

No. 34152

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

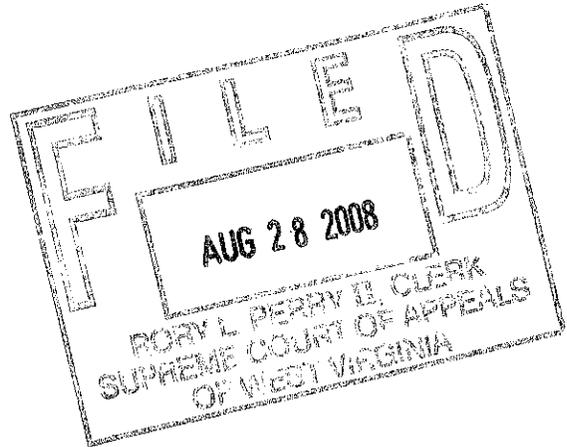
STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY,

Appellant,

v.

JENNIFER BONIEY,

Appellee,



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

APPELLANT'S REPLY BRIEF

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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 Reply 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 Appellant relies upon its statement of the Nature of Proceedings and Rulings Below as set forth in its Appellant's Brief.

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 operating was uninsured. 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).

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. ATVs are prohibited from being operated on public roads or highways except for the purpose of crossing the road, street or highway.

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).

In granting summary judgment to Ms. Boniey, the Circuit Court of Brooke County held: "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." (See Memorandum of Opinion and Order, p. 3, entered September 14, 2007, attached as Exhibit A to Appellant's Brief).

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 and that where the ATV was being operated was not determinative.

IV. POINTS AND AUTHORITIES

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

The key in this matter is the scope of application of W.Va. Code §33-6-31. The statute governs operation of motor vehicles on roadways in West Virginia. It does not govern off-road activity. It is undisputed the accident underlying this action occurred off-road; thus, the UM statute governing roadway activity does not apply.

By its clear language, the uninsured motorist statute applies to "motor vehicles." Contrary to the appellee's assertion, State Farm has never denied such fact nor does State Farm deny the ATV which the appellee was riding is a motor vehicle. The issue is whether a highway-oriented statute governs off-road activity. It does not.

W.Va. Code §33-6-31 presumably incorporates the definitions of vehicle and motor vehicle as set forth in Chapter 17 of the Code. These definitions describe devices which are highway-oriented. The uninsured motorist statute does not separately define an ATV. Such is found in the ATV statute, W.Va. Code §17F-1-9. By definition, an ATV is designed primarily to be operated off highway. Mirroring this same delineation, State Farm excluded operation of an ATV from UM coverage, except when the ATV is operated on public roads. Thus, per statutory definition and by clear policy language, an ATV, when operated off-road, falls outside the purview of the UM statute and applicable policy language.

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, 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. The statutes at issue herein work in concert and apply when motor vehicles are operated on public highways. Their scope, however, ends there as 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.¹

¹ 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

State Farm likewise recognized the distinction between vehicles and ATVs and the location of operation. Consequently, when an ATV is not operated on a public road, W. Va. Code §33-6-31 has no application. Therefore, under these facts, 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 contravenes the aforementioned legislative distinctions and must be reversed.

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

Where an ATV is operated and thus which statutes apply was also considered by this Court in *State ex rel. Sergeant v Nibert*, 220 W.Va. 520, 648 S.E.2d 26 (2007). 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 drew the same distinction the Legislature and State Farm did between operation of an ATV on and off public highways. When on public highways, the rules of the road apply; when 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). *Sergeant* 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.

Given that this Court has already spoken on the issue that the location of operation of an ATV is dispositive, the Circuit Court's ruling that "where the motor vehicle is being operated is not determinative of whether the statute and UM coverage applies" is clearly wrong and must be reversed.

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

Assuming, *arguendo*, that this Court should extend application of the UM 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. Each of these factors demonstrates that the language should be enforced.

The Circuit Court improperly limited the focus of its inquiry when analyzing the propriety of the policy to the two qualifications set forth in W.Va. Code §33-6-31(a), *i.e.*, a bailee for hire or a person specifically excluded by a restrictive endorsement.² The Circuit Court reasoned that if neither of those situations is present, no other exclusions

² W.Va. Code §33-6-31(a) states: 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.

are valid. This narrowing is an incorrect application of the law. This reasoning is opposite numerous rulings of this Court.

This Court has consistently applied exclusions beyond those two situations when language is appropriately framed and comports with public policy. See, e.g., *Cox v Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995). (Claimants were not entitled to UM coverage for actions of a person who was neither occupying the vehicle when the accident occurred nor was he the vehicle's owner or driver). The limited exclusionary language herein falls within the same rubric of exclusionary language which has been upheld by this Court on other occasions. Thus, it remains that an ATV is eligible for uninsured motorist coverage when operated on a public highway when the machine and operator are governed by other rules of the road. However, when the ATV leaves the highway, as it is designed to do, highway statutes, rules of the road and, hence, motor vehicle insurance coverage ceases.

Therefore, any attempt to avoid application of clear policy language by unduly restricting application of exclusionary language to two situations set forth in W.Va. Code §33-6-31(a) warrants reversal of the Circuit Court's Order.

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

The Circuit Court's Order also impedes public policy. This Court has consistently held that the purpose of UM 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 an uninsured ATV off-road.

The West Virginia Legislature has never mandated insurance coverage for any type of off-road activity. 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 dangerous off-road activity. However, it is the province of the Legislature, not the Circuit Court, to so govern off-road activity.

The Legislature has determined that mandatory insurance coverage must be in place when motor vehicles are operated on public highways. It has not so extended such mandatory insurance coverage beyond public highways. State Farm's policy carries out this legislative mandate in that it provides coverage for highway activity; it does not provide coverage for off-highway activity. The Circuit Court's attempt to force such coverage when the Legislature has not deemed it necessary must therefore be reversed.

V. CONCLUSION

The claim pursued by the Appellee is foreign to the risk insured by State Farm for uninsured motorist coverage in that an ATV does not meet the definition of an "uninsured motor vehicle" when operated off public roads, nor should it since coverage is designed for highway-oriented driving.

Moreover, the UM statute is inapplicable when an ATV is operated off a public road or highway. Thus, any attempt by the Circuit Court to expand the scope of the uninsured motorist statute is improper 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
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CERTIFICATE OF SERVICE

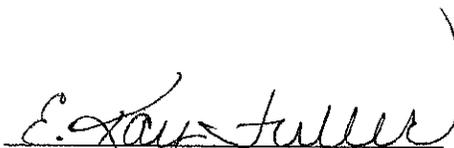
This is to certify that I, E. Kay Fuller, Counsel for the Appellant, served the foregoing ***Appellant's Reply Brief***, upon the following individuals by United States Mail, first class, postage prepaid on this the **27th** day of **August, 2008**:

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