all other matters submitted before this Court, we find that the Appellee was not entitled to underinsured motorist coverage under the state's insurance policy and, accordingly, we reverse the lower court's decision.

I.

On March 24, 1992, the Appellee, a Deputy Sheriff for the Wyoming County Sheriff's Department, responded to a one-vehicle accident on Route 97 near Saulsville, West Virginia. The Appellee testified that when he arrived at the scene, he parked his police cruiser on the side of the road and started his investigation. Almost twenty-five minutes later, while he was still investigating the accident, the Appellee was struck and injured by a vehicle driven by Tammy Cook. At the time the Appellee sustained his injuries, he stated he was standing more than thirty feet away from his cruiser, preparing an accident report. As a result of the accident, the Appellee suffered an amputation of his left leg and a broken right leg.

Subsequent to the accident, the Appellee filed a complaint in the Circuit Court of Wyoming County against the tortfeasor, Ms. Cook, and the Appellant, the underinsurance carrier for the State of West Virginia that provided coverage for the Wyoming County Commission. The Appellee settled with Ms. Cook prior to trial for the limits of her liability policy. The action proceeded against the Appellant who defended the action in Ms. Cook's name.

Prior to trial, the Appellant sought summary judgment on the coverage issue pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, arguing that the Appellee was not an "insured" at the time of the accident since, under the terms of the policy, he was not "'occupying' a covered 'auto' or a temporary substitute for a covered 'auto'" at the time of the accident. Additionally, the Appellee filed a declaratory judgment action requesting the circuit court to find that the Appellee was an insured under the Appellant's underinsured insurance policy as he was "using" the vehicle as that term is defined in West Virginia Code § 33-6-31(1996). Pursuant to an order dated April 19, 1993, the lower court , ruling on the Appellee's declaratory judgment action, found that "[t]he West Virginia Underinsured Motorist Statute provides Deputy Trent was a person using the vehicle with the consent of the 'named insured[,]'" and concluded, as a

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[3]We use the version of West Virginia Code § 33-6-31 as it appears in the 1996 volume of the West Virginia Code. In using this version, we note that West Virginia Code § 33-6-31 was amended in 1995; those

matter of law, that "[t]he policy of insurance in this case is more restrictive than the statute. Under the terms of the statute, Deputy Trent was using the vehicle and therefore should be covered by the terms and benefits of underinsurance coverage." The Appellant objected and excepted to this ruling.

II.

The first issue concerns whether the trial court erroneously concluded that the Appellee was insured under the Appellant's policy on the basis that the term insured, as defined within the insurance policy, contravened the statutory language of West Virginia Code § 33-6-31. The Appellant argues that in order for underinsured motorist coverage to apply, the Appellee had to have been "occupying" a covered auto when he was hit by Ms. Cook as that term is defined within the policy. The Appellant maintains that the facts undisputedly demonstrated that the Appellee was not occupying his police cruiser at the time of the accident. Further, the Appellant argues that the custom-designed state

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amendments, however, do not effect the outcome of this case.

[4]The policy defines the term "occupying" as "in, upon, getting in, on, out or off" of the covered vehicle.

[5]In Eggleston v. West Virginia Department of Highways, 189 W. Va. 230, 429 S.E.2d 636 (1993), we recognized that policies of insurance issued under the Governmental Tort Claims and Insurance Reform Act are often "custom designed" and,

insurance policy is immune from the requirements of West Virginia Code § 33-6-31. In contrast, while the Appellee concedes that he was not "occupying" the police cruiser at the time of the accident, he argues that a liberal construction of the term "use" as found in West Virginia Code § 33-6-31(c) and as interpreted by this Court should be applied, rather than the policy definitions of "insured" and "occupy," since the provisions of the underinsured motorist statute are remedial and should be liberally construed. See State Auto. Mut. Ins. Co. v. Youler, 183 W. Va. 556, 564, 396 S.E.2d 737, 745 (1990) (stating the purpose of the statute is "that the injured person be fully compensated for his or her damages, not compensated by a negligent tortfeasor, up to the limits of the uninsured or underinsured motorist coverage"); Syl. Pt. 7, Perkins v. Doe, 177 W. Va. 84, 85, 350 S.E.2d 711, 712 (1986)(holding that "[t]he uninsured motorist statute, West Virginia

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therefore, different from the normal insurance policy issued to a private individual. Id. at 233, 429 S.E.2d at 639; see Cook v. McDowell County Emergency Ambulance Service Authority, Inc.,191 W. Va. 256, 260, 445 S.E.2d 197, 201 (1994).

[6]The Appellee argues that he was using the vehicle as that term is defined in West Virginia Code § 33-6-31 because he was utilizing his cruiser as a traffic control device through the operation of the vehicle's emergency lights and its police radio to protect himself and to alert other drivers on the highway of the accident. Further, the materials necessary for him to complete his accident report were transported to the scene in the cruiser and were to be returned to said cruiser after the investigation was completed.

Code § 33-6-31 (Supp. 1986), is remedial in nature and, therefore, must be construed liberally in order to effect its purpose"). The Appellee maintains that because the policy language is more restrictive than the statutory language, it is void as against public policy. See Syl. Pt. 2, Universal Underwriters Ins. Co. v. Taylor, 185 W. Va. 606, 408 S.E.2d 358 (1991); Syl. Pt. 1, Bell v. State Farm Mut. Auto. Ins. Co., 157 W. Va. 623, 207 S.E.2d 147 (1974).

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[7]The Appellee argues for the first time on appeal that he should be considered a named insured since he is an employee of the county commission. Moreover, the Appellee asserted in oral argument that a document entitled "Certificate of Liability Insurance" that was issued by the Appellant to the Appellee specifically listed employees of the county commission as named insureds under the policy at issue. That document, however, was not part of the record before the trial court or before this Court and, therefore, we do not consider it in rendering our decision. Furthermore, the "NAMED INSURED ENDORSEMENT" that is in the record clearly establishes that the Appellee was not a named insured under the policy provisions.

As we recently noted in Powderidge Unit Owners Association v. Highland Properties, Ltd., No. 23105, __ W. Va. __, __ S.E.2d __ (1996), evidence not submitted before the trial court may not be considered by this Court on appeal. Id. at __, __ S.E.2d at __ n.16; accord O'Neal v. Peake Operating Co., 185 W. Va. 28, 32, 404 S.E.2d 420, 424 (1991) (stating that "[t]his court may only properly consider those issues which appear in the record before us"). Consequently, it is the parties' duty to make sure that all matters relevant to a resolution of the issues on appeal be placed in

We begin by examining the pertinent policy provisions in relation to West Virginia Code § 33-6-31. The policy provides, in pertinent part, that the following individuals are considered to be insured for purposes of the policy:

> 1. You
> 2. If you are an individual, any "family member"
> 3. Anyone else "occupying" a covered "auto" or a temporary substitute for a covered "auto" . . . .
> 4. Anyone for damages he is entitled to recover because of "bodily injury" sustained by another "insured."

The policy proceeds to define the term "occupying" as "in, upon, getting in, on, out or off" of the covered vehicle. It is undisputed that, under the literal terms of the policy, the Appellee was not "occupying" the vehicle at the time of the accident.

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the record before the lower court so that we may properly consider it on appeal.

[8]The Appellee did not argue before the lower court that the policy provisions regarding who was considered an insured were in any way ambiguous. Consequently, the lower court made no ruling regarding whether the provisions of the policy were ambiguous. As we stated in syllabus point one of Russell v. State Auto Mutual Insurance Co., 188 W. Va. 81, 422 S.E.2d 803 (1992), "'[w]here the provisions of an insurance policy are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.'" Russell, 188 W. Va. at 81, 422 S.E.2d at 803 (quoting Syllabus, Keffer v. Prudential Ins. Co., 153 W. Va. 813, 172 S.E.2d 714 (1970)) .

Since it was clear that the Appellee is not an insured under the express policy terms, for the Appellee to secure coverage under the policy this Court would have to determine that the Appellant's policy, is not a custom-designed state insurance policy immune from the requirements of West Virginia Code § 33-6-31. Such a determination would result in the Appellant not being entitled to incorporate a more restrictive definition of an insured into the policy than is found in the statutory definition. See id.

West Virginia Code § 33-6-31(c) defines "insured" as follows:

> the term "insured" shall mean the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person, except a bailee for hire, who uses, with the consent, express or implied, of the named insured, the motor vehicle to which the policy applies or the personal representative of any of the above.

Id. (emphasis added). Although the legislature did not define the term "uses" as it appears in the above-mentioned statute, in Baber v. Fortner ex rel. Poe, 186 W. Va. 413, 412 S.E.2d 814 (1991), we discussed the term "use" as it was employed in an "Intentional Acts Exclusion" of an insurance policy. Id. at 415, 412 S.E.2d at 816. Under the terms of the policy, in order for coverage to apply, the incident had to "arise out of the 'ownership, maintenance or use'" of a covered vehicle. Id. at 416, 412 S.E.2d at 817. In ascertaining what the term "use" meant, we relied upon the Michigan Court of Appeal's decision in Detroit Automobile Inter-Insurance Exchange v. Higginbotham, 290 N.W.2d 414 (Mich. Ct. App. 1980), which stated that:

> 'Cases construing the phrase "arising out of the . . . use of a motor vehicle" uniformly require that the injured person establish a causal connection between the use of the motor vehicle and the injury. Such causal connection must be more than incidental, fortuitous or but for. The injury must be foreseeably identifiable with the normal use of the vehicle. (Citations omitted.) (Emphasis added.)'

Baber, 186 W. Va. at 417, 412 S.E.2d at 818 (quoting Higginbotham, 290 N.W.2d at 419). Moreover, we noted in Dotts v. Taressa J.A., 182 W. Va. 586, 390 S.E.2d 568 (1990), that the phrase was not intended to be restrictive. Id. at 592, 390 S.E.2d at 574. Consequently, it is apparent that the term "uses" as it is employed in West Virginia Code § 33-6-31 is less restrictive than the term "occupying" as it is defined within the insurance policy at issue.

The provisions of West Virginia Code § 33-6-31, however, are not mandatory for every insurance policy issued in this state as indicated by the following language of West Virginia Code § 33-6-10(a) (1996):

> Insurance contracts shall contain such standard provisions as are required by the applicable provisions of this chapter pertaining to contracts of particular kinds of insurance. The commissioner may waive the required use of a particular standard provision in a particular insurance policy form, if he finds such provision unnecessary for the protection of the insured and inconsistent with the purposes of the policy, and the policy is otherwise approved by him.

Id.

Relying on the above-mentioned statutory language, as well as our decisions in Cook v. McDowell County Emergency Ambulance Service Authority, Inc., 191 W. Va. 256, 445 S.E.2d 197 (1994) and Eggleston v. West Virginia Department of Highways, 189 W. Va. 230, 429 S.E.2d 636 (1993), the Appellant argues that since the policy was issued to a governmental entity pursuant to the Governmental Tort Claims and Insurance Reform Act ("Act"), West Virginia Code §§ 29-12A-1 to -18 (1992), it is immune from the requirements of West Virginia Code § 33-6-31. In Cook, two passengers in an ambulance owned and operated by the McDowell County Emergency Ambulance were injured when the ambulance swerved and struck two parked automobiles. One of the passengers sustained severe head injuries, while the other suffered only minor injuries. 191 W. Va. at 257-58, 445 S.E.2d at 198-99. The issue on appeal concerned whether an underinsured motorist endorsement was subject to the maximum liability limit of $1,000,000 for a single claim or occurrence as provided under the terms of the policy. Id. at 258-59, 445 S.E.2d at 199-200.

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[9]In Cook, the parties negotiated a partial settlement under the Continental Casualty Company policy in which Continental agreed to pay a lump sum of $890,686.45. The question raised on appeal focused on whether the underinsured endorsement extended coverage beyond the $1,000,000 cap provided for in the general policy language. 191 W. Va. at 259, 445 S.E.2d at 200.

In determining this issue, we analyzed West Virginia Code § 29-12A-16(a) (1992):

> A political subdivision may use public funds to secure insurance with respect to its potential liability and that of its employees in damages in civil actions for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or any of its employees, including insurance coverage procured through the state board of risk and insurance management. The insurance may be at the limits, for the circumstances and subject to the terms and conditions that are determined by the political subdivision in its discretion.

191 W. Va. at 260, 445 S.E.2d at 201 (emphasis added). Based upon this statute, we stated that:

> [t]he West Virginia State Board of Risk and Insurance Management, under the terms of W. Va. Code § 29-12A-16(a), is granted broad discretion and powers relating to the procurement of insurance, and this Court believes that when a policy is a custom-designed policy procured by a body subject to the Governmental Tort Claims and Insurance Reform Act, the broad discretion granted the West Virginia State Board of Risk and Insurance Management authorizes that body to incorporate language absolutely limiting liability under the policy, even if such language would ordinarily be in violation of the provisions of W. Va. Code § 33-6-31(b) . . . .

191 W. Va. at 260, 445 S.E.2d at 201 (footnote added).

We find the Cook decision controlling in the instant case. Accordingly, we hold that West Virginia Code § 29-12A-16(a) conveys broad discretion to both the West Virginia State Board of Risk and Insurance Management, as well as governmental

entities for purposes of obtaining insurance. Consequently, when an insurer issues a custom-designed insurance policy to a governmental entity pursuant to the Act, that entity may incorporate language absolutely limiting liability under the policy, even if such language would otherwise violate the provisions of West Virginia Code § 33-6-31(b).

In the present case, since the insurance policy is substantially similar to the one issued in Cook, we find that it too is a custom-designed policy. See Cook, 191 W. Va. at 260, 445 S.E.2d at 201. Additionally, it is undisputed that the policy was procured by a governmental entity pursuant to the Act. Accordingly, just as the State Board of Risk in Cook limited liability by restricting the total amount of coverage to $1,000,000, the State Board of Risk in the instant case acted in accordance with its legitimate powers in limiting the State's liability for underinsurance to individuals "in, upon, getting in, on, out or off" a covered auto, even if the limitation otherwise violated the provisions of West Virginia Code § 33-6-31. Given the Appellee's concession that he was not occupying a covered auto at the time of the accident, underinsured motorist coverage is not available under the terms of the Appellant's policy and, accordingly, the circuit court erred in its ruling regarding this matter.

III.

The next issue concerns whether the workers' compensation exclusion in the state's insurance policy also bars the Appellee from underinsured motorist coverage in this case. The Appellant asserts that the insurance policy excludes coverage for any obligation that either the State of West Virginia or the Appellant "may" be held liable for under Workers' Compensation laws. Thus, the Appellant maintains that since the Appellee has already received workers' compensation benefits for past medical bills and time lost from work and currently has pending a workers' compensation claim for disability benefits, underinsured motorist coverage was excluded under the policy. The Appellee, however, argues that there is a sharp split among jurisdictions having underinsured motorists statutes as to whether the workers' compensation exclusion is valid. The Appellee maintains that the split centers upon the stated public policy of each respective jurisdiction's underinsured motorist statute. The Appellee contends that since stated public policy in West Virginia is to provide full compensation, not exceeding coverage limits, to an injured person for his or her damages not compensated by a negligent tortfeasor, the exclusion is void as against public policy. See Youler, 183 W. Va. at 564, 396 S.E.2d at 745. Further, the Appellee asserts that the exclusion is analogous to a policy set off that is expressly prohibited by West Virginia Code § 33-6-31(b).

The express language of the state's policy provides that "[t]his insurance does not apply to . . . [a]ny obligation for which the "insured" or the "insured's" insurer may be held liable under workers' compensation, disability benefits or unemployment compensation law or any similar law." The Appellee argues that this language contravenes the following proviso of West Virginia Code § 33-6-31(b): "No sums payable as a result of underinsured motorists' coverage shall be reduced by payments made under the insured's policy or any other policy." Id. Relying on this Court's decision in Youler, the Appellee argues that the workers' compensation exclusion, in reality, is a set off against the underinsurance benefits that is void as against public policy. See 183 W. Va. at 570, 396 S.E.2d at 751.

In Youler, we addressed whether a tortfeasor's liability insurance coverage is to be set off against the limits of the underinsured motorist coverage or, instead, against the

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[10]There was no assertion by any of the parties that the above-mentioned policy language was ambiguous. See supra note 8.

[11]Another exclusion in the policy precludes coverage for bodily injury to "an employee of the 'insured' arising out of and in the course of employment by the 'insured'[.]" Given that the Appellee indisputably is an employee of an insured, this exclusion would also preclude coverage for his claim for underinsured motorist benefits.

injured person's damages. Id. at 565, 396 S.E.2d at 746. We examined the following policy provision in relation to West Virginia Code § 33-6-31(b): "'Any amounts otherwise payable for damages under this endorsement [on uninsured/underinsured motorist coverage] shall be reduced by all sums paid because of the bodily injury or property damage by or on behalf of persons or organizations who may be legally responsible.'" Id. at 559, 396 S.E.2d at 740 (alterations in original). We concluded that

> W. Va. Code, 33-6-31(b), as amended, on uninsured and underinsured motorist coverage, contemplates recovery, up to coverage limits, from ones' own insurer, of full compensation for damages not compensated by a negligent tortfeasor who at the time of the accident was an owner or operator of an uninsured or underinsured motor vehicle. Accordingly, the amount of such tortfeasor's motor vehicle liability insurance coverage actually available to the injured person in question is to be deducted from the total amount of damages sustained by the injured person, and the insurer providing underinsured motorist coverage is liable for the remainder of the damages, but not to exceed the coverage limits.

183 W. Va. at 570, 396 S.E.2d at 751.

The Youler decision is readily distinguishable from the instant case for several reasons. First, Youler concerned a set off of mandatory liability coverage against the damages sustained by the injured party rather than what impact a workers' compensation exclusion has on the underinsurance coverage where the injured party was entitled to and did receive workers' compensation benefits. Second, and most important, the policy in

Youler was not a custom-designed policy issued to a governmental agency; instead, it was a policy issued to private individuals.

As we have previously stated in this opinion, by virtue of the State's insurance policy being custom-designed, a governmental entity may incorporate terms in such a policy absolutely limiting its liability, even where such limitation would otherwise violate the purview of West Virginia Code § 33-6-31. See Cook, 191 W. Va. at 260, 445 S.E.2d at 201. The workers' compensation exclusion evinces a bargained for policy that was designed to insure that an injured party is compensated for an injury, yet was also designed to prevent the taxpayers of this state from paying an injured party both workers' compensation benefits and damages through the insurance policy. For these reasons, the lower court should have also denied coverage based upon the workers' compensation exclusion.

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[12]Because our decision turns on the policy being a custom-designed policy issued to a governmental entity, we need not address at this time whether the workers' compensation exclusion contravenes West Virginia Code § 33-6-31 when private individuals or entities are involved.

Based on the foregoing, we reverse the decision of the Circuit Court of Wyoming County and remand for entry of an order consistent with this opinion.

Revers

[13]Having concluded that the lower court erred in determining the coverage issue, it is unnecessary to address the Appellant's remaining assignments of error.