

No. 34152

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

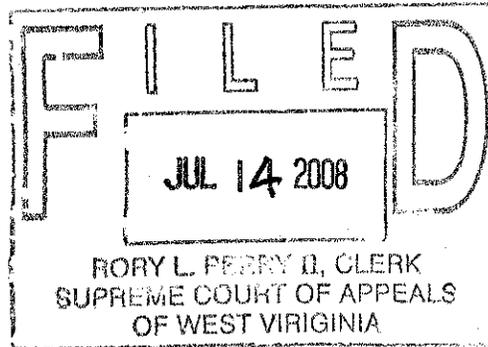
STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY,

Appellant,

v.

JENNIFER BONIEY,

Appellee,



*Appeal from the Circuit Court of
Brooke County, West Virginia
Case No. 07-C-78*

APPELLANT'S BRIEF

E. Kay Fuller
(WV State Bar No. 5594)
MARTIN & SEIBERT, L.C.
1453 Winchester Avenue
P.O. Box 1286
Martinsburg, WV 25405
(304) 262-3209
Counsel for Appellant

TABLE OF CONTENTS

I. NATURE OF PROCEEDINGS AND RULINGS BELOW..... 1

II. STATEMENT OF FACTS..... 2

III. ASSIGNMENT OF ERROR..... 4

IV. POINTS & AUTHORITIES5

A. Motions for Summary Judgment are reviewed *de novo*.....5

B. W.Va. Code §33-6-31 and other rules of the road do not apply

C. This Court has applied rules of the road only when vehicles are8
operated on the roads of the State.....8

D. ATV exclusions in auto policies are valid and enforceable.....9

E. The Circuit Court's Order violates public policy.....14

V. CONCLUSION15

TABLE OF AUTHORITIES

W.VA. CASES:

Bell v. State Farm Mut. Auto. Ins. Co., 157 W.Va. 623, 207 S.E. 2d 147 (1974). 11

Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995)..5

Cox v. Amick, 195 W.Va. 608,466 S.E. 2d 459 (1995)..... 13

Dairyland Ins. Co. v. Fox, 209 W.Va. 598, 550 S.E.2d 388 (2001)..5

Deel v. Sweeney, 181 W.Va. 460, 383 S.E. 2d 92 (1989)..... 13

Imgrund v. Yarborough, 199 W.Va. 187,483 S.E. 2d 533 (1997)..... 10,12, 13

Murray v. State Farm Fire & Cas. Co., 203 W.Va. 477, 509 S.E.2d 1(1998)..5

Pacific Indemnity Co. v. Linn, 766 F.2d 754, 760 (3d Cir.1985)..5

Painter v Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994)..5

Payne v. Weston, 195 W.Va. 502, 466 S.E.2d 161(1995)..5

State ex rel. Sergent v. Nibert, 220 W.Va. 520, 648 S.E.2d 26 (2007)..8,9

Thomas v. Nationwide Mut. Ins. Co.,188 W.Va. 640,425 S.E. 2d 595 (1992)..... 13-14

Transamerica Ins. Co. v. Arbogast, 662 F. Supp. 164 (N.D.W.Va.) (987)..... 13

Trent v. Cook, 198 W.Va. 601,482 S.E. 2d 218(1990)... 13

STATUTES AND RULES:

W.Va. Code § 17A-1-1..... 5

W.Va. Code § 17A-1-1(a)..... 4,6

W.Va. Code § 17A-1-1(b)..... 4,6

W.Va. Code § 17B-4-3 8

W.Va. Code § 17C-1-10. 12

W.Va. Code § 17C-2-1. 12

W.Va. Code § 17D-2A-1.	6
W.Va. Code §17F-1-1(a)(2).	4
W.Va. Code § 17F-1-2.	15
W.Va. Code § 17F-1-4.	15
W.Va. Code § 17F-1-7.	7,8
W.Va. Code § 17F-1-7(a).	7
W.Va. Code § 17F-1-7(b).	7
W.Va. Code § 17F-1-9.	4,6,7
W.Va. Code §33-6-31.	1, 2, 4, 5, 7, 11,15
W.Va. Code § 33-6-31(a).	12, 13
Rule 10, W.Va. Rules of Appellate Procedure	1

COMES NOW the Appellant, State Farm Mutual Automobile Insurance Company, (hereinafter "State Farm"), by and through its counsel E. Kay Fuller and Martin and Seibert, L.C., pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure and presents its Appellant's Brief respectfully requesting the September 14, 2007 Order of the Circuit Court of Brooke County be reversed.

I. NATURE OF PROCEEDINGS AND RULINGS BELOW

The Appellee, Jennifer Boniey, filed suit in the Circuit Court of Brooke County against Brian Kuchinski on or about May 2, 2007 alleging personal injuries as a result of an all-terrain vehicle (hereinafter "ATV") accident. In addition to serving Mr. Kuchinski, she also served State Farm as a notice defendant seeking uninsured motorist (UM) coverage under two automobile policies. State Farm filed a Motion to Dismiss on May 31, 2007. On July 16, 2007, State Farm also filed a Motion for Summary Judgment concerning an ATV exclusion in the definition of uninsured motor vehicles when the ATV is being operated off-road as was the ATV Ms. Boniey was riding at the time of her accident. Ms. Boniey responded with a cross Motion for Summary Judgment on August 2, 2007 to which State Farm responded on August 21, 2007.

The Circuit Court of Brooke County, Judge Arthur Recht presiding, conducted a hearing on August 24, 2007. At this first hearing, the Circuit Court found the facts were not in dispute and that the policy language in question was clear and unambiguous. The Court, however, requested additional briefing on the issue of whether State Farm's exclusion of an ATV in its policy definition of an "uninsured motor vehicle" violates West Virginia's uninsured motorist statute, W.Va. Code §33-6-31. The parties submitted additional briefing on September 7, 2007.

Thereafter, on September 14, 2007, the Court issued its Memorandum of Opinion and Order in which it concluded that "the attempt to exclude UM coverage for the ATV involved in the case *sub judice* violates both the letter and spirit of WV Code §33-6-31." (A copy of the Memorandum of Opinion and Order is attached hereto as **Exhibit A**).

State Farm appealed the Circuit Court's decision to this Court which accepted the Petition for Appeal on June 11, 2008. The present appeal is based on two errors committed by the Circuit Court in its reasoning. First, the question framed by the Circuit Court is immaterial to the resolution of this matter in that the uninsured motorist statute, W.Va. Code §33-6-31, is inapplicable to the facts of the present action since the UM statute does not apply when ATVs are operated off public highways. Secondly, even if the uninsured motorist statute applies, it was incorrectly interpreted by the Circuit Court in that the exclusion is valid and enforceable. State Farm respectfully requests that this Court therefore reverse the September 14, 2007 Order of the Circuit Court of Brooke County.

II. STATEMENT OF FACTS

The facts underlying this appeal are not in dispute and all parties agree the claim is subject to resolution as a matter of law.

Jennifer Boniey was a passenger on an all-terrain vehicle (hereinafter "ATV") operated by Brian Kuchinski on May 8, 2005. While riding in the woods –off public roads – the ATV crashed and Ms. Boniey suffered bodily injuries.

The ATV which Mr. Kuchinski was operated was uninsured. Mr. Kuchinski's auto liability insurer, GEICO, denied coverage presumably because an ATV does not qualify

for liability coverage under an auto policy. Such machinery is likewise excluded as an uninsured motor vehicle by definition in auto policies issued by State Farm in off-road situations.

On the date of loss, Ms. Boniey was an additional insured under two auto policies issued by State Farm to Patrick J. Boniey and Joseph Boniey, both of which carried uninsured motorist coverage. Specifically, the uninsured motor vehicle provisions state:

“An ***uninsured motor vehicle*** does not include a motor vehicle:

1. Owned or operated by a self-insurer under the West Virginia Motor Vehicle Safety Responsibility Law, any motor carrier law or similar law;
2. Owned by:
 - a. The United States or any of its agencies; or
 - b. West Virginia or any of its political subdivisions or agencies;
3. Operated on rails;
4. Designed for use mainly off public roads, except while on public roads;
or
5. While located for use as premises.

(emphasis added).

Ms. Boniey alleged in paragraph 3 of her Complaint that she was riding a “gas-powered self-propelled motor vehicle, more commonly referred to as a quad, and which vehicle was not operated on rails.” The ATV Ms. Boniey was riding on May 8, 2005 was designed for use mainly off public roads and the incident did not occur while on a public road. Rather, the incident occurred in a heavily wooded area along a creek several miles off any public roadway.

An ATV is defined in W.Va. Code §17F-1-9 as a motor vehicle fifty-two inches or less in width, having an unladen weight of eight hundred pounds or less, traveling on three or more low pressure tires with a seat designed to be straddled by the rider, designed for or capable of travel over unimproved terrain.¹ ATVs are prohibited from being operated on public roads or highways except for the purpose of crossing the road, street or highway. W.Va. Code §17F-1-1(a)(2).

A motor vehicle is defined at W.Va. Code §17A-1-1(b) as every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails.

Finally, a vehicle is defined at W.Va. Code §17A-1-1(a) as every device in, upon or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks. (emphasis added).

III. ASSIGNMENT OF ERROR

The Circuit Court of Brooke County erred when it held that an ATV exclusion in an uninsured motorist policy violates the spirit and intent of W.Va. Code §33-6-31 in that the UM statute is inapplicable when a motor vehicle is operated off-road.

¹ The "quad" Ms. Boniey was riding has been identified as a 2000 Honda Four Trax. There are several models of Honda Four Trax, however, each weighs less than 800 pounds and each has 4 wheels, with a seat designed to be straddled by the rider which is designed for or capable of travel over unimproved terrain. Thus, regardless of which specific model of Honda Four Trax, Ms. Boniey was riding, it meets the statutory definition of an "all-terrain vehicle."

IV. POINTS AND AUTHORITIES

A. Motions for summary judgment are reviewed *de novo*.

"The interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination which, like the court's summary judgment, is reviewed *de novo* on appeal." *Dairyland Ins. Co. v. Fox*, 209 W.Va. 598, 601, 550 S.E.2d 388, 391 (2001), quoting *Payne v. Weston*, 195 W.Va. 502, 506-7, 466 S.E.2d 161, 165-66 (1995). "Determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law." *Id.*, quoting *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 483, 509 S.E.2d 1, 7 (1998), quoting *Pacific Indemnity Co. v. Linn*, 766 F.2d 754, 760 (3d Cir.1985). "Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of statute, we apply a *de novo* standard of review." *Id.*, quoting *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

Likewise, the standard of review concerning a Summary Judgment Order is *de novo*. *Painter v Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

B. W.Va. Code §33-6-31 and other rules of the road do not apply when ATVs are operated off-road.

West Virginia's uninsured motorist statute, W.Va. Code § 33-6-31, applies to motor vehicles. However, it applies only when such motor vehicles are operated on public roads or highways. There is nothing in the statute – nor should there be – extending the scope of the statute to off-road situations.

W.Va. Code §33-6-31 does not contain separate definitions of "motor vehicle" or "vehicle," thus it is presumed that the definitions as set forth in W.Va. Code §17A-1-1

apply since the Legislature strives to be consistent in its definitions. The omnibus UM/UIM statute does not contain a separate definition of ATV. Such definition is found within the ATV statute, specifically at W.Va. Code §17F-1-9. Mirroring this same delineation, State Farm separately defined an ATV as machinery excluded from UM coverage, except when the ATV is operated on public roads.

Thus, the question raised is whether the UM statute applies to off-road situations and more specifically does the exclusion of ATVs from UM coverage when not operated on public roads comport with the UM statute.

The Legislature defined a "motor vehicle" as every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails. W.Va. Code §17A-1-1(b) (emphasis added). Moreover, "vehicle" is defined by the Legislature as every device in, upon or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks. W. Va. Code §17A-1-1(a) (emphasis added).² Thus, by its own language, an ATV, when not operated upon a highway, does not meet the statutory definition of a "vehicle" and therefore falls outside the purview of the UM statute.

There is no debate the accident underlying this civil action occurred off-road. There is also no question that had this accident occurred upon a public road or highway,

² The same definitions – and notably lack of definition of ATV - are set out again in Section 17C of the West Virginia Code which govern the rules of the road. Likewise, these definitions are again utilized in Section 17D of the Code requiring security upon motor vehicles. W.Va. Code §17D-2A-1 states that the purpose of the article "is to promote the public welfare by requiring every owner or registrant of a motor vehicle licensed in this State to maintain certain security during the registration period for such vehicle." This provision of the Code also lacks a separate definition of an ATV.

UM coverage would have been available. In that regard, the Legislature and State Farm's definitions of ATVs and when coverage is available for such machines is in accord.

Clearly, the Legislature intended different standards to apply, thus, the distinct definition of ATV at W.Va. Code §17F-1-9. A simple review of the ATV statute reveals the reasoning behind this. W.Va. Code §17F-1-7 only requires compliance with the rules of the road and other provisions of Chapter 17 of the Code when the ATV is operated upon a public road or highway. Such requirements are specifically removed when the ATV is operated off public roads. W.Va. Code §17F-1-7(b).³ Therefore, it is clear that where the machine is being operated is determinative of whether the UM statute applies and consequently whether UM coverage is applicable. State Farm recognized the distinction between vehicles and ATVs and further recognized the distinction between where the ATV is being utilized and permits coverage – in compliance with the statute - when the ATV is operated on a public road and exempting coverage when the ATV is not operated on a public road. Consequently, when an ATV is not operated on a public road, W. Va. Code §33-6-31 has no application. In the present civil action, therefore, the UM statute is inapplicable and the clear and unambiguous policy language must be enforced. The Circuit Court, however, disregarded this distinction and specifically found in contravention of the statute that where the ATV was being operated was of no consequence. This finding is in defiance of legislative distinctions and must be reversed.

³ Moreover, the Legislature recognized the inherent difference between an automobile and an ATV when it permitted certain exemptions to provisions of Chapter 17C even when the ATV is operated on public roads or highways because those laws "by their nature can have no application." See W. Va. Code §17F-1-7(a).

The statutes at issue herein work in concert and apply when motor vehicles are operated on public highways. Their application, however, ends there and they have no application off-road nor should the rules of the road apply off-road. The Legislature made the extent of the statute's effects plain in W.Va. Code §17F-1-7 which requires compliance with the rules of the road when (and only when) the ATV is upon a public road or highway.⁴

C. This Court has applied rules of the road only when vehicles are operated on the roads of the State.

In reaching its decision, the Circuit Court relied upon this Court's recent ruling of *State ex rel. Sergeant v Nibert*, 220 W.Va. 520, 648 S.E.2d 26 (2007). However, the Circuit Court incorrectly interpreted and applied *Sergeant*.

In *Sergeant*, this Court held that an ATV meets the definition of "motor vehicle" and applied the rules of the road – specifically DUI statutes – because the ATV was being operated on a public highway at the time of the incident. In *Sergeant*, this Court likewise drew the distinction the Legislature and State Farm did between when an ATV is operated on and off public highways. When on public highways, the rules of the road apply; when operated off public highways, the rules of the road do not apply. "An individual who operates an all-terrain vehicle on a public highway of this state may be prosecuted for committing the offense of driving while suspended or revoked under the provisions of W.Va. Code § 17B-4-3 (2004)." *Id.*, Syl. Pt. 3 (emphasis added).

⁴ W.Va. Code §17F-1-7 states: (a) Every person operating an all-terrain vehicle upon a public road or highway of this state shall be subject to all of the duties applicable to the driver of a vehicle by the provisions of chapter seventeen-c of this code except where inconsistent with the provisions of this article and except as to those provisions of chapter seventeen-c of this code which by their nature can have no application

Sergent upholds the statutory definition of a “motor vehicle” including an ATV – when operated on a public roadway. That decision, however, has no application to operation of an ATV off a public roadway.

The Petitioner in *Sergent* argued that the rules of the road should never apply to the operation of an ATV. This Court disagreed. Here the Appellee argues the converse, asserting that the rules of the road should apply in every circumstance regardless of where an ATV is being operated. Again, this Court should disagree. Syllabus Point 3 of *Sergent* is clear - the rules of the road govern operation of an ATV when operated on a public highway. That distinction is critical and is evident in State Farm’s policy language. Had this incident occurred on a public highway, the exclusion would not have applied. The West Virginia Legislature, this Court and State Farm are in harmony as to when the rules of the road, and the availability of insurance, applies to the operation of an ATV. The Circuit Court of Brooke County, however, misapplied *Sergent* and the circumstances under which the rules of the road and consequently the triggering of insurance coverage applies. This misapplication warrants a reversal of the September 14, 2007 Memorandum of Opinion and Order of the Circuit Court of Brooke County.

D. ATV exclusions in auto policies are valid and enforceable.

Assuming, *arguendo*, that this Court should extend application of the uninsured motorist statute to off-road situations, the exclusion in the State Farm policy is nonetheless valid and enforceable.

The exclusion, as with all other exclusions upheld by this Court in this context, comports with statutory requirements as to when it is and is not applicable and promotes public policy. When considering the propriety of exclusions to insurance

coverage, this Court usually considers the language of the exclusion itself, the effect of application of the exclusionary language, the availability of other recovery and the public policy behind enforcement of the exclusion.

Consideration of each of these factors should be resolved in favor of upholding the exclusion. First, the language of the exclusion itself is applicable only when an ATV is being operated off public roads. This tracks the application of the UM and ATV statutes as to when certain other rules and regulations must be followed. The effect of applying the exclusion also comports with these statutes as it applies when an ATV is being operated not as a vehicle on a highway but as a recreational machine off-road. This also encompasses the next factor in that coverage is separately available for ATVs. Furthermore, under certain circumstances and dependent upon policy language, homeowners' coverage may cover the acts of the operator of an ATV. Finally, public policy – most notably the cost of insurance – again weighs in favor of applying the exclusion as written. Just as with *Imgrund v. Yarborough, infra*, coverage is available through a different policy. ATVs can be separately insured. Recreational policies covering these machines such as boats and ATVs are available. Thus, there is no need – and certainly no public policy reason – to require UM coverage intended for vehicles operated on public highways to cover such machinery. To force such coverage onto every auto policy in West Virginia is in and of itself contrary to public policy. Auto policies are rated based upon the risk. Automobiles and ATVs are vastly different in their risk, thus the need for separate coverage that takes such risk into consideration in determining premiums.

The stated purpose of the UM statute is ensure that the burden of loss for accident caused by financially irresponsible motorists is distributed among the owners of all motor vehicles in West Virginia. *Bell v State Farm Mut. Auto. Ins. Co.*, 157 W.Va. 623, 207 S.E.2d 147 (1974). This public policy of "spreading the risk" applies to those who operate motor vehicles on public highways in that such roads are made available to all members of the public to use. Such is not the case with respect to off-road trails utilized by ATV drivers. Those who choose to engage in such activity must bear the risks and costs attendant thereto. The public at large should not shoulder those costs by way of increased auto insurance premiums for the few who engage in off-road activity.

Plaintiff below argued that State Farm's rationale is flawed and that adopting State Farm's reasoning will cause a "slippery slope" with regard to UM exclusions. Plaintiff's concern, however, is ill-founded. Plaintiff below argued that excluding ATVs from coverage when operated off-road opens the door to excluding certain makes or models of automobiles or excluding classes of automobiles. Such argument is nonsensical and non-persuasive. First, automobiles are intended to be covered by W.Va. Code §33-6-31. Any attempt to exclude a particular type of automobile would be void as against the statute and public policy. Excluding machinery, such as an ATV when operated off public roads, however, is in compliance with the statute and consistent with the premium charged.

Plaintiff below also urged an expanded definition of "motor vehicle" for purposes of UM coverage. To accept that argument would require mandatory UM insurance for all self-propelled machinery such as riding lawn mowers and golf carts. Such is clearly beyond the ambit of compulsory insurance laws that are intended to protect persons on

public highways. However, this expansion will be the result of the Circuit Court's Order which is unwarranted. UM coverage is designed to apply to machinery operated upon public highways. This includes instances in which machinery not normally operated on public highways is operated on public highways. It does not extend when such machinery is operated off-road.⁵ In the present case the ATV was not on a public highway. Thus, the factors which would trigger UM coverage are absent.

The Circuit Court incorrectly narrowed the focus of its inquiry based upon two enumerated exclusions to the UM statute. As written, the UM statute exempts (1) bailees for hire and (2) any persons excluded by any restrictive endorsement attached to the policy. W.Va. Code §33-6-31(a). However, this Court has on many occasions considered and upheld several different exclusions to UM coverage which are broader than the two restrictions found in the body of the statute.

In *Imgrund v. Yarborough*, 199 W.Va. 187, 483 S.E.2d 533 (1997), the Supreme Court held that the "owned but not insured" exclusion was valid and enforceable, and that the claimant was not entitled to recover additional benefits under his parents' policy in light of this exclusion. Imgrund, who was injured in an accident with an uninsured motorist, recovered mandatory minimum limits of uninsured motorist benefits under his motorcycle policy, and then filed suit against the uninsured motorist and against his parents' UM carrier seeking additional benefits. Imgrund was residing in his parents' household at the time of the accident.

⁵ See for example the definition of "farm tractor" at W.Va. Code §17C-1-10 as "every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry." Such motor vehicle is subject to the rules of the road as set forth in Section 17C of the Code only when operated upon streets and highways. W.Va. Code §17C-2-1. (emphasis added).

Imgrund filed a claim against Nationwide seeking payment under the UM provision of his parents' insurance. Nationwide refused to pay Imgrund's claim citing the "owned but not insured" provision contained in his parents' policy. The exclusionary language stated that UM insurance did not apply "[t]o bodily injury suffered while occupying a motor vehicle owned by you or a relative but not insured for Auto Liability coverage under this policy...." *Id.*, 483 S.E.2d at 535. On appeal, this Court framed the issue as whether an "owned but not insured" exclusion is valid with respect to UM coverage and concluded that the exclusion was valid and enforceable. *Id.*, 483 S.E.2d at 541-542.

In *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995), this Court held that the claimants were not entitled to UM coverage for actions of a person who, though he had been a passenger in the tortfeasor's vehicle shortly before the accident, was neither occupying the vehicle when the accident occurred nor was he the vehicle's owner or driver.

This Court has also upheld other exclusions to UIM coverage which are broader than the two exclusions contained in § 33-6-31(a).⁶ In *Deel v. Sweeney*, 181 W.Va. 460, 383 S.E.2d 92 (1989), the Court upheld the "owned but not insured" exclusion. The same exclusion was held enforceable and in compliance with public policy by the District Court in *Transamerica Ins. Co. v. Arbogast*, 662 F.Supp. 164 (N.D.W.Va. 1987), *aff'd* 835 F.2d 875 (4th Cir. 1987). In *Trent v. Cook*, 198 W.Va. 601, 482 S.E.2d 218 (1996), the Court held that a workers' compensation exclusion was valid. In *Thomas v.*

⁶ Although the case at bar concerns UM coverage, the omnibus statute in question applies to UM and UIM coverage.

Nationwide Mut. Ins. Co., 188 W.Va. 640, 425 S.E.2d 595 (1992), the Court held that the "family use" exclusion is valid and in line with public policy.

When considering the UM statute, the Circuit Court incorrectly reasoned that where a motor vehicle is being operated is not determinative of whether the statute and UM coverage applies. Again, this overlooks the fundamental premise that the UM statute simply does not apply to off-road situations. Secondly, however, it too narrowly construes the UM statute and completely ignores each exclusion which has been upheld by this Court. Any attempt by the Circuit Court to overlook the validity of the exclusion and declare it void simply because it does not concern a bailee for hire or a person specifically excluded by a restrictive endorsement is an incorrect application of the law.

This incorrect view of the UM statute and exclusions which have been upheld thereunder by this Court, also mandates reversal of the Circuit Court of Brooke County.

F. The Circuit Court's Order violates public policy.

The Circuit Court's decision severely impinges upon public policy that requires mandatory UM insurance coverage. This Court has consistently held that the purpose of this mandatory coverage is to protect innocent victims who rightfully use public highways provided for the public's use. Such, however, does not extend to voluntary actions of assuming dangerous activities such as riding on an uninsured ATV on hilly terrain off-road.

The West Virginia Legislature has never mandated insurance coverage when one assumes such dangerous activity, yet the Order of the Circuit Court mandates such coverage. The effect of the Circuit Court's Order is to force uninsured motorist coverage.

onto each and every insurance policy in the State of West Virginia to cover individuals who knowingly engage in this activity. Newspapers are filled with reports of the dangers of ATVs. The Legislature has deemed it necessary to legislate the operation of the machinery including mandating safety awareness courses and requiring rental dealers to provide safety equipment, W.Va. Code §§17F-1-2 and 17F-1-4, respectively. No such requirements are imposed with other motor vehicles. Legislative enactment of these additional safety precautions demonstrates the dangerous nature of the operation of such machines. One who chooses to engage in such activity has the right and opportunity to purchase separate insurance coverage that is rated for such activity and which is specifically applicable to such. Those increased risks – and attendant increased premiums – however, should not be imposed upon every insurance consumer in West Virginia. The West Virginia Legislature mandates operators of motor vehicles to carry uninsured motorist coverage W.Va. Code § 33-6-31. Such mandatory coverage, however, is for the protection of motorists and passengers on public highways, not for the minority of riders of ATVs off-road. The Circuit Court's Order, however, now mandates such coverage on all UM policies which is inconsistent with public policy and the very reason that UM coverage is mandated in West Virginia. This error alone requires a reversal of the Order of September 14, 2007.

V. CONCLUSION

The claim pursued by the Appellee is foreign to the risk insured for uninsured motorist coverage in State Farm's automobile policies. An ATV does not meet the definition of an "uninsured motor vehicle" when operated off public roads. This clear and unambiguous policy language excludes UM coverage to Ms. Boniey for her off-road

accident. Moreover, the UM statute is inapplicable to the facts of the present situation in that the ATV was indisputably being operated off a public road or highway when the accident occurred.

Should this Court nonetheless, consider the exclusion in light of the statute, the exclusion is valid and enforceable and serves a strong public policy purpose. As such, it should be plainly enforced. The only correct interpretation of the policy to the facts of the present action is that uninsured motorist coverage is not available under these facts.

No statute or opinion of this Court attempts to impose rules of the road upon ATVs or any other motor vehicle when operated off-road. In fact, all statutes in question specifically limit their application to when a motor vehicle is being operated on a public highway or road. When off-road, such rules and statutes are simply inapplicable. Quite simply, ATVs, when operated off-road, are not governed by roadway statutes, including the uninsured motorist statute. Any attempt to apply the uninsured motorist statute to an off-road situation is clearly erroneous and must be reversed.

WHEREFORE, the Appellant, State Farm Mutual Automobile Insurance Company, respectfully requests that this Court reverse the September 14, 2007 Order of the Circuit Court of Brooke County.

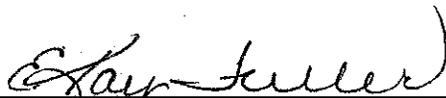
Respectfully submitted,

**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY**

By Counsel

MARTIN & SEIBERT, L.C.

BY:



E. Kay Fuller
(WV State Bar No. 5594)
1453 Winchester Avenue
P.O. Box 1286
Martinsburg, WV 25405
(304) 262-3209

CERTIFICATE OF SERVICE

This is to certify that I, E. Kay Fuller, Counsel for the Appellant, served the foregoing ***Appellant's Brief***, upon the following individuals by United States Mail, first class, postage prepaid on this the 11th day of **July, 2008**:

Joseph John, Esq.
JOHN LAW OFFICES
200 Board of Trade Building
Wheeling, WV 26003

Daniel L. McCune, Esq.
SELLITTI NOGAY & MCCUNE, PLLC
PO Drawer 3095
Weirton, WV 26062

Brian Kuchinski

Lodged in Circuit Court file


E. Kay Fuller

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

JENNIFER BONIEY,

Plaintiff,

v.

Civil Action No. 07-C-78

BRIAN KUCHINSKI,

Defendant.

MEMORANDUM OF OPINION AND ORDER

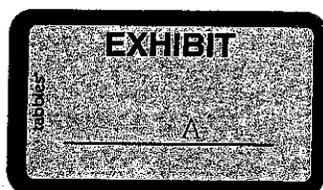
There is currently pending before this Court cross motions for summary judgment centered upon the question as to whether the exclusion of an off-road All Terrain Vehicle from uninsured motorist (UM) is enforceable, or is invalid as being in contravention of the UM Statute, WV Code §33-6-31.

After reviewing the initial memoranda of law submitted by both parties, and considering the arguments in support of those memoranda, this Court directed the parties to file supplemental memoranda of law on the sole issue of the validity of the exclusion found in the State Farm policy.

The Court has now considered the various motions, all memoranda of law, and as a result of this review and for the reasons set forth in the following Opinion, this Court has concluded that the plaintiff is entitled to Summary Judgment concluding that the attempt to exclude UM coverage for the ATV involved in the case *sub judice* violates both the letter and spirit of WV Code §33-6-31.

OPINION

On May 8, 2005, the plaintiff, Jennifer Boniey was injured while a passenger on an ATV owned and operated by Brian Kuchinski. At the time of the accident, Mr.



Kuchinski was insured by GEICO Insurance and Ms. Boniey was insured under two policies issued by State Farm, which contained UM coverage. Liability coverage has been denied to Mr. Kuchinski by GEICO insurance. Therefore, Ms. Boniey submitted a claim for UM coverage. However, State Farm denied UM coverage on the basis that an ATV does not qualify as an uninsured "motor vehicle" while not operated on public roads.

The UM statute W.Va. Code § 33-6-31 does not contain separate definitions of a "motor vehicle." Therefore we must look to other sections of the code for guidance. The West Virginia Legislature defines a "motor vehicle" as "every vehicle which is self propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails." W.Va. Code §17A-1-1(b). The Legislature also defines "vehicle" as "every device in, upon or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks." W.Va. Code §17A-1-1(a). Furthermore, the Legislature defines an ATV as "any motor vehicle, fifty-two inches or less in width, having an unladen weight of eight hundred pounds or less, traveling on three or more low pressure tire with a seat designed to be straddled by the rider, designed for or capable of travel over unimproved terrain." W.Va. Code §17F-1-9.

The plaintiff and defendant, while using the same statutory language, differ as to whether an ATV qualifies as a "motor vehicle." However, the West Virginia Supreme Court has already held that "the definitions provided by the Legislature clearly include an all-terrain vehicle as a motor vehicle." State of West Virginia ex rel Sergent v. Nibert, No. 33327, June 6, 2007. The only question remaining is whether the exclusion of a

motor vehicle, while not operated on public roads, from UM coverage violates the letter and spirit of the UM statute.

W.Va. Code §33-6-31(a) provides:

No policy or contract of bodily injury liability insurance, or of property damage liability insurance, covering liability arising from the ownership, maintenance or use of any motor vehicle, shall be issued or delivered in this state to the owner of such vehicle, or shall be issued or delivered by any insurer licensed in this state upon any motor vehicle for which a certificate of title has been issued by the division of motor vehicles of this state, unless it shall contain a provision insuring the named insured and any other person, **except a bailee for hire and any persons specifically excluded by any restrictive endorsement attached to the policy, responsible for the use of or using the motor vehicle with the consent, expressed or implied, of the named insured...**

It is clear from reading the UM statute that where the motor vehicle is being operated is not determinative of whether the statute and UM coverage applies. The statute makes no distinction between motor vehicles operated on public roads and highways and motor vehicles operated off public roads and highways. The statute simply applies to any motor vehicle. The only exceptions provided in the statute are: a bailee for hire and any persons specifically excluded by any restrictive endorsement attached to the policy.

In Imgrund v. Yarborough, the West Virginia Supreme Court held, “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 2, 199 W.Va. 187 (1997). The Court further held “statutory provisions mandated by the *Uninsured Motorist Law*, *W. Va. Code* § 33-6-31 [1988] may not be altered by insurance policy exclusions.” *Id.* Syllabus point 3. Therefore, an exclusion in a

motor vehicle policy that seeks to exclude an ATV, which is a motor vehicle, from UM coverage when not operated on public roads is contrary to the West Virginia UM statute.

Accordingly, the Plaintiff's Cross Motion for Summary Judgment is GRANTED.

It is so **ORDERED**.

Entered on the 14th day of September, 2007.



ARTHUR M. RECHT, JUDGE

A copy of this Memorandum of Opinion and Order has been sent by United States Mail to the following counsel of record:

Daniel L. McCune, Esquire
Sellitti Nogay & McCune
P.O. Box 3095
Weirton WV 26062

Joseph J. John, Esquire
John Law Offices
80 Twelfth Street Ste 200
Wheeling, WV 26003

E. Kay Fuller, Esquire
Martin & Seibert
P.O. Box 1286
Martinsburg WV 25402-1286