STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Marvin White,
Plaintiff Below, Petitioner

vs) No. 101507 (Fayette County No. 09-C-255)

David L. Bragg,
Defendant Below, Respondent

State Farm Mutual Automobile Insurance Company,
Respondent

FILED
April 1, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Marvin White files this timely appeal from the circuit court's order granting summary judgment in favor of Respondent State Farm Mutual Automobile Insurance Company and denying petitioner's cross-motion for summary judgment. Petitioner seeks a reversal of the circuit court's order and a remand for entry of an order of summary judgment in his favor. State Farm has filed a timely response.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

The relevant facts are not in dispute. On October 5, 2007, petitioner, a Georgia resident, was traveling on U.S. Route 19 in Fayette County, West Virginia, in a rental car when he was struck in the rear by a vehicle being operated by David Bragg. Petitioner was injured as a result of the accident.

At the time of the accident, petitioner owned two vehicles that were principally garaged in Georgia. Both vehicles were insured under separate State Farm policies issued in Georgia. These separate policies provided uninsured/underinsured motorist coverage in

the amount of $25,000 per vehicle. The Court notes that under Georgia law and as reflected by the policies at issue, the term "uninsured" refers to both uninsured and underinsured motorist coverage. The policies contained the following definition of "uninsured motor vehicle":

> **Uninsured Motor Vehicle** means:
> 1. A land motor vehicle, the ownership, maintenance or use of which is:
>
> b. insured or bonded for bodily injury and property damage liability at the time of the accident; but
>
> (1) the limits of liability are less than required by the motor vehicle safety responsibility laws of the state where your car is mainly garaged; or
>
> (2) **the limits of liability that apply from such vehicle to the insured's damages:**
>
> **(a) are less than the limits of liability for uninsured motor vehicle coverage under this policy**; or
>
> (b) have been reduced by payments to persons other than the insured to less than the limits of liability for uninsured motor vehicle coverage under this policy.
>
> (3) the insuring company denies coverage or becomes insolvent.

(Emphasis added)

The highlighted policy language tracks the Georgia uninsured motorist statute which was in effect on the date of the accident. *See* Ga.Code Ann. § 33-7-11(2007) This statute provided that the amount of available uninsured motorist coverage for a particular accident was calculated by adding the policy limits of all available uninsured motorist coverage and, if that amount exceeded the available liability coverage, then offsetting the uninsured motorist coverage in an amount equal to the limits of any available liability coverage. There would be no recovery of uninsured motorist benefits in cases where their total amount did not exceed the amount of the liability coverage.

About a year after the accident, effective January 1, 2009, the Georgia Legislature revised the uninsured motorist statute. The revised statute permitted an injured policy-holder to recover benefits under his or her available uninsured motorist coverages in addition to any liability insurance recovery so long as the amount of total payments did not exceed his or her total economic and non-economic losses caused by the accident. This change made the Georgia law similar to West Virginia law regarding uninsured/underinsured motorist coverage.

Coverage Issue

Petitioner reached a settlement with David Bragg for the $100,000 policy limits of Bragg's liability policy. Petitioner filed suit and served Respondent State Farm in order to pursue underinsured motorist coverage under his own policies.

Respondent State Farm sought summary judgment. State Farm argued that Georgia law was controlling because the relevant policies were issued to the petitioner, a Georgia resident, in Georgia by a Georgia insurance agent. State Farm further argued that the specific language of the petitioner's policies barred recovery of uninsured/underinsured motorist benefits when the combined policy limits of the petitioner's uninsured motorist coverages were less than and, thus, completely offset by the liability policy limits he received. In other words, petitioner's uninsured/underinsured policy limits totaled $50,000, which is less than the $100,000 liability policy limits he received from David Bragg's insurer.

Petitioner filed a cross-motion for summary judgment arguing that he was entitled to underinsured motorist coverage because the 2009 Georgia uninsured motorist statute eliminated the offset and allowed recovery of uninsured motorist benefits under the facts of the present case. Petitioner argued that any language in the relevant policies, which conflicted with the 2009 statute, was void.

The circuit court granted summary judgment in favor of Respondent State Farm and denied petitioner's cross-motion for summary judgment. The circuit court held that the substantive law of Georgia, not West Virginia, applied to determine the rights of parties under the relevant insurance policies which were issued in Georgia, to a Georgia resident, for vehicles principally garaged in Georgia. "'The provisions of a motor vehicle policy will ordinarily be construed according to the laws of the state where the policy was issued and the risk insured was principally located, unless another state has a more significant relationship to the transaction and the parties.' Syllabus Point 2, *Lee v. Saliga*, 179 W.Va. 762, 373 S.E. 2d 345, (1988)." Syl. Pt. 2, *Nadler v. Liberty Mutual Fire Insurance Company*, 188 W.Va. 329, 424 S.E. 2d 256 (1992). The circuit court, relying upon *Nadler*, found that Georgia law

applied and that petitioner was not entitled to underinsured motorist coverage because of the express language of his policies which tracked the 2007 version of the Georgia uninsured motorist statute. The circuit court concluded that the 2009 revision of the Georgia uninsured motorist statute did not become effective until January 1, 2009, after petitioner had purchased his policies from Respondent State Farm and after the subject accident occurred. As such, the circuit court concluded that the 2009 Georgia uninsured motorist statute had no bearing on the determination of coverage and does not void the provisions contained within the applicable State Farm policies. The circuit court specifically declined to apply the revised uninsured motorist statute retroactively.

"Determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law." Syl. Pt. 1, *Tennant v. Smallwood*, 211 W.Va. 703, 568 S.E. 2d 10 (2002) "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E. 2d 755 (1994) After considering the record and arguments of counsel, this Court concludes that there was no error in the circuit court's order granting summary judgment in favor of Respondent State Farm and denying petitioner's cross-motion for summary judgment. Accordingly, we affirm.

Affirmed.

ISSUED: April 1, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh