

CASE NO. 33310

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COLLETT L. KEEFER, II,

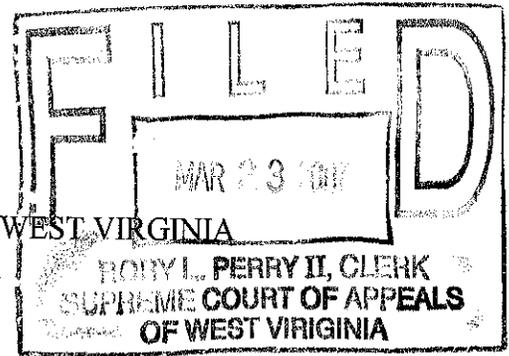
Appellee/Plaintiff Below,

v.

Mason County Civil Action No. 04-C-149N

ANGELA MAE FARRELL,
a/k/a ANGELA MAE WHITE, and
KENNETH D. HESS,

Defendants Below.



COPY

**APPELLANT FARM FAMILY CASUALTY INSURANCE COMPANY'S
BRIEF ON APPEAL**

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**APPELLANT FARM FAMILY CASUALTY INSURANCE COMPANY'S
BRIEF ON APPEAL**

Now comes the Appellant, Farm Family Casualty Insurance Company (hereinafter "Farm Family"), by counsel, Lou Ann S. Cyrus, Heather B. Lord and Shuman, McCuskey & Slicer, PLLC, and hereby appeals to this Honorable Court to reverse the Order entered April 27, 2006, by the Circuit Court of Mason County, West Virginia, pursuant to which the Circuit Court denied Farm Family's Motion for Summary Judgment and entered judgment in favor of the Appellee/plaintiff below with respect to the insurance coverage issue that was the subject of Farm Family's Counterclaim for Declaratory Judgment in the lower tribunal. In support of its Brief on Appeal, Farm Family states as follows:

I. NATURE OF PROCEEDING AND RULING BELOW

This matter comes before this Court from the Circuit Court of Mason County, West Virginia, on appeal from an Order entered April 27, 2006, by the Honorable David W. Nibert, which Order denied the Appellant's Motion for Summary Judgment on its declaratory judgment action and further, *sua sponte*, entered judgment in favor of the Appellee, Colette L. Keefer, II, on the insurance coverage issue that is the subject of Farm Family's Counterclaim for Declaratory Judgment. (See April 27, 2006, Order.)

The Appellee filed a civil action on September 2, 2004, in the Circuit Court of Mason County, West Virginia, arising out of injuries he allegedly sustained as a result of a motor vehicle accident on September 2, 2002. The accident occurred while the Appellee was operating a 1972

Allis-Chalmers 180 Farm Tractor owned by defendant Kenneth D. Hess on State Route 87 in Mason County. More specifically, the tractor was struck by an automobile operated by defendant Angela Mae Farrell, a/k/a Angela Mae White.

In his Complaint, the Appellee alleged that defendant Angela Mae Farrell may have been an uninsured motorist at the time of the accident. Complaint at ¶ 17. The Appellee further alleged that at the time of the accident, defendant Kenneth D. Hess had multiple policies of insurance with Farm Family, which policies contained provisions for uninsured motorist coverage. *Id.* at ¶¶ 17-18. In his Complaint below, the Appellee's Second Cause of Action is for uninsured motorist coverage under insurance coverage issued by Farm Family to Kenneth D. Hess. *Id.*

On December 14, 2004, Farm Family, by counsel, filed "Farm Family's Notice of Special Appearance and Counterclaim for Declaratory Judgment" in the Circuit Court of Mason County, West Virginia, asserting affirmative defenses to the Complaint and seeking a determination that the Appellee is not entitled to uninsured motorist coverage under either policy of insurance issued by Farm Family to Kenneth D. Hess.

Farm Family subsequently filed a Motion for Summary Judgment, along with a supporting Memorandum of Law, in which it sought a declaration by the Circuit Court that the Appellee is not entitled to recover uninsured motorist coverage under either policy of insurance issued to Kenneth D. Hess by Farm Family. On April 7, 2006, a hearing was conducted on Farm Family's Motion for Summary Judgment. By Order entered April 27, 2006, the Circuit Court denied Farm Family's Motion for Summary Judgment and entered judgment in favor of the Appellee, thereby finding that the insurance policy at issue does extend uninsured motorist coverage in favor of the Appellee for injuries arising out of the September 2, 2002, motor vehicle accident.

It is from the Circuit Court of Mason County's April 27, 2006, Order denying Farm Family's Motion for Summary Judgment and entering judgment in favor of the Appellee that Farm Family now respectfully appeals to this Honorable Court.

II. STATEMENT OF FACTS

The Appellee, Collett L. Keefer, II, filed the lawsuit giving rise to Farm Family's appeal on September 2, 2004, against the named defendants, Angela Mae Farrell a/k/a Angela Mae White and Kenneth D. Hess. The Appellee also caused a copy of the Complaint to be served upon Farm Family pursuant to West Virginia Code § 33-6-31, to pursue uninsured motorist coverage.

This case arises as a result of a motor vehicle accident on September 2, 2002 in which the Appellee, while driving a 1972 Allis-Chalmers tractor on Route 87 in Leon, Mason County, West Virginia, was struck from behind by a vehicle driven by defendant, Angela Mae Farrell, a/k/a Angela Mae White. The plaintiff is seeking uninsured motorist coverage from Kenneth D. Hess's policy on a 2002 Dodge truck under the "theory" that he was "in the process of" loading the tractor onto a trailer attached to the truck at the time the tractor he was driving was hit by the uninsured driver some 25-30 feet away. The Complaint alleges, in pertinent part, as follows:

On or about September 2, 2002, at approximately 8:20 o'clock p.m., the Plaintiff, Collett L. Keefer, II was the operator of a 1972 Allis-Chalmers 180 Farm Tractor, owned by Defendant, Kenneth D. Hess.

Plaintiff, Collett L. Keefer, II, under the supervision of Defendant Kenneth D. Hess, was operating aforementioned farm tractor in an eastbound direction on West Virginia State Route 87, and **was slowing to prepare the same to be loaded** into a trailer also owned by Defendant, Kenneth D. Hess.

Plaintiff, Collett L. Keefer, II, while under the supervision and direction of Defendant, Kenneth D. Hess in loading his tractor onto the trailer, Defendant,

Kenneth D. Hess, was negligent in his supervision of Plaintiff and failed to have adequate lighting on the tractor, failed [to] keep a proper lookout in the process of loading the tractor, including, but not limited to, method of loading, time and place of loading, and further failed to warn the Plaintiff of any dangers.

Defendant, Angela Mae Ferrell at the same date and time, was the owner and operator of a 1995/1996 Chevrolet Automobile and was being driven in an eastbound direction on West Virginia State Route 87, in the Town of Leon, County of Mason, State of West Virginia, was approaching the Plaintiff from an oncoming direction.

Defendant, Angela Mae Ferrell, negligently, carelessly, and recklessly failed to stop for traffic and struck the vehicle being driven by the Plaintiff from the rear.

See Complaint at ¶¶ 4-8. (Emphasis added.)

The uncontroverted evidence in the matter established that the parties, in fact, were not actually loading the tractor onto the trailer at the time of the accident, as is alleged. Rather, when it was hit, the tractor was being driven on Route 87 to the point where *the plan* was to load it onto the trailer attached to the insured truck that was parked in a driveway off of Route 87. This conclusion is consistent both with what the Complaint actually alleges as well as the Appellee's testimony. The Appellee, Mr. Keefer, testified:

Q: Okay. You saw him [Mr. Hess] pull up into that driveway?

A: Yes.

Q: Were you on the tractor when you saw Mr. Hess pull into the driveway?

A: Yes.

Q: Okay. Did you stop the tractor and have any discussion with him at that point?

A: No.

Q: What did you do?

A: He dropped the ramps and I proceeded onto 87, and I remember *slowing down getting ready to turn into the driveway*, and that's all I can tell you.

(Keefer Depo. at 24.) (Emphasis added.)

Q: Where was the last location that you can place yourself on Route 87 before the collision?

A: Ready to turn in the driveway.

Q: Had you been able to maneuver any part of the tractor off of Route 87 before the collision?

A: Yes.

Q: What part?

A: The front tires was off, I do believe. I think.

(*Id.* at 33)

Although Mr. Keefer could not approximate the distance between the tractor and the trailer, the defendant, Mr. Hess, was able to approximate the distances involved, as follows:

Q: How far in the driveway was the—your truck and trailer?

A: You mean the distance of the truck and the trailer in the driveway, or from the trailer to the road?

Q: From the trailer to the road.

A: Probably 25, 30 feet.

(Hess Depo. at 18-19.)

Therefore, not only was the tractor still on Route 87 at the time it was hit, it still had *25 to 30 feet* to go before it reached the point where it could even be loaded onto the trailer. The accident report completed by the Mason County Sheriff's Department makes no mention of any vehicles being involved in the accident besides the tractor and Ms. White's vehicle. (See Accident Report.)

In addition to alleging that the defendant, Angela Mae Farrell, may have been an uninsured motorist, the underlying Complaint further alleges that defendant, Kenneth D. Hess, had multiple policies of insurance with Farm Family, which contained provisions for uninsured motorist coverage. *Id.* at ¶¶ 17-18. The Appellee's Second Cause of Action is for uninsured motorist coverage under insurance coverage issued by Farm Family to Kenneth D. Hess.¹ *Id.* In actuality, Farm Family issued two (2) policies of insurance to Kenneth D. Hess that included uninsured motorist coverage, but neither affords such coverage to the Appellee because he is not an "insured" under either policy, as more fully explained below.

The first policy, an Amended New (Business Auto) Policy, identified as Policy No. 4718CO159-01, with coverage change was issued to the "named insureds" – Kenneth D. Hess and Bert Hess – on November 15, 2001, covering a period extending to November 15, 2002. The insured business is designated as "individual" with "farmer" being the name of the insured business. The Appellee, Mr. Keefer, is not listed as a named insured on the policy. However, Kenneth Dean Hess, Bert C. Hess and Collett L. Keefer, II, are all listed as "drivers" on the declarations page of the policy. The Schedule of Covered Vehicles on the policy includes a 2002 Dodge Pickup and a 1990 GMC Pickup. (See Business Auto Policy.)

The "Definitions" section of the business auto policy states that "insured" means "any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage." (Business Auto Policy, page 9 of 10.) The "Who Is An Insured" section of the uninsured

¹ Farm Family has provided a defense to its insured, Kenneth Hess, a named defendant in the underlying civil action, under the liability portion of his insurance policy, for the allegations of negligence against him, which are separate and distinct from the claim against Farm Family for uninsured motorist coverage. The claim against Mr. Hess is currently pending before the Circuit Court below.

endorsement to the policy provides three ways in which an individual may qualify as an “insured” for purposes of uninsured coverage. More specifically, the business auto policy provides as follows:

B. WHO IS AN INSURED

1. An individual, then the following are “insureds”:
 - a. The named insured and any “family members”.
 - b. Anyone else “occupying” or using a covered “auto” or temporary substitute for a covered “auto”. The covered “auto” must be out of service because of its breakdown, repair, servicing, “loss” or destruction.
 - c. Anyone for damages he or she is entitled to recover because of “bodily injury” sustained by another “insured”.

(See Business Auto Policy.)

Further, the “Definitions” section of the West Virginia Uninsured and Underinsured Motorists Coverage Endorsement of the Farm Family business auto policy clearly defines the term “occupying” as “in, upon, getting in, on, out or off.” (See Business Auto Policy.)

In addition to the business auto policy, on November 16, 2001, a New (Personal Auto) Policy, identified as Policy No. 4718PO221-01, was issued to the “named insureds” – Kenneth D. Hess and Amy R. Hess – covering a period extending to November 16, 2002. Kenneth Dean Hess, Amy Ruth Hess, Bert C. Hess and Virginia L. Hess are all listed as “drivers” on the personal auto policy. The Appellee is not listed as a named insured or a driver on this policy. The Schedule of Covered Vehicles on the personal auto policy includes a 1998 Ford Ranger Pickup and a 1985 Buick LeSabre.²

²In his Response to Farm Family’s Motion for Summary Judgment, the Appellee did not assert that he is entitled to recover uninsured motorist coverage under the personal auto policy. Moreover, the Circuit Court’s April 27, 2006, Order addresses coverage under the business auto
(continued...)

At his deposition taken on May 5, 2005, the Appellee admitted that, to his knowledge, he is not related by blood, marriage or adoption to Kenneth D. Hess, Amy R. Hess or Bert Hess. (See Deposition of Collette L. Keefer, Vol. II at pp. 12-13.) Rather, the Appellee was simply an acquaintance of the Hesses.

For these reasons, and as further explained below, the Appellee does not qualify for uninsured motorist coverage under the business auto policy issued to Kenneth Hess by Farm Family. As such, Farm Family respectfully requests that this Honorable Court reverse the Order dated April 27, 2006, pursuant to which the Circuit Court of Mason County, West Virginia, denied Farm Family's Motion for Summary Judgment and entered judgment in favor of the Appellee, finding that the insurance policy at issue does extend uninsured motorist coverage in favor of the Appellee for injuries arising out of the September 2, 2002, motor vehicle accident.

III. ASSIGNMENTS OF ERROR

In support of its Brief on Appeal, Farm Family respectfully asserts that the Circuit Court of Mason County, West Virginia, committed the following errors with respect to its Order entered April 27, 2006:

- a. The Circuit Court erred in denying Farm Family's Motion for Summary Judgment;

²(...continued)

policy, only. It is Farm Family's understanding, based upon the pleadings in the lower court, that the Appellant concedes that the personal auto policy is inapplicable to the September 2, 2002, accident.

- b. The Circuit Court erred in entering judgment in favor of the Appellee on the issue of the applicability of uninsured motorist coverage available to the Appellee for the motor vehicle accident of September 2, 2002;
- c. The Circuit Court erred in finding, as a matter of law, that the Farm Family insurance policy at issue provided uninsured motorist coverage to the Appellee for the motor vehicle accident of September 2, 2002;
- d. The Circuit Court erred in finding that the Appellee was attempting to load a 1972 Allis-Chalmers 180 Farm Tractor onto a trailer attached to a 2002 Dodge truck, owned by Kenneth D. Hess, when the tractor was struck from the rear by a vehicle driven by Angela Mae Farrell, an uninsured motorist, on Route 87;
- e. The Circuit Court erred in finding that the Appellee was engaged in loading the tractor onto the trailer attached to the 2002 Dodge truck when the tractor he was operating was struck by the uninsured motorist;
- f. The Circuit Court erred in finding that the subject motor vehicle accident, in which the Appellee was struck by an uninsured motor vehicle while operating a farm tractor, was a foreseeable result of the normal use of the 2002 Dodge truck;
- g. The Circuit Court erred in finding that, at the time of the accident, the Appellee was “essentially in the course of getting on the trailer” attached to the vehicle and, therefore, the Appellee was “occupying” the insured vehicle, as the term “occupying” is defined by the Farm Family policy; and
- h. The Circuit Court erred in finding that, at the time of the accident, the Appellee was “using” the insured vehicle.

IV. POINTS AND AUTHORITIES RELIED UPON

Federal Cases

Nationwide Mutual Insurance Co. v. Shumate, 63 F. Supp.2d 745 15

West Virginia Cases

Adkins v. Meador, 201 W.Va. 313, 423 S.E.2d 922 (1997) 15

American States Ins. Co. v. Tanner, 563 S.E.2d 825 (W.Va. 2002) 11

Baber v. Fortner, 186 W.Va. 413, 417, 412 S.E.2d 814, 818 (1991) 15

Christopher v. U.S. Life Ins. Co. in City of New York, 116 S.E.2d 864 (W.Va. 1960) 11

Cleaver v. Big Arm Bar & Grill, Inc., 202 W.Va. 122, 502 S.E.2d, 438 (1998) 15

Other State Cases

Auto-Owners Ins. Co. v. Above All Roofing, LLC, 924 So.2d 842 (2006) 12

Cook v. Aetna Ins. Co., 661 So.2d 1169 (Ala. 1995) 12

Miller v. Mabe, 947 S.W.2d 151 (Tenn. 1997) 12

Mutual of Enumclaw Ins. Co. v. Payne, 993 P.2d 186 (Ore. 1999) 13

State Statutes

West Virginia Code § 33-6-31 3

W.Va. Code, 33-6-31(c) 15

V. DISCUSSION OF APPLICABLE LAW

Pursuant to the “Findings of Fact and Conclusions of Law” set forth in its Order of April 27, 2006, the Circuit Court of Mason County denied Farm Family’s Motion for Summary Judgment and entered judgment in favor of the Appellee based upon the Court’s erroneous finding that, at the time

of the accident, the Appellee was “occupying” and/or using the 2002 Dodge truck insured under the Farm Family business auto policy issued to Kenneth D. Hess.

- (1) **The Circuit Court was plainly wrong in finding that the Appellee was “occupying” a covered auto at the time of the September 2, 2002, motor vehicle accident.**

The Circuit Court was plainly wrong in finding that the Appellee was “occupying” a covered auto at the time of the September 2, 2002, motor vehicle accident, inasmuch as the clear, plain and unambiguous language of the Farm Family business auto policy belies any such finding. Specifically, the Circuit Court erred in finding that the Appellee was “essentially in the course of getting on the trailer” attached to the 2002 Dodge truck and, therefore, the Appellee was “occupying” the insured vehicle, as the term “occupying” is defined by the Farm Family policy.

The language in an insurance policy should be given its plain, ordinary meaning. *American States Ins. Co. v. Tanner*, 563 S.E.2d 825 (W. Va. 2002). Where the provisions in 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. *Id.* In the absence of ambiguity, neither party can be favored in construction of an insurance contract. *Christopher v. U.S. Life Ins. Co. in City of New York*, 116 S.E.2d 864 (W. Va. 1960).

The “Definitions” section of the West Virginia Uninsured and Underinsured Motorists Coverage Endorsement of the Farm Family business auto policy clearly and unambiguously defines “occupying” as “in, upon, getting in, on, out or off.” (See Business Auto Policy.) The undisputed facts surrounding the subject accident clearly demonstrate that the Appellee was not “in, upon, getting in, on, out or off” of the covered vehicle – a 2002 Dodge truck – at the time of the accident.

Rather, the Appellee was operating a farm tractor approximately 25 to 30 away feet from the trailer attached to the 2002 Dodge truck when the accident occurred. (See depo. of Kenneth D. Hess, at 18-19.)

Although it does not appear that there are any cases from this Court that would bear on this issue, consideration given by other jurisdictions as to whether an individual was “occupying” a covered auto at the time of injury is instructive in the matter *sub judice*. More specifically, the Supreme Court of Alabama has held that an employee who was within one foot (1') of his employer's insured vehicle when he was struck by a uninsured motorist was not “getting in” the vehicle so as to be entitled to UM benefits available to anyone “occupying” the insured vehicle, where the most that could be said for the employee's action at the time of the collision was that he was *approaching* the insured vehicle. *Cook v. Aetna Ins. Co.*, 661 So.2d 1169 (Ala. 1995). Similarly, in *Miller v. Mabe*, 947 S.W.2d 151 (Tenn. 1997), the Court of Appeals of Tennessee held that a cable repairman was not “occupying” his employer's insured van when he was hit while stringing cable approximately three to four feet from the van and, thus, he was not entitled to UM benefits. *Id.* The court reasoned that although the employee was utilizing lights from the van in performing his work, he was not using the van itself *and he was not close enough to the van to be considered “upon” it. Id.*

Moreover, the Court of Appeals of Florida found that a driver who stopped his employer's van in the median after witnessing an accident was not occupying the van when an uninsured motorist struck him as he stood on the right side of the interstate next to a car involved in the collision and, thus, he was not entitled to UM benefits under his employer's policy. *Auto-Owners Ins. Co. v. Above All Roofing, LLC*, 924 So.2d 842 (Fla. 2006). The Court reasoned that the facts

of the case *did not present a situation wherein the injured party was in "close proximity" to the insured vehicle*, inasmuch as the injured party had left the insured van and was standing on the other side of the road when he was struck. *Id.* In *Mutual of Enumclaw Ins. Co. v. Payne*, 993 P.2d 186 (Ore. 1999), the Court of Appeals of Oregon likewise held that an individual who was in the middle of the street, *completely out of physical contact with the insured vehicle* when he was struck by another vehicle, was not "occupying" the insured vehicle under the Oregon UM statute or the UM provision of the subject policy of insurance. *Payne, supra.*

In light of the fact that, at the time of the accident, the Appellee was indisputably operating a farm tractor on State Route 87, at a distance of approximately 25 to 30 feet away from the truck with attached trailer into which the tractor might eventually be loaded, the Appellee was certainly not "in" the covered vehicle – a 2002 Dodge truck – when the accident occurred. Nor was the Appellee "upon" the truck. Likewise, the Appellee was not "getting in" the truck at the time of the accident. The Appellee also clearly was not in the process of getting "on", "out" or "off" of the truck when the accident occurred. Rather, the Appellee was operating the farm tractor on State Route 87, while the covered truck was parked in a driveway approximately 25 to 30 feet away. Based upon the undisputed facts of this case, there exists no factual basis whatsoever to find the Appellee was "occupying" the covered auto – a 2002 Dodge truck – at the time of the accident. He was certainly not in close proximity to the insured vehicle to warrant a finding of occupancy. Such a finding is a blatant misinterpretation and misapplication of the clear, plain and unambiguous definition of "occupying" set forth in the business auto policy.

Notably, in its Order, the Circuit Court offers no explanation for its finding that the Appellee "was essentially in the course of getting on the trailer attached to the vehicle, and, under the above

definition was 'occupying' it." To the contrary, the undisputed facts show that the Appellee was 25 to 30 feet away from the trailer attached to the insured Dodge truck when the accident occurred. The distance of 25 to 30 feet cannot reasonably be considered in close proximity to the covered vehicle so as to justify the Circuit Court's finding that the Appellee was "essentially in the course of getting on the trailer" and therefore was "occupying" the covered vehicle. Nor does the Circuit Court make a distinction between the trailer and the 2002 Dodge truck – the truck being the insured vehicle, not the trailer that the Court found the Appellee was "essentially in the course of getting on."

Pursuant to the clear, plain and unambiguous language of the Farm Family business auto policy, specifically the definition of "occupying" set forth therein, the Circuit Court was plainly wrong in finding that the Appellee was "occupying" a covered vehicle at the time of the accident. For these reasons, Farm Family respectfully requests that this Honorable Court reverse the Circuit Court's Order of April 27, 2006, and find that summary judgment in favor of the Appellant was warranted.

(2) The Circuit Court was plainly wrong in finding that the Appellee was "using" a covered auto at the time of the September 2, 2002, motor vehicle accident.

The Circuit Court was plainly wrong in finding that the Appellee was "using" a covered auto at the time of the September 2, 2002, motor vehicle accident, pursuant to West Virginia case law interpreting the meaning and scope of "using" as set forth in a policy of automobile insurance.

The Appellee has claimed that he was "in the process of loading" the farm tractor onto the trailer attached to the 2002 Dodge truck at the time of the subject accident and, therefore, was "using" it. However, in his Response to Farm Family's Motion for Summary Judgment, the

Appellee cited *nothing* in the record in support of the assertion. In fact, such as assertion by the Appellee was, as the undisputed evidence establishes, a gross misstatement of the facts.

In *Adkins v. Meador*, 201 W.Va. 313, 423 S.E.2d 922 (1997), this Court discussed the applicable standard to be applied in determining whether a party was “using” a covered vehicle at the time of an accident. More specifically, in *Adkins*, this Court found that, “[u]nder W.Va. Code, 33-6-31(c), uninsured and underinsured motorist coverage must encompass injuries causally connected to the use of the vehicle, and foreseeably identifiable with the normal use of the vehicle. Whether or not an injury arose from the “use” of a motor vehicle within the contemplation of W.Va. Code 33-6-31(c) depends upon the factual context of each case.” 201 W.Va. at 157, 494 S.E.2d at 924.

Further, the subsequent case of *Cleaver v. Big Arm Bar & Grill, Inc.*, 202 W.Va. 122, 502 S.E.2d, 438 (1998) is particularly instructive here, inasmuch as this Court stated therein, “[w]hen . . . the ‘use’ of a vehicle is a question for insurance purposes due to the separation of an individual from a vehicle at the time of an accident, the court must determine whether there is a causal connection between the motor vehicle and the injury.” Moreover, “[s]uch a causal connection must be ‘more than incidental, fortuitous, or but for.’ The injury must be foreseeably identifiable with the normal use of the vehicle.” *Nationwide Mutual Insurance Co. v. Shumate*, 63 F. Supp.2d 745 (quoting *Baber v. Fortner*, 186 W.Va. 413, 417, 412 S.E.2d 814, 818 (1991) (citation omitted)). The “causal connection” standard serves as a safeguard against claims for uninsured motorist coverage in those instances when the insured vehicle is merely “incidental” to the accident and was not involved in the accident in any way.

Applying the applicable standard here, it is clear that there is no “causal connection” between the insured vehicle – Kenneth Hess’s 2002 Dodge truck – and the Appellant’s injury from defendant Angela Farrell’s vehicle rear-ending the farm tractor the Appellee was operating some 25 to 30 feet away from the insured vehicle. The Appellee has testified that, at the time he was hit from behind, he was still on Route 87, “slowing down *getting ready to turn* into the driveway,” while the 2002 Dodge truck, with its attached trailer, was off of the road in the private driveway. (See Keefer Depo. at 24.) (Emphasis added.) Similarly, the Complaint alleges that the Appellant “was slowing to prepare the [tractor] *to be loaded* into a trailer. . . .” (Emphasis added.) It is undisputed that not only was the farm tractor still on Route 87 at the time it was hit, it had *25 to 30 feet* more to travel before it reached the point where the process of loading the tractor into the trailer could begin.

While there may have been *an intent* to load the tractor on the trailer, any number of events might have transpired that resulted in the trailer not being loaded. Clearly, the Appellee was not, as the Circuit Court erroneously found, “attempting to load” the tractor onto the trailer attached to the insured truck. Nor was the Appellee, as the Circuit Court erroneously found, “engaged in the loading” of the tractor onto the trailer at the time the tractor was struck by Angela Mae Farrell’s vehicle on State Route 87. An intent or plan to do something does not equate to actually doing it, yet the Circuit Court’s Order concludes that they are one and the same.

Further, the 2002 Dodge truck was, at best, “incidental” to the accident, since it was not involved in the accident in any way and was actually situated at a distance of 25 to 30 feet away from the farm tractor when the tractor was struck. Notably, the Uniform Traffic Crash Report relative to accident makes no mention of the 2002 Dodge truck. The investigating officer made no comments on the report to suggest that he deemed the truck to be involved in the accident.

Additionally, under no stretch of the imagination could it be “foreseeably identifiable with the normal use of the [2002 Dodge truck]” that the tractor would be rear-ended by a vehicle on Route 87. The Circuit Court offered no explanation or rationale in its April 27, 2006, Order for its finding that this specific accident, in which the Appellee was struck by an uninsured vehicle while operating a farm tractor on State Route 87, was a foreseeable result of the normal use of the 2002 Dodge truck. The fact that the “plan” was for the insured truck to be used to haul the farm tractor cannot be considered as broadly as the Circuit Court has done so in its Order. Rather, it is necessary to look at the specific facts giving rise to this particular accident, including the facts that: The tractor was being operated on a highway when the accident occurred; the insured truck was *not* on the highway when the accident occurred; and the insured truck was not in close proximity to the tractor at the time of the accident. The facts of this case do not meet the foreseeability test previously set forth by this Court.

Indeed, the undisputed facts of this case show that there was no causal connection between the insured vehicle, a 2002 Dodge truck, and the rear-end collision that occurred on Route 87 while the Appellee was operating the farm tractor. Therefore, pursuant to West Virginia case law interpreting the meaning and scope of “using” a vehicle, as set forth in a policy of automobile insurance, the Circuit Court was plainly wrong in finding that the Appellee was using a covered auto at the time of the September 2, 2002, motor vehicle accident. The Circuit Court has given an overly broad meaning to the phrase “using a covered auto” by transforming the “intent” to use a vehicle in to the use of such vehicle. If this opinion stands, it has the potential to set the law in this area headlong down a slippery slope of “I was going to” and “what ifs.” For these reasons, Farm Family

respectfully requests that this Honorable Court reverse the April 27, 2006, decision of the Circuit Court and find that summary judgment in favor of the Appellant was warranted.

- (3) **The Appellee was not otherwise an “insured” for purposes of uninsured motorist coverage at the time of the September 2, 2002, motor vehicle accident.**

The Farm Family business auto policy at issue is plain and unambiguous as to who is an “insured” for purposes of uninsured coverage. Specifically, the “Definitions” section of the policy states that “insured” means “any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage.” (See Business Auto Policy, page 9 of 10.) Turning to the “Who Is An Insured” section of the uninsured endorsement to the policy, there are three ways in which an individual may qualify as an “insured” for purposes of uninsured coverage, none of which are applicable to the Appellee. Specifically, the business auto policy provides as follows:

B. WHO IS AN INSURED

1. An individual, then the following are “insureds”:
 - a. The named insured and any “family members”.
 - b. Anyone else “occupying” or using a covered “auto” or temporary substitute for a covered “auto”. The covered “auto” must be out of service because of its breakdown, repair, servicing, “loss” or destruction.
 - c. Anyone for damages he or she is entitled to recover because of “bodily injury” sustained by another “insured”.

The second of the three options, sub-section (b) - “occupying” or using a covered auto, has already been discussed in detail, above.³

³The Circuit Court’s April 27, 2006, Order is not predicated upon a finding that the Appellee
(continued...)

With regard to the first way by which a person can be considered an “insured” under (B)(1)(a)—by being either a “named insured” or their “family member”—the declarations page of the business auto policy identifies Kenneth D. Hess and Bert Hess as named insureds under the policy. It is undisputed that the Appellee is neither a “named insured” nor a family member of the named insureds. Therefore, (B)(1)(a) does not qualify the Appellee as an insured under the first opinion in section (B)(1)(a) of the Farm Family business auto policy.

Moreover, it is clear that the Appellee does not qualify as an insured under the third section, (B)(1)(c) of the business auto policy, because bodily injury was not sustained by any other insured and the Appellee is not claiming entitlement to damages to another insured and is not making a claim for loss of consortium or other such claim. Section (B)(1)(c) is, therefore, inapplicable to render the Appellee an insured under the business auto policy.

Clearly, there are only three (3) possible scenarios under the business auto policy pursuant to which the Appellee could be considered an insured under the policy for purposes of recovering uninsured motorist coverage. Under the undisputed facts, the Appellee does not fall into any of the three (3) categories. Therefore, the Circuit Court was plainly wrong in finding that uninsured motorist coverage under the Farm Family business auto policy is implicated by the September 2, 2002, accident.

³(...continued)

is an “insured” under the Farm Family business auto policy except for his purported conduct in “occupying” or using the insured vehicle. Nonetheless, for purposes of completeness, Farm Family considers it prudent to address the other possible means by which one can qualify as an “insured” under the policy, and to demonstrate that the Appellee likewise does not qualify as an “insured” under these alternative methods.

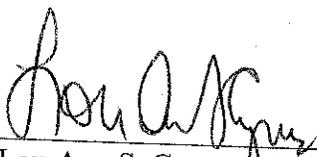
VI. CONCLUSION AND PRAYER FOR RELIEF

The Appellee does not qualify as an insured under the Farm Family business auto policy because he fails the three (3) tests for "Who Is An Insured." The undisputed facts surrounding the subject accident clearly establish that the Appellee is not entitled to recover uninsured motorist coverage from Farm Family, inasmuch as he is not an insured under the policy.

The Circuit Court of Mason County, West Virginia was plainly wrong in denying Farm Family's Motion for Summary Judgment and entering judgment in favor of the Appellee with respect to the insurance coverage issue that is the subject of Farm Family's Counterclaim for Declaratory Judgment. WHEREFORE, Farm Family prays that this Honorable Court reverse the Circuit Court's April 27, 2006, decision and, given that there is no genuine issue of material fact, find that summary judgment for Farm Family is appropriate as a matter of law.

FARMFAMILY CASUALTY INSURANCE
COMPANY

By Counsel



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CASE NO. 33310

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COLLETT L. KEEFER, II,

Appellee/Plaintiff Below,

v.

Mason County Civil Action No. 04-C-149N

ANGELA MAE FARRELL,
a/k/a ANGELA MAE WHITE, and
KENNETH D. HESS,

Defendants Below.

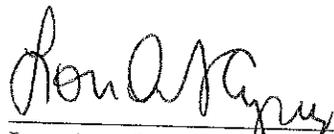
CERTIFICATE OF SERVICE

The undersigned, counsel for Farm Family Casualty Insurance Company, does hereby certify that the foregoing "**Appellant Farm Family Casualty Insurance Company's Brief on Appeal**" was served upon the following by this day depositing a true and exact copy thereof in the United States mail, postage prepaid, and addressed as follows:

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DONE this 23rd day of March, 2007.



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