IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 25-ICA-85

SEAN MCKEE,

Plaintiff Below, *Petitioner*,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, **and PARKER HALL INSURANCE AGENCY, INC.**,

Defendants Below, *Respondents.*

On Appeal from the Circuit Court of Monongalia County
Case No. CC-31-2021-C-280

BRIEF OF RESPONDENTS

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Respondents, State Farm Mutual Automobile Insurance Company ("State Farm") and the Parker Hall Insurance Agency, Inc. ("the Hall Agency") submit the following response to Petitioner's Brief:[1]

I. INTRODUCTION

This appeal concerns a contractual claim for insurance coverage under a written insurance contract, not negligence. Petitioner's only assignments of error in this appeal stem from the circuit court's decision granting summary judgment in State Farm's favor as to Petitioner's breach of contract claim for underinsured motorist ("UIM") benefits. Relying on the undisputed, material facts relevant to Petitioner's UIM claim and the unambiguous and enforceable terms of the insurance policy, the circuit court correctly granted summary judgment in State Farm's favor. Petitioner's only arguments in this appeal conflate the claim for negligence against the Hall Agency with his UIM breach of contract claim against State Farm. Those claims are separate and distinct. Moreover, the circuit court correctly denied Petitioner's cross-motion for summary judgment on his negligence claim against the Hall Agency (which decision is not on appeal), finding, at that time, there were genuine issues of material fact concerning the Hall Agency's alleged negligence. However, those disputed facts are neither material nor relevant to Petitioner's UIM claim. Because the circuit court correctly applied the law to the undisputed material facts relevant to Petitioner's UIM claim, State Farm respectfully asks this Court to affirm the circuit

[1] The Hall Agency is considered a "party" to this appeal only because it is a party in the proceedings below. *See* W. Va. R. App. P. 5(c) (stating that all parties to the proceeding in the tribunal below are deemed parties in the Intermediate Court of Appeals "unless the appealing party indicates on the notice of appeal that one or more of the parties below [] has no interest in the outcome of the matter"). However, Petitioner only appealed the circuit court's decision granting summary judgment as to Count I of Petitioner's Complaint, which seeks underinsured motorist insurance coverage and was asserted against State Farm, not the Hall Agency. The Hall Agency was not a party to the Motion for Partial Summary Judgment on Count I that is the subject of this appeal.

court's decision granting summary judgment in favor of State Farm as to Count I of Petitioner's Complaint.

II. STATEMENT OF THE CASE

On or around October 3, 2019, Petitioner Sean McKee was involved in a motor vehicle accident. Jt. App. at 001, ¶ 5. Petitioner was driving a 2016 Subaru WRX, which he purchased on September 12, 2019, three weeks prior to the accident. *Id.* at 002, ¶ 10. The 2016 Subaru WRX was delivered to Petitioner at least 15 days prior to the accident, on September 14, 2019. *Id.* at 003, ¶ 12; Pet.'s Brief at 2. Petitioner alleges he had UIM bodily injury coverage through State Farm at the time of the accident. *Id.* at 002, ¶ 9. However, on the date of loss, the only State Farm automobile insurance policy issued to Petitioner, bearing the Policy Number 212-5863-C14-48P, listed a 2015 Ford Focus (the "Ford Policy" or the "Policy"). *Id.* at 046.

The Ford Policy provides, in relevant part: "***We*** will pay compensatory damages for ***bodily injury*** and ***property damage*** an ***insured*** is legally entitled to collect from the owner or driver of an ***underinsured motor vehicle.*** [However, [t]he ***bodily injury*** must be sustained by an ***insured***..." *Id.* at 069. Under the Policy, an "***insured***" includes "***you***," defined as "the named insured or named insureds shown on the Declarations Page," the named insured(s)' ***resident relatives***, and any other person while occupying or otherwise using "your car, ***a newly acquired car***, or a ***temporary substitute car***…" *Id.* at 068 (cleaned up). "Your car" is defined as "the vehicle shown under YOUR CAR on the Declarations Page." *Id.* at 057. A "newly acquired car" is "a ***car*** newly ***owned by you***," but a ***car*** ceases to be a ***newly acquired car*** on the earlier of the effective date of any of other policy that "describes the ***car*** as an insured vehicle" or "the end of the 14th calendar day immediately following the date the ***car*** is delivered to you." *Id.* at 056.

The Policy also contains the following "owned but not insured exclusion," which explicitly excluded UIM coverage:

> FOR AN ***INSURED*** WHO SUSTAINS ***BODILY INJURY*** WHILE ***OCCUPYING*** OR OTHERWISE USING A MOTOR VEHICLE ***OWNED BY YOU*** OR ANY ***RESIDENT RELATIVE*** IF IT IS NOT ***YOUR CAR*** OR A ***NEWLY ACQUIRED CAR*** AND IF IT IS:
>
> > a. NOT INSURED FOR UNDERINSURED MOTOR VEHICLE COVERAGE; OR
> >
> > b. INSURED FOR UNDERINSURED MOTOR VEHICLE COVERAGE UNDER ANOTHER POLICY ISSUED BY US.

Id. at 070.

On April 21, 2022, after State Farm declined to extend UIM coverage for the October 3, 2019 accident, Petitioner filed suit in the Circuit Court of Monongalia County, West Virginia. In the Complaint, Petitioner asserts claims against State Farm for: breach of contract seeking UIM coverage (Count I); common law bad faith (Count II); violations of the West Virginia Unfair Trade Practices Act (Count III); and punitive damages (Count IV). Petitioner also asserts an "errors or omissions" claim against his insurance agent, the Hall Agency, alleging the Hall Agency negligently failed to add the 2016 Subaru WRX to Petitioner's Policy prior to the date of loss (Count V). *Id.* at 008, ¶¶ 44-45.

On August 28, 2023, State Farm filed its Motion for Partial Summary Judgment, requesting judgment in its favor as to Petitioner's UIM claim in Count I of the Complaint. In its supporting Memoranda, State Farm asserted UIM coverage is not available under the Ford Policy because Petitioner, although an insured under the Ford Policy, was not operating "your car" or a "***newly acquired car***" on October 3, 2019. *Id.* at 038. Also, the Subaru WRX Plaintiff was operating was

owned by him but was not insured for UIM coverage. Under those undisputed facts, the Policy explicitly and unambiguously excludes coverage.

Following oral argument on December 19, 2023, the circuit court granted State Farm's Motion and denied Petitioner's Cross-Motion for Summary Judgment, finding there was ***NO*** UIM coverage for the October 2019 accident. *See Id.* at 202 – 207. The Court found there was no UIM coverage under the "owned but not insured" exclusion in the Policy. *Id.* at 206, ¶ 12. The Court also found the definition of "newly acquired car" is clear and unambiguous, and the 2016 Subaru WRX does not qualify as a "newly acquired car" on the date of the accident because the vehicle was purchased by Petitioner and delivered to Petitioner more than 14 days prior to the accident. *Id.* at ¶ 15. On February 12, 2025, the Court issued an Order, entering final judgment in State Farm's favor as to Count I of the Complaint. *Id.* at 237-39.

On appeal, Petitioner assigns two errors to the circuit court's entry of summary judgment in State Farm's favor as to the UIM breach of contract claim set forth in Count I of the Complaint.[2]

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument in this matter is unnecessary because the facts and legal arguments concerning Plaintiff's UIM claim are adequately presented in the briefs and record on appeal. *See* W. Va. R. App. P. 18(a)(4). The Circuit Court's Order granting summary judgment should be

[2] In its February 6. 2025 Order certifying its Order granting summary judgment against Plaintiff's UIM claim as a final judgment, the Court also certified its Order granting the Hall Agency's Motion for Partial Summary wherein the Court found Petitioner could only recover up to the $100,000 for accident-related damages, the amount of UIM policy limits Petitioner claimed would be available but for the alleged negligence of the Hall Agency. Jt. App. at 237-38. However, in this appeal, Petitioner does not assign error to the Court granting summary judgment as to scope of damages available for his negligence claim or to any other ruling concerning his negligence claim. Therefore, arguments in this appeal relevant to Petitioner's negligence claim, which at best, are "mentioned only in passing" and are "not supported with pertinent authority" should thus not be considered on appeal before this Court. *Joshua H. v. Kristen H.*, No. 24-ICA-226, 2024 W. Va. App. LEXIS 303, at *5 (Ct. App. Oct. 28, 2024) (quoting *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996)).

affirmed based on the relevant, undisputed record and West Virginia law. However, should this Court determine oral argument is necessary, this case is appropriate for Rule 19 argument and disposition by a memorandum decision. W. Va. R. App. P. 19(a) ("cases involving assignments of error in the application of settled law").

IV. STANDARD OF REVIEW

On appeal, "[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). "It is the province of the court, and not of the jury, to interpret a written contract." Syl. Pt. 1, *Stephens v. Bartlett*, 118 W. Va. 421, 191 S.E. 550 (1937). "Under West Virginia law, the interpretation of a contract is a legal question freely reviewable on appeal." *Lopez v. Erie Ins.*, 908 S.E.2d 508, 513, 2024 W. Va. App. LEXIS 292, at *8 (Ct. App. 2024) (citing *IPI, Inc. v. Axiall Corp.*, 249 W. Va. 544, 552, 897 S.E.2d 572, 580 (Ct. App. 2024)).

V. SUMMARY OF ARGUMENT

Relying on provisions within the four corners of the Policy, the circuit court properly found there was no genuine issue of material fact as to Petitioner's UIM claim and correctly granted summary judgment in State Farm's favor. First, the 2016 Subaru WRX was not within the Policy's clear and unambiguous definition of "your car" because there is no dispute that vehicle does not appear on the Declarations Page of the Policy. Second, the 2016 Subaru WRX did not qualify as a "newly acquired car" under the Policy because it is undisputed that Petitioner purchased the vehicle on September 12, 2019, and the vehicle was delivered on September 14, 2019, more than 14 days before the October 3, 2019 accident. Third, the Policy's "owned but not insured exclusion" explicitly excludes UIM coverage for Petitioner because he was operating a vehicle owned by him but not insured for UIM coverage.

Moreover, neither on appeal nor in the circuit court below, has Petitioner argued that any of the above-listed provisions of the Policy are vague, ambiguous, or otherwise unenforceable. Therefore, because there is no dispute concerning the facts material to Petitioner's UIM claim, under the Policy's clear and unambiguous terms, the circuit court correctly concluded there is no UIM coverage for the October 3, 2019 accident. Instead of addressing the undisputed material facts relevant to the applicable Policy provisions, Petitioner maintains "genuine issues of material fact exist" regarding whether he "took reasonable actions and methods to timely reflect the trade of the 2015 Ford Focus and substitution of the newly purchased Subaru to his State Farm insurance policy." Pet.'s Brief at 4. However, this question is entirely immaterial to Petitioner's UIM claim.

While the circuit court properly viewed any permissible inferences from the underlying facts material to Plaintiff's UIM claim in a light most favorable to the Petitioner, "[f]actual disputes that are irrelevant or unnecessary will not be counted" as a "material fact." *Jividen v. Law*, 194 W.Va. 705, 714, 461 S.E.2d 451, 460 (1995) (internal citations omitted). To that end, the circuit court correctly concluded the parties' dispute concerning whether Petitioner reported the purchase of the 2016 Subaru WRX to the Hall Agency prior to the accident "is not relevant" to Petitioner's UIM claim asserted against State Farm. Jt. App. at 206, ¶ 14. Because all the inferences Petitioner claims were not viewed in his favor were irrelevant to the UIM claim, the circuit court's Order granting summary judgment in State Farm's favor as to Petitioner's UIM claim should be affirmed.

VI. ARGUMENT

A. The Circuit Court Properly Found There Was No Genuine Issue of Material Fact as to Petitioner's UIM Claim and Correctly Granted Summary Judgment to State Farm.

Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is proper when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *See* Syl, Pt. 3, *Via v. Beckett*, 217 W. Va. 348. 349. 617 S.F..2d 895,

896 (2005): Syl. Pt. 1, *Williams v. Precision Coil. Inc.*, 194 W. Va, 52, 56, 459 S.E.2d 329, 333 (1995). "Summary judgment is not a remedy to be exercised at the circuit court's option; it must be granted when there is no genuine dispute over a material fact." *Payne v. Weston*, 195 W. Va. 502, 506, 466 S.E.2d 161, 165 (1995). Also, "[d]etermination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law," and thus, is an appropriate issue for summary judgment. Syl. Pt. 1, *Tennant v. Smallwood,* 211 W. Va. 703, 568 S.E.2d 10 (2002). "Language in an insurance policy should be given its plain, ordinary meaning." Syl. Pt. 1, *Mylan Labs. v. Am. Motorists Ins. Co.,* 226 W. Va. 307, 700 S.E.2d 518 (2010). Finally, "[w]here the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." Syl., *Keffer v. Prudential Ins. Co.*, 153 W. Va. 813, 172 S.E.2d 714 (1970).

Following these principles, the circuit court properly granted summary judgment in State Farm's favor as to Petitioner's UIM claim based on the undisputed, material facts and the clear and unambiguous terms of the Policy. First, the 2016 Subaru WRX was not listed on the Declarations Page of the Policy on the date of the accident. Therefore, the circuit court properly found—and Petitioner acknowledges—the 2016 Subaru WRX did not qualify as "your car" under the clear and unambiguous definition of that term under the Policy. Jt. App. at 205, ¶ 10; *see also* Pet.'s Brief at 9 ("The [circuit c]ourt…did not consider the whole picture of why and how the ***Subaru was not on the policy***.") (emphasis added)).

Second, there is no dispute Petitioner purchased the Subaru WRX on September 12, 2019, the vehicle was delivered two days later on September 14, 2019, and the accident occurred on October 3, 2019, more than 14 calendar days after delivery of the vehicle. *Id.* at 206, ¶ 15; Pet.'s Brief at 2 (stating that "on September 14, 2019, [Petitioner's] new vehicle was delivered to [a

dealership] and was retrieved by [Petitioner] and his father"). The Policy states that a car purchased by the insured "ceases to be a ***newly acquired car*** by "the end of the 14th calendar day immediately following the date the ***car*** is delivered to ***you***." *Id.* at 056. The circuit court properly found, and Petitioner does not dispute that, the Policy's definition of "newly acquired car" is clear and unambiguous. *Id.* at 205, ¶ 11.

Further, although the "newly acquired car" provision in the Policy is clear and unambiguous, Petitioner misinterprets this provision as a "14-day policy transfer requirement" again alleging there are genuine issues of material fact concerning whether Petitioner took reasonable steps to provide notice of the Subaru's purchase to State Farm prior to the accident. *See* Pet.'s Brief at 4, 10-11. However, there is no notice requirement within the Policy's newly acquired car provisions and pursuant to the clear and unambiguous Policy terms, the Subaru WRX was no longer considered a "newly acquired car" 14 days following delivery to Petitioner, regardless of whether Petitioner provided notice to State Farm or his agent. For that reason, the Court should disregard Petitioner's references to *State Auto. Mut. Ins. Co. v. Youler*, 183 W.Va. 556 (1990**)** and to *Dairyland Ins. Co. v. Voshel*, 189 W.Va. 121, 428 S.E.2d 542 (1993), both of which analyzed provisions of insurance contracts that required the insureds to "promptly" provide notice to the insurer that the insured was involved in a car accident. Because those cases deal with the timing of an insurer's notice of accidents or claims under a policy, not notice of a new vehicle, they are distinguishable and Petitioner's reliance on them is misplaced. Unlike in *Dairyland* and *Youler*, there is no need for a factfinder in the instant case to make a reasonableness determination as to when Petitioner provided notice to State Farm about his purchase of the Subaru, because the "newly acquired car" provision is unambiguous and the material facts are not in dispute. *See Tennant* at Syl. Pt. 1.

Third, there is no dispute Petitioner purchased the Subaru before the accident, but it was not insured for UIM coverage. Accordingly, the circuit court properly found—and Petitioner does not dispute on appeal—the Policy's "owned but not insured exclusion" precludes UIM coverage for the 2016 Subaru WRX. The Supreme Court of Appeals of West Virginia previously held owned but not insured exclusions are enforceable. *See Deel v. Sweeney*, 181 W. Va. 460 (1989); *Jenkins v. State Farm Hut. Auto. Ins. Co.*, 219 W. Va. 190 (2006) (per curium). Further, the Supreme Court of Appeals found the same "owned but not insured" provision at issue in this case unambiguous and enforceable, and granted summary judgment to State Farm. *See Thomas v. State Farm Mut. Auto. Ins. Co.*, No. 11-0495, 2012 WL 5232255, at *3 (W. Va. Nov. 30, 2012) (memorandum decision) (because decedent was operating a motor vehicle he owned, but was not covered under the automobile insurance policy, the decedent could not recover UIM benefits "pursuant to the plain language of the subject owned but not insured exclusion"). Accordingly, the unambiguous and enforceable "owned but not insured" provision of the Policy precludes Petitioner from recovering UIM benefits.

B. The Circuit Court Properly Viewed All Permissible Inferences Concerning Material Facts Relevant to Petitioner's UIM Claim in the Most Favorable Light to Petitioner.

The circuit court viewed any permissible inferences from the material underlying facts in the most favorable light to Petitioner and still properly found judgment in favor of State Farm on the UIM claim. Indeed, all the inferences Petitioner claims were not viewed in his favor (which is not conceded by Respondents) are entirely irrelevant to the UIM claim. While the Supreme Court of Appeals holds courts "must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion" (*Williams*, 194 W. Va. 52 at 59, 459 S.E.2d 329 at 336), "[f]actual disputes that are irrelevant or unnecessary" do not concern "material

fact[s]." *Jividen*, 194 W.Va. 705 at 714, 461 S.E.2d 451 at 460. "A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law." *Id*. at Syl. Pt. 5.

Petitioner improperly conflates factual disputes relevant to his negligence claim against the Hall Agency with facts relevant to his contract claim against State Farm for UIM coverage. For example, Petitioner assigns error to the circuit court allegedly failing to "consider conflicting evidence as it pertains to the actions – or inactions – of [the Hall Agency]" in obtaining UIM coverage for the 2016 Subaru WRX. Pet.'s Brief at 15. However, although these facts may be relevant to Petitioner's negligence claim against the Hall Agency, they are not material or relevant to Plaintiff's UIM claim. In its Order granting summary judgment, the circuit court explained that while "[t]he parties dispute whether Plaintiff reported the purchase of the 2016 Subaru WRX to the Hall Agency prior to the accident…[t]his dispute is not relevant to Count I (UIM Coverage Claim) asserted against State Farm: rather, this dispute is relevant to [Petitioner's negligence claim] against the Hall Agency." Jt. App. at 206, ¶ 14. Accordingly, recognizing there is a genuine issue as to material facts pertinent to Petitioner's negligence claim against the Hall Agency, the circuit court denied Petitioner's Cross-Motion for Summary Judgment as to Count V of the Complaint. *See Id.* at ¶ 16.

Further, Petitioner misstates the findings of the circuit court and the terms of the Policy by asserting the circuit court failed to adopt all reasonable inferences his favor, specifically "State Farm/Parker Hall's position that [Petitioner] failed to comply with State Farm's 14-day requirement." Pet.'s Brief at 15. As explained *supra*, Petitioner not only misinterprets the Policy's "newly acquired car" provisions to contain a notice requirement when there is none, the circuit court made no finding that Petitioner "failed to comply" with a purported notice requirement. Instead, the circuit court found—and Petitioner does not dispute—the 2016 Subaru WRX was not

a "newly acquired car" under the Policy on the date of the accident, because it was delivered to Petitioner more than fourteen 14 days prior to the accident. Jt. App. at 205, ¶ 11.

Finally, contrary to Petitioner's argument that whether Petitioner "had UIM coverage under his State Farm policy should be determined by a trier of fact," a determination of UIM coverage under the unambiguous and enforceable terms of the Policy is well within the authority of the circuit court to rule as a matter of law on a motion for summary judgment. *See Tennant* at Syl. Pt. 1; *Keifer* at Syl. In this case, under the totality of the evidence presented and viewing any permissible inferences from the material underlying facts in the most favorable light to Petitioner, the record could not lead a rational trier of fact to find for the Petitioner as to his UIM claim. *Via v. Beckett*, 217 W. Va. 348, 353, 617 S.E.2d 895, 900 (2005) ("Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party…") (quoting *Williams* at Syl. Pt. 2).

VII. CONCLUSION

For the foregoing reasons, State Farm respectfully requests that this Court affirm the Monongalia County Circuit Court's Order granting summary judgment in favor of State Farm as to Plaintiff's UIM claim.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and PARKER HALL INSURANCE AGENCY, INC.,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June 2025, a copy of the foregoing **RESPONDENTS' BRIEF** was filed electronically via File & ServeXpress. Notice of this filing will be sent to the following party by operation of the Court's electronic filing system:

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