No. 30036 – Jeanne Tennant, individually and as mother and next friend for Andrea Tennant and Addie Tennant, both infants v. Russell A. Smallwood, Jr. and State Farm Mutual Automobile Insurance Company

FILED
July 11, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
July 12, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, Justice, concurring:

I concur with the majority's opinion in the instant case for one simple reason: State Farm's policy cannot be read to provide coverage for the plaintiff's loss. The majority opinion, however, suggests an analysis of the case that is much more complex than it should be.

The majority opinion was partly correct in beginning its analysis by comparing the State Farm policy to *W.Va. Code*, 33-6-31(c) [1995], and determining whether the policy conformed to the statute's mandates. As we stated in *Adkins v. Meador*, 201 W.Va. 148, 153, 494 S.E.2d 915, 920 (1997) (with emphasis added):

> In construing any insurance policy, it is appropriate to *begin* by considering whether the policy language is in accord with West Virginia law. The terms of the policy should be construed in light of the language, purpose and intent of the applicable statute.

This should not, however, have been the end of, or even the primary focus of, the majority opinion's analysis.

I believe that the majority opinion should have focused its analysis upon the language of the State Farm insurance policy. An insurance company is not required to follow

W.Va. Code, 33-6-31 with exacting precision in crafting an automobile insurance policy. Instead, the statute simply mandates the minimum types and levels of coverage that an insurance policy must contain; if the insurance company so chooses, it may offer additional types and levels of coverage beyond that required by the statute. If the insurance company's policy does not contain the coverage required by state law, then courts will construe the statutorily required coverage into the policy. *W.Va. Code*, 33-6-17 [1957].

The instant case actually hinges upon the language chosen by State Farm in drafting its policy, and not whether the policy mirrored the statute or contained the minimum coverage required by the statute or violated some public policy. The question presented was whether the *policy* could be construed to allow the plaintiffs to recover uninsured motorist coverage from State Farm when the alleged tortfeasor had automobile insurance. In other words, did State Farm intend to offer more coverage than was required by *W.Va. Code*, 33-6-31(c)?

I believe that if State Farm wanted to, it could have defined "uninsured motor vehicle" in its policy in such a way that the tortfeasor in the instant case would have been considered "uninsured," and the plaintiffs could have recovered benefits under the policy. However, after reading the policy language, I find no ambiguity in the policy's language and believe that State Farm clearly intended to provide uninsured motorist coverage only for losses caused by drivers who carried liability insurance less than that required by state law. The tortfeasor in this case had plenty of liability insurance coverage, and therefore the State Farm uninsured motorist coverage was not triggered.

In sum, I concur with the result reached by the majority opinion. I believe, however, that the reasoning employed by the majority should have focused on the policy's language, not state law.