No. 32573 – *Pamela E. Howe, individually, and as adoptive parent and next friend of Trey J. Howe, a minor v. Duane A. Howe, American Standard Insurance Company of Ohio and American Family Insurance Company*

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Albright, Chief Justice, dissenting:

The majority is correct; this Court has never explicitly stated that household exclusions in automobile liability policies are contrary to the public policy of the State of West Virginia. However, in examining immunities and exclusions of a similar nature, this Court has unequivocally expressed its commitment to the fulfillment of legislative intent to provide coverage for liability in automobile accidents, subject to certain statutory limits.

With regard to family immunity, including parent-child and interspousal immunity, this Court has gradually modified its posture, ultimately eliminating those immunities. In its 1968 decision in *Freeland v. Freeland*, 152 W.Va. 332, 162 S.E.2d 922 (1968), *overruled by Lee v. Comer*, 159 W.Va. 585, 224 S.E.2d 721 (1976), this Court reduced the scope of family immunity, limiting it to parent-child and husband-wife relationships. In 1976, the Court readdressed such principles in *Lee* and abrogated the doctrine of parental immunity to the extent that an unemancipated minor child would be

permitted to sue his parent for injuries received in a motor vehicle accident.[1] In *Lee*, this Court specifically discussed automobile liability insurance and explained as follows:

> The rights of such minor child must be considered in light of today's contemporary conditions and modern concepts of fairness. In the realm of automobile accident cases we cannot brush aside or ignore the almost universal existence of liability insurance. Where liability insurance exists the domestic tranquillity argument is no longer valid, for, in fact, the real defendant is not the parent, but the insurance carrier.

159 W.Va. at 590, 224 S.E.2d at 723. Syllabus point two of *Lee* states: "An unemancipated minor may maintain an action against his parent for personal injuries sustained in a motor vehicle accident caused by the negligence of said parent and to that extent the parental immunity doctrine is abrogated in this jurisdiction."

By 1978, this Court had determined that the defense of interspousal immunity was no longer available in suits between spouses. *Coffindaffer v. Coffindaffer*, 161 W.Va. 557, 567-68, 244 S.E.2d 338, 344 (1978). In *Sitzes v. Anchor Motor Freight, Inc.*, 169 W.Va. 698, 289 S.E.2d 679 (1982), this Court reviewed the changes which had been instituted and observed "that the trend in this State was decidedly in favor of the abolishment of common law immunities." 169 W.Va. at 702, 289 S.E.2d at 682.

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[1]The *Lee* Court recognized that "[i]n recent years the application of this doctrine has begun to recede as rapidly as it had once spread." 159 W.Va. at 588, 224 S.E.2d at 722.

In *Paul v. National Life,* 177 W.Va. 427, 352 S.E.2d 550 (1986), this Court accentuated that "comity does not require the application of the substantive law of a foreign state when that law contravenes the public policy of this State." 177 W.Va. at 433, 352 S.E.2d at 556 (citing *Dallas v. Whitney*, 118 W.Va. [106], 188 S.E. 766 (1936)). The *Paul* Court recognized the "strong public policy of this State that persons injured by the negligence of another should be able to recover in tort." *Id*. The Court also declared "that automobile guest passenger statutes violate the strong public policy of this State in favor of compensating persons injured by the negligence of others." *Id*. at 434, 352 S.E.2d at 556. Based upon that recognition of public policy, the *Paul* Court specifically stated that "we will no longer enforce the automobile guest passenger statutes of foreign jurisdictions in our courts." *Id*.

Subsequent to the *Paul* decision, this Court addressed the existence of a named insured exclusion clause in *Dairyland Insurance Company v. East*, 188 W.Va. 581, 425 S.E.2d 257 (1992), and held as follows at syllabus point two:

> A named insured exclusion endorsement is invalid with respect to the minimum coverage amounts required by the West Virginia Motor Vehicle Safety Responsibility Law, West Virginia Code §§ 17D-1-1 to 17D-6-7 (1991 & Supp. 1992). Above the minimum amounts of coverage required by West Virginia Code § 17D-4-12 (1992), however, the endorsement remains valid.

In arriving at that conclusion, this Court endorsed the reasoning of a federal district court in Kansas to the effect that a named insured clause and a household exclusion clause are invalid

for the same reason: they both thwart the purpose of legislative enactments ensuring coverage for automobile accident liability up to certain statutory limitations. *See State Farm Mutual Automobile Insurance Co. v. Gengelbach*, No. 91-2048-O, 1992 WL 88025 (D. Kan. March 3, 1992). The *Gengelbach* court relied upon the following logic from *Halpin v. American Family Mutual Insurance Co.*, 823 S.W.2d 479 (Mo. 1992):

> The plain purpose of the 1986 amendment [the enactment of the Missouri Motor Vehicle Financial Responsibility Law] is to make sure that people who are injured on the highways may collect damage awards, within limits, against negligent motor vehicle operators. This protection extends to occupants of the insured vehicle as well as to operators and occupants of other vehicles and pedestrians. *The purpose would be incompletely fulfilled if the household exclusion clause were fully enforced*. . . . We believe that the legislature had a purpose of requiring motor vehicle liability policies to provide coverage coextensive with liability, subject to the statutory limits. We should give effect to the pervasive purpose even though the method of expression may be inartistic.

823 S.W.2d at 482 (emphasis supplied).

Thus, this State has consistently emphasized a strong public policy of ensuring protection of the innocent victims of automobile accidents.[2] As was explained by the

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[2]The majority references syllabus point two of *Thomas v. Nationwide Mutual Insurance Co.*, 188 W.Va. 640, 425 S.E.2d 595 (1992) and another opinion quoting that syllabus point. In that instance, however, this Court was addressing the family use exclusion within the context of underinsured coverage. Because the family use exclusion properly had "the purpose of preventing underinsured coverage from being converted into additional liability coverage," the Court upheld the exclusion. 188 W.Va. at 645, 425 S.E.2d at 600. "[W]hen the exclusion is applied, it is the liability coverage that has been paid for by the (continued...)

Washington court in *Mutual of Enumclaw Insurance Co. v. Wiscomb*, 643 P.2d 441 (Wash. 1982), exclusions such as the household exclusion should be void because they "exclude[ ] from protection an entire class of innocent victims for no good reason." 643 P.2d at 444.

> The family or household exclusion clause strikes at the heart of this public policy. This clause prevents a specific class of innocent victims, those persons related to and living with the negligent driver, from receiving financial protection under an insurance policy containing such a clause. . . .
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> This exclusion becomes particularly disturbing when viewed in light of the fact that this class of victims is the one most frequently exposed to the potential negligence of the named insured. Typical family relations require family members to ride together on the way to work, church, school, social functions, or family outings. Consequently, there is no practical method by which the class of persons excluded from protection by this provision may conform their activities so as to avoid exposure to the risk of riding with someone who, as to them, is uninsured.

Id.; *see also Lewis v. West Am. Ins. Co.*, 927 S.W.2d 829, 835 (Ky. 1996), (holding that household exclusion clauses in policies of automobile liability insurance are contrary to public policy).

Based upon this Court's specific statements disapproving of application of any principle which serves to thwart the public policy and legislative intent to ensure protection

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[2](...continued)
insured, and not underinsured coverage. Therefore, such an exclusion would not violate the public policy of full compensation of an insured." *Id.*

of victims of automobile accidents, I do not believe that the household exclusion in the Ohio policy should be enforced in the courts of this State.