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Consolidated No. 20-0851

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

PROGRESSIVE MAX INSURANCE COMPANY,

Defendant Below, Petitioner,

v.

CIVIL ACTION NO. 19-C-210
(CIVIL ACTION NO. 19-C-209)

AMBER R. HESS and CHRISTINE BREHM,

Plaintiffs Below, Respondents.

REPLY BRIEF OF PETITIONER

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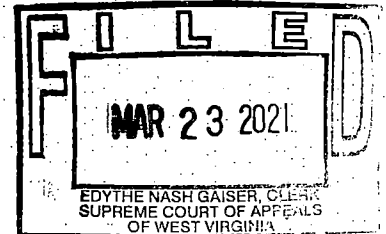


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I. STATEMENT OF THE CASE

Petitioner reincorporates its Statements of the Case, Backgrounds of Instant Action, Summaries of Claims, and Proceedings and Rulings Below, as if fully set forth herein. *See* Brehm and Hess Appeal Briefs of Petitioners at pp. 1-5. Petitioner would note that Respondents substantially agree with the issue and note that there is no dispute as to the facts of this case.

In addition, Petitioner submits this consolidated reply in response to the two briefs filed by Christine Brehm (20-0850) and Amber R. Hess (20-0851), pursuant to this Court's February 8, 2021 Order consolidating these two pending matters.

II. ARGUMENT

A. **THE CIRCUIT COURT ERRED IN HOLDING THAT W. VA. CODE § 33-6-29(b) EXTENDS UNDERINSURED MOTORIST COVERAGE TO ALL GUEST PASSENGERS IN RENTAL VEHICLES, REGARDLESS OF THE LANGUAGE OF THE POLICY.**

The issues presented in this appeal are a matter of first impression. At no time has this Court addressed the applicability of underinsured motorist coverage in the context of a "Class Two" passenger of a rental vehicle. The Circuit Court held that W. Va. Code § 33-6-29 and W. Va. Code § 33-6-31 should be "read together," and then summarily concluded that these "West Virginia statutes require a guest passenger in a rental vehicle to be afforded underinsured motorist coverage under a policy of insurance issued by the Progressive Max Insurance Company ("Progressive") that provides coverage to the rental vehicle in which she is a lawful guest passenger."

In other words, the Court implicitly held that West Virginia Code § 33-6-29 causes a rental vehicle to automatically meet the definition of a "covered auto" (or "a vehicle to which the coverage applies") under every motor vehicle liability policy issued in this State, thereby providing underinsured motorist coverage to every "Class Two" passenger of all rental vehicles in West

Virginia. See W. Va. Code § 33-6-31(c). However, the plain language of West Virginia Code § 33-6-29 evinces no such legislative intent. The language of the statute explicitly states which coverages are “extended,” and to whom. It cannot be read to alter the definitions of a “covered auto,” “additional auto” or “replacement auto” of every liability insurance policy so as to create coverage that would not otherwise be available under the plain language of that liability insurance policy.

Respondents rely solely upon the statutory language to support their position. However, there is no specific reference by the Legislature applying the statutory mandates for underinsured motorist coverage to guest passengers in rental vehicles. As this court noted in *Swiger v. UGI/AmeriGas, Inc.*, 216 W. Va. 756, 613 S.E.2d 904 (W. Va. 2005):

“[i]n the absence of ... [legislative] direction as to what elements are to be considered in promulgating... [a] rule, the presumption is that ... [the Legislature] is entrusting the decision as to what to consider to the hands of the agency in deference to agency expertise.” 195 W.Va. at 589, 466 S.E.2d at 440 (quoting *Kennedy v. Block*, 606 F.Supp. 1397, 1403 (W.D.Va.1985)).

Id. at 764. Respondents summarily dismiss this lack of legislative guidance in their brief.

It is the Petitioner’s position that the Circuit Court’s conclusion that W.Va. Code § 33-6-29(b), which extends certain types of coverage in a liability policy to the insured while they are “operating” a rental vehicle, was not meant to also extend underinsured motorist coverage for “Class Two” insureds who are occupants of the vehicle. A clear reading of W. Va. Code § 33-6-29(b) refutes the trial Court’s finding. That section reads, in operative part:

(b) Every policy or contract of **liability insurance** which insures a motor vehicle licensed in this state with **collision, comprehensive, property or bodily injury coverage** shall extend **these coverages** to cover the insured individual **while operating** a motor vehicle which he or she is permitted to use by a person, firm or corporation that owns the vehicle and is engaged in the business of selling, repairing, leasing or servicing motor vehicles.

W. Va. Code § 33-6-29(b) (emphasis added). In the absence of any clear legislative intent to the

contrary, the terms of the policies of insurance at issue in these matters should be given their plain meaning. As this Court stated in *Deel v. Sweeney*:

Insurers may incorporate such terms conditions and exclusions in an automobile insurance policy as may be consistent with the premium charged, so long as any such exclusions do not conflict with the spirit and intent of the uninsured and underinsured motorists statutes.

Syllabus Point 3, Deel v. Sweeney, 181 W.Va. 460, 383 S.E.2d 92 (1989). See also *Cunningham v. Hill*, 226 W.Va. 180, 698 S.E.2d 944 (W. Va. 2010).

Underinsured motorist coverage is optional in West Virginia. *Imgrund v. Yarborough*, 199 W.Va. 187, 483 S.E.2d 533 (1997) (emphasis added). In drafting West Virginia Code § 33-6-29(b), the Legislature made no reference to this optional underinsured motorist insurance. Rather than acknowledging that the subject statutes reflect no legislative intent as to the application of underinsured motorist coverage, the Circuit Court supplied its own conclusion to the instant case. In doing so, the Circuit Court misinterpreted the legislative intent of the statutes and the relevant language of the policies, and thereby committed reversible error.

B. A PROPER ANALYSIS BY THE CIRCUIT COURT OF WHETHER THE PASSENGERS IN THE RENTAL VEHICLE WERE INSURED UNDER THE PROGRESSIVE POLICY, AND/OR W. VA. CODE § 33-6-31(C) WOULD HAVE RESULTED IN EXCLUSION OF COVERAGE.

The proper analysis, which should have been applied in the court below, was to ask whether the Respondents, who were passengers in a rental vehicle, met the definition of an “insured” under either the language of the Policy, or W.Va. Code § 33-6-31(c). The court below never reached this portion of the analysis as discussed, *infra*.

The Respondent rental vehicle passengers do not meet the definition of “insureds” under either the Policy or the statute. The reason for this is clear: (1) the rental car at issue does not meet the Policy’s definition of a “covered auto,” and/or (2) the passengers were not using or

occupying “a vehicle to which the coverage applies.” W. Va. Code § 33-6-31(c). For West Virginia Code § 33-6-31(c) to apply, a passenger in a rental car must have been “using” “the motor vehicle to which the policy applies.”¹ *Id.* (emphasis added). (JA 078).

In their Response Brief, Respondents gloss over the crucial distinction in West Virginia law between class one and class two insureds, by relegating this key issue to a footnote. *See* Brief of Respondent, Christine Brehm at pp. 7-8 and Brief of Respondent, Amber R. Hess at pp. 7-8. W.Va. Code §33-6-31(c) recognizes the first class of insureds as “the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either....” These specific persons are insured “while in a motor vehicle or otherwise.” *See* W.Va. Code §33-6-31(c) (underlined text above). As argued to the trial court below, the second category of insureds under the statute applies to **any** person, as long as certain conditions exist. Under the second category, the person must be using, with permission, “the motor vehicle to which the policy applies.” *Id.* Under the second category, any person is an insured “who uses, with the consent, expressed or implied, of the named insured, **the motor vehicle to which the policy applies.**” *Id.*

As this Court is aware, in its opinion of in *Starr v. State Farm Fire & Cas. Co.*:

The statute clearly differentiates between the named insureds and their resident relatives, who are considered insureds “while in a motor vehicle or otherwise,” and any other “person ... who uses ... the motor vehicle to which the policy applies” with the consent of the named insured.

This analysis of our statute brings about the same result that was obtained from our consideration of State Farm's policy definition. The named insured and his or her spouse and resident relatives are Class One insureds and enjoy broader uninsured/underinsured motorist protection because their coverage is not limited to their occupancy of a particular motor vehicle. On the other hand, the Class Two

¹ West Virginia Code§ 33-6-31(c) states, in operative part: ...the term “insured” means 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, expressed or implied, of the named insured, the motor vehicle to which the policy applies.**

insured is statutorily limited to coverage under the policy covering the vehicle he or she was occupying at the time of the accident.

Thus, we conclude that W.Va. Code, 33–6–31(c), creates two classes of insureds for purposes of uninsured/underinsured motorist insurance. The first class includes the named insured, his or her spouse, and their resident relatives. The second class consists of the permissive users of the named insured's vehicle.

....

The foregoing cases generally hold that because the Class Two insured's coverage is tied to occupancy of *the covered motor vehicle*, such occupant is not an “insured” for purposes of the policyholder's uninsured/underinsured motorist coverage *on any other vehicle*.

Starr v. State Farm Fire & Cas. Co., 188 W. Va. 313, 318–19, 423 S.E.2d 922, 927–28 (1992) (emphasis added).

It is undisputed that Respondent rental vehicle passengers are “Class Two” insureds because they are neither the named insured Susan Bindernagel, her spouse, or a resident relative (JA 078-080, 163-165). To be a Class Two insured for purposes of underinsured motorist coverage the passengers must have been occupying or using a “motor vehicle to which the coverage applies.” W. Va. Code § 33-6-31(c).

At this juncture the trial court failed to properly consider the Policy’s definition of an “insured.” The Progressive Policy creates two classes: (1) the named insured, a relative, or a rated resident, and (2) any other person while operating or occupying a “covered auto.” (JA 078-079, 163-164). Thus, the Policy is in substantial accord with the definition supplied by W.Va. Code § 33-6-31(c). It is clear that the Enterprise rental car in question was not a “covered auto” as that term is defined in the Policy because as it is neither (1) an auto shown on the declarations page, (2) an “additional auto,” nor a “replacement auto.” Accordingly, Respondents were “Class Two” insureds under the Policies’ definitions as well.

The Trial Court erred in its ruling below as the clear and unambiguous language of the Progressive Policy also states that, for purposes of underinsured motorist coverage, an “insured person” is defined as follows:

ADDITIONAL DEFINITIONS

When used in this Part III:

1. “Insured person” means:
 - A. you, a relative, or a rated resident;
 - B. any person while operating a covered auto with the permission of you, a relative, or a rated resident;
 - C. any person occupying, but not operating, a covered auto; and
 - D. any person who is entitled to recover damages covered by this Part III because of bodily injury sustained by a person described in a., b. or c.

(JA 037, 121). The Respondent rental car passengers were not:

- named insureds,
- “relatives”,
- or “rated residents”.

Neither were occupying or using a “covered auto” (JA 027, 111) and neither of the Respondents were residing in the household with Susan Bindernagel (JA 078).

A further review of the Policy at issue reveals that under GENERAL DEFINITIONS, the Policy provides:

1. “Additional auto” means an auto you become the owner of during the policy period that does not permanently replace an auto shown on the declarations page if;
 - a. we insure all other autos you own;
 - b. the additional auto is not covered by any other insurance policy;
 - c. you notify us within 30 days of becoming the owner of the additional auto; and
 - d. you pay any additional premium due.

An additional auto will have the broadest coverage we provide for any auto shown on the declarations page. If you ask us to insure an additional

auto more than 30 days after **you** become the owner, any coverage **we** provide will begin at the time **you** request coverage.

....

5. **“Covered auto”** means:

- A. any **auto** or **trailer** shown on the **declarations page** for the coverages applicable to that **auto** or **trailer**;
- B. any **additional auto**;
- C. any **replacement auto**; or
- D. a **trailer** owned by **you**.

....

11. **“Replacement auto”** means an **auto** that permanently replaces an **auto** shown on the **declarations page**. A **replacement auto** will have the same coverage as the **auto** it replaces if the **replacement auto** is not covered by any other insurance policy. However, if the **auto** being replaced had coverage under Part IV—Damage To A Vehicle, such coverage will apply to the **replacement auto** only during the first 30 days after **you** become the owner unless **you** notify us within that 30-day period that **you** want **us** to extend coverage beyond the initial 30 days. If the **auto** being replaced did not have coverage under Part IV—Damage To A Vehicle, such coverage may be added, but the **replacement auto** will have no coverage under Part IV until you notify us of the **replacement auto** and ask **us** to add the coverage.

(JA 027-028, 111-112).

Finally, the Policy’s declarations page lists one automobile: a 2011 Subaru Legacy 4 Door Sedan with VIN No. 4S3BMBG69B3253984 (JA 021-022, 105-106). Under these clear and unambiguous terms, the rental car clearly does not meet the definition of a “covered auto” under the Policy. For these reasons, as rental car passengers, Respondents do not meet the Policy’s definition of “an insured person” for underinsured motorist coverage.

Because of the failure of the court below to apply the Policy language, the Circuit Court erred when it held that all rental vehicles are “covered autos” or “motor vehicle(s) to which the policy applies,” by the operation of W.Va. Code § 33-6-29(b), and therefore, all guest passengers of rental vehicles in West Virginia must be afforded optional underinsured motorist coverage, by

law. The reliance of the trial court was in error.

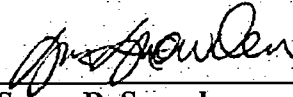
IV. CONCLUSION

In this matter of first impression before this court there are two separate and distinct approaches that may be taken, each having opposite results. The trial court took the Respondents' approach which was reaching a conclusion that the legislature meant for West Virginia Code § 33-6-29(b) to afford Underinsured Motorist Coverage to passengers in rental vehicles. Petitioner maintains that there is no evidence that the legislature intended such a result. Rather, the other approach, application of the clear and unambiguous terms of the Policy was the correct analysis, resulting in no coverage under the Progressive Policy.

For the reasons set forth above, Petitioner would request that this court reverse the decision granting summary judgment to the Respondents and direct the Court to enter judgment in favor of Petitioner on coverage, specifically finding that the Enterprise rental car in this matter was neither a "covered auto" under the Policy nor a "motor vehicle to which the policy applies" under West Virginia Code § 33-6-31(c). Further, Petitioner would ask that the court find that the Circuit Court erred, and that Respondents Brehm and Hess do not meet the definition of an insured person and cannot recover for underinsured motor vehicle bodily injury under the Policy.

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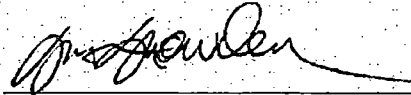
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Susan R. Snowden, counsel for Petitioner hereby certify that I served a true copy of the foregoing upon the following individuals, via U.S. Mail, postage prepaid, on this the **23rd** day of

March, 2021:

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