
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GUY R. CUNNINGHAM and
BRIDGETT L. CUNNINGHAM, his wife,

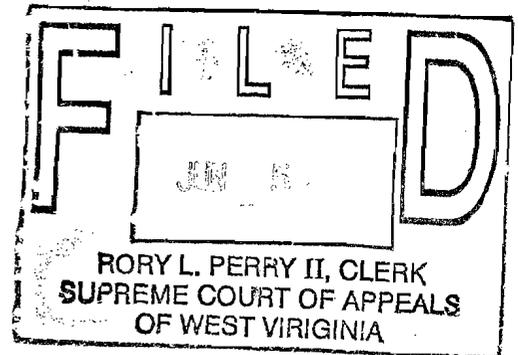
Plaintiffs,

v.

No.: 34862
(Civil Action No. 07-C-51
Circuit Court of Boone County)

WALTER LEE HILL, an individual;
ERIE INSURANCE PROPERTY AND CASUALTY
COMPANY, a Pennsylvania corporation,
B. MICHAEL BENTLEY, an individual;
ENCOMPASS INSURANCE COMPANY OF AMERICA,
an Illinois corporation; STATE FARM
MUTUAL AUTOMOBILE INSURANCE COMPANY, an
Illinois corporation; and WILLIAM WILSON,
an individual,

Defendants.



STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S
BRIEF UPON CERTIFIED QUESTION

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KIND OF PROCEEDING AND NATURE OF RULING
IN THE CIRCUIT COURT OF BOONE COUNTY

This case involves an issue of first impression relating to underinsured motorist coverage limits when two insurers provide coverage for the same loss and each policy limits the amount of recovery to the highest amount of underinsured motorist coverage available under all applicable policies. The Circuit Court of Boone County, in answer to the certified question, erroneously refused to honor the unambiguous language of the State Farm Mutual Automobile Insurance Company ["State Farm"] policy relating to the underinsured motorist coverage limits of liability when more than one policy applied to the same loss.

On April 11, 2005, Guy Cunningham, an agent with the United States Bureau of Alcohol, Tobacco, Firearms and Explosives, was operating a vehicle owned by his employer, the United States government, when a collision occurred with a vehicle operated by Walter Hill. There was no underinsured motorist coverage for the vehicle operated by Mr. Cunningham. Thus, after receiving the liability coverage limits from the policy insuring the Hill vehicle, Mr. Cunningham sought underinsured motorist coverage from his own insurance policies.

A policy issued to Mr. Cunningham by State Farm upon a 1995 Harley Davidson motorcycle provided underinsured motorist coverage with limits of \$50,000 per person and \$100,000 per

accident. Erie Insurance Property and Casualty Company ["Erie"] issued a policy to Mr. Cunningham and his wife, Bridgett Cunningham, which provided coverage for a Chevrolet Silverado and a Cadillac Escalade, with underinsured motorist coverage limits of \$100,000 per person and \$300,000 per accident.

Both the State Farm policy and the Erie policy contained language which, when more than one policy applied, limited recovery to the highest available underinsured motorist coverage limits. Because the Erie underinsured motorist coverage limits were \$100,000, higher than the State Farm limits of \$50,000, State Farm and Erie took the position that \$100,000 was the limit of underinsured coverage available to Mr. Cunningham from all policies. Therefore, State Farm paid Mr. Cunningham \$33,333.34 in underinsured motorist coverage benefits and Erie paid \$66,666.67 in underinsured motorist coverage benefits, so that Mr. Cunningham received a total of \$100,000 in underinsured motorist coverage.

The Cunninghams instituted this action against Erie and State Farm, seeking a declaration that Erie was required to provide underinsured motorist coverage of \$100,000 per person and State Farm was required to provide underinsured motorist coverage of \$50,000 per person for the April 11, 2005,

accident.¹ The Cunninghams also named Erie's claim handler, Michael Bentley, and State Farm's claim handler, William Wilson, as defendants, contending the individual defendants, as well as Erie and State Farm, allegedly violated the Unfair Trade Practices Act. The Cunninghams further claimed Erie and State Farm breached their respective contracts of insurance and their duties of good faith and fair dealing.

In addition, the Cunninghams sued Encompass Insurance Company of America ["Encompass"], seeking a declaration that underinsured motorist coverage was available from an umbrella policy issued to them by Encompass. They contended Encompass breached the contract of insurance, violated the Unfair Trade Practices Act and breached the duty of good faith and fair dealing. By Order entered July 9, 2007, the Circuit Court bifurcated and stayed all claims, except the claims for declaratory relief against Erie, State Farm and Encompass.²

After the Cunninghams, Erie and State Farm filed their respective summary judgment motions upon the issue of the applicable underinsured motorist coverage liability limits, the

¹Against Erie, the Cunninghams also sought a declaration that medical payments coverage was available under the Erie policy. The lower court ruled in the Cunninghams' favor upon that issue.

²The coverage dispute between plaintiffs and Encompass differs from the issues presented in the certified question and Encompass is not involved in this certified question.

Circuit Court of Boone County, pursuant to W. Va. Code §58-5-2, certified the following question to this Court:

When two insurers issue separate automobile liability insurance policies upon different vehicles containing underinsured motorist coverages which provide coverage for the same loss, is policy language which provides that the limits of underinsured motorist coverage available from all policies shall not exceed the liability limits of the policy with the highest limit of underinsured motorist coverage valid and enforceable?

The Circuit Court answered that question "NO." The lower court's answer was incorrect and this Court should answer the certified question in the affirmative.

STATEMENT OF FACTS

On April 11, 2005, Mr. Cunningham, an agent of the United States Bureau of Alcohol, Tobacco, Firearms and Explosives, was operating a 2001 Mercury Grand Marquis owned by his employer, the United States government. (See Order upon Certified Question ["Order"], p. 3.)³ While he was proceeding in a southerly direction on U.S. Route 119 in Boone County, West Virginia, his vehicle was struck by a 1997 Chevrolet truck owned by Beaury Cochran and operated by Walter Hill. *Id.*

The vehicle operated by Mr. Hill was insured under an automobile liability insurance policy issued by West Virginia National Auto Insurance Company. *Id.* West Virginia National Auto Insurance Company paid Mr. Cunningham its per person liability coverage limits of \$20,000. *Id.*

There was no underinsured motorist coverage for the vehicle owned by the United States government and operated by Mr. Cunningham and (See Order, pp. 3-4.) Mr Cunningham, therefore, sought underinsured motorist coverage from policies issued by State Farm and Erie.

At the time of the accident, Mr. Cunningham was the named insured under State Farm policy 243 1264-D26-48A, which provided coverage for a 1995 Harley Davidson motorcycle. (See

³The parties stipulated facts pertaining to the underinsured motorist coverage issue and the lower court incorporated the stipulation into its Order upon Certified Question.

Order, p. 4.) The State Farm policy contained underinsured motorist coverage with limits of \$50,000 per person and \$100,000 per accident. *Id.*

Mr. Cunningham and his wife also were the named insureds under a policy issued by Erie which provided coverage for a 2001 Chevrolet Silverado and a 2003 Cadillac Escalade. *Id.* The Erie policy contained underinsured motorist coverage with limits of \$100,000 per person and \$300,000 per accident. *Id.*

The policies issued by State Farm and Erie each contained policy language limiting recovery to the highest available underinsured motorist coverage limits when more than one policy provided underinsured motorist coverage. The Erie policy provided:

OTHER INSURANCE

If "anyone we protect" has other similar insurance that applies to the accident, "we" will pay "our" share of the loss, subject to the other terms and conditions of the policy and this endorsement. "Our" share will be the proportion of the Limit of Protection of this insurance bears to the total Limit of Liability of all applicable insurance. Recovery will not exceed the highest limit available among the applicable policies.

(See Order, pp. 4-5.)

The State Farm policy provided:

If There is Other Coverage - Coverage W

1. If underinsured motor vehicle coverage for **bodily injury** is available to an **insured** from more than one policy provided by us or

any other insurer, the total limit of liability available from all policies provided by all insurers shall not exceed the limit of liability of the single policy providing the highest limit of liability. This is the most that will be paid regardless of the number of policies involved, **persons** covered, claims made, vehicles insured, premiums paid or vehicles involved in the accident.

2. Subject to item 1 above, any coverage applicable under this policy shall apply:

...

- b. on an excess basis if the **insured** sustained **bodily injury** while **occupying** or otherwise using a vehicle not owned by or leased to **you, your spouse, or any relative**.
3. Subject to items 1 and 2 above, if this policy and one or more other policies provide coverage for **bodily injury**:

...

- b. on an excess basis, we are liable only for our share. Our share is that percent of the damages payable on an excess basis that the limit of liability of this policy bears to the total of all applicable underinsured motor vehicle coverage provided on an excess basis.

The total damages payable from all policies that apply on an excess basis shall not exceed the amount by which the limit of liability of the single policy providing the highest limit of liability on an excess basis exceeds the limit of liability of the single policy providing the highest limit of liability on a primary basis.

(See Order, pp. 5-6.)

Erie paid Mr. Cunningham \$66,667.66 in underinsured motorist coverage benefits and State Farm paid him \$33,333.34 in underinsured motorist coverage benefits. (See Order, p. 6.) Mr. Cunningham therefore received \$100,000, the highest available limit of liability for underinsured motorist coverage from all policies.

On March 23, 2007, Mr. Cunningham and his wife instituted this action against the underinsured motorist, Walter Hill; Erie and its claim handler, Michael Bentley; State Farm and its claim handler, William Wilson; and, Encompass. They sought a declaration that they were entitled to \$100,000 in underinsured motorist coverage from Erie and \$50,000 in underinsured motorist coverage from State Farm.⁴

By Order upon Certified Question, entered December 30, 2008, the Circuit Court of Boone County, pursuant to W. Va. Code §58-5-2, certified the following question of law to this Court:

⁴They also sought a declaration that medical payments coverage was available from Erie and underinsured motorist coverage was available from an umbrella policy issued by Encompass. Additionally, they asserted claims for breach of contract and breach of the duty of good faith and fair dealing against the insurers and claims for violation of the Unfair Trade Practices Act against the insurers and the individual claim handlers. By Order entered July 29, 2007, all issues, with the exception of the various claims for declaratory relief, were bifurcated and stayed, pending resolution of the coverage issues.

When two insurers issue separate automobile liability insurance policies upon different vehicles containing underinsured motorist coverages which provide coverage for the same loss, is policy language which provides that the limits of underinsured motorist coverage available from all policies shall not exceed the liability limits of the policy with the highest limit of underinsured motorist coverage valid and enforceable?

After the Circuit Court erroneously answered the certified question in the negative, State Farm and Erie filed their respective Petitions upon Certified Question. By Order entered April 30, 2009, this Court docketed the certified question for hearing.

ASSIGNMENT OF ERROR

The lower court erred by answering the certified question in the negative and refusing to apply, as written, State Farm's clear and unambiguous policy language.

STANDARD OF REVIEW

This Court utilizes a *de novo* standard when reviewing a lower court's answer to a certified question. *Smith v. State Consol. Pub. Ret. Bd.*, 222 W. Va. 345, ___, 664 S.E.2d 686, 688 (2008); *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 174, 475 S.E.2d 172, 174 (1996).

DISCUSSION

I. The unambiguous State Farm policy language permissibly limits underinsured motorist coverage when more than one policy applies.

A. The unambiguous State Farm policy language should be applied as written.

The lower court incorrectly failed to apply State Farm's unambiguous language. See *Payne v. Weston*, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995) (It is well-settled that unambiguous policy provisions are to be applied, not interpreted, and the policy is not to be rewritten by the Court.) When more than one policy applies, the State Farm policy explicitly limits the amount of underinsured motorist coverage available to the highest available limits of liability under all policies:

If There is Other Coverage - Coverage W

1. If underinsured motor vehicle coverage for ***bodily injury*** is available to an ***insured*** from more than one policy provided by us or any other insurer, the total limit of liability available from all policies provided by all insurers shall not exceed the limit of liability of the single policy providing the highest limit of liability. This is the most that will be paid regardless of the number of policies involved, ***persons*** covered, claims made, vehicles insured, premiums paid or vehicles involved in the accident.
2. Subject to item 1 above, any coverage applicable under this policy shall apply:

...

- b. on an excess basis if the *insured* sustained *bodily injury* while *occupying* or otherwise using a vehicle not owned by or leased to *you, your spouse, or any relative*.
3. Subject to items 1 and 2 above, if this policy and one or more other policies provide coverage for *bodily injury*:

...

- b. on an excess basis, we are liable only for our share. Our share is that percent of the damages payable on an excess basis that the limit of liability of this policy bears to the total of all applicable underinsured motor vehicle coverage provided on an excess basis.

The total damages payable from all policies that apply on an excess basis shall not exceed the amount by which the limit of liability of the single policy providing the highest limit of liability on an excess basis exceeds the limit of liability of the single policy providing the highest limit of liability on a primary basis.

(See Order, pp. 5-6.)

In this case, because the Erie policy provided underinsured motorist coverage with \$100,000 liability limits, which was higher than the State Farm limits of \$50,000, \$100,000 was the total amount of underinsured motorist coverage available. Mr. Cunningham received the full \$100,000 of available underinsured motorist coverage.

Under West Virginia law, policy language which is unambiguous is not subject to interpretation or construction, but must be applied as written. *See Payne, supra*, at 507, 466 S.E.2d at 166. Even though the lower court did not find the State Farm policy language ambiguous, the lower court nonetheless erred when it determined the policy language could not be applied as written.⁵

B. The State Farm policy language comports with this Court's prior decisions limiting or even precluding recovery of underinsured motorist coverage.

This Court has never addressed the issue presented in the instant case of two policies, provided by two separate insurers, which contain unambiguous language limiting underinsured motorist coverage to the highest limit of liability available under either of the policies. The lower court seemed to rely upon the absence of a multi-vehicle discount as a basis for its conclusion that the policy language would not be applied as written. (See Order, p. 8.)

This Court has not found the existence of a multi-vehicle discount dispositive when upholding unambiguous policy language that limits or even excludes underinsured motorist coverage altogether. This Court's decisions demonstrate that

⁵The Circuit Court did conclude, however, that a portion of the Erie policy language was ambiguous. (See Order, pp. 7-8.) That does not, however, impact upon application of the State Farm policy language.

unambiguous policy language controls the availability of and the amount of such coverage.

In the seminal decision of *Deel v. Sweeney*, 181 W. Va. 460, 383 S.E.2d 92 (1989), the Court upheld the "owned but not insured" exclusion, prohibiting an insured from recovering underinsured motorist coverage from his father's policy when, at the time of the accident, he was occupying a vehicle which he owned, but had not insured for underinsured motorist coverage. In addition to holding that the policy language did not violate W. Va. Code §33-6-31, the Court found the policy language to be clear and unambiguous and applied the same as written. *Id.* at 462-63, 383 S.E.2d at 94-95. The *Deel* Court recognized it was permissible, under W. Va. Code §33-6-31(k), for insurers to "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." *Id.* at Syllabus Point 3.

Thus, in *Deel*, application of the policy language precluded recovery of underinsured motorist coverage by the injured insured. Adherence to the policy language in this case, however, permits Mr. Cunningham to recover underinsured motorist coverage up to the highest limits of liability, *i.e.*, \$100,000. Mr. Cunningham, unlike the insured in *Deel*, received under-

insured motorist coverage, subject to the contractual limitations upon the amount of such coverage.

The same result would be reached if, for example, Mr. Cunningham had been occupying one of the vehicles insured by Erie at the time of the accident. Under State Farm's "owned but not insured" exclusion, no underinsured motorist coverage would be available from State Farm and Mr. Cunningham's recovery would be limited to the \$100,000 of underinsured motorist coverage from Erie. There is no legitimate basis for an increase in the available underinsured motorist coverage merely because Mr. Cunningham was occupying his employer's vehicle when the accident occurred.

The State Farm policy language comports with W. Va. Code §33-6-31(b), as well as W. Va. Code §33-6-31(k), and simply limits recovery to the highest available liability limits when more than one policy applies. The Insurance Commissioner's approval of State Farm's policy language reflects that the language complies with West Virginia law and the benefits provided are consistent with the premium charged. See W. Va. Code §33-6-9.

This Court consistently has evoked the principles discussed in *Deel* to uphold policy language limiting or even prohibiting recovery of underinsured motorist coverage. For example, the Court in *Thomas v. Nationwide Mutual Insurance*

Company, 188 W. Va. 640, 425 S.E.2d 595 (1992), also enforced policy language which precluded recovery of underinsured motorist coverage. The policy at issue in *Thomas* contained a "family use" exclusion, excluding from the definition of an underinsured motor vehicle, "any vehicle owned by or furnished for the regular use of **you** or a **relative**." *Id.* at 643, 425 S.E.2d at 598. The Court concluded that such language was valid and prohibited recovery of underinsured motorist coverage when the insured claimed the insured vehicle was an underinsured motor vehicle. *Id.* at 645-46, 425 S.E.2d at 600-01. See also *Cantrell v. Cantrell*, 213 W. Va. 372, 582 S.E.2d 819 (2003) (Rejecting appellant's invitation to revisit *Deel v. Sweeney*, and reiterating the validity of the "family use" exclusion.)

This Court has permitted insurers to exclude punitive damages from underinsured motorist coverage. In *State ex rel. State Auto Insurance Company v. Risovich*, 204 W. Va. 87, 93-94, 511 S.E.2d 498, 504-05 (1998), the Court rejected the insured's argument that, because W. Va. Code §33-6-31(b) requires that underinsured motorist coverage pay the insured "all sums which he shall be legally entitled to recover as damages" from the owner or operator of an underinsured motor vehicle, underinsured motorist coverage for punitive damages was required. The Court concluded that insurers validly could exclude underinsured

motorist coverage for punitive damages. *Id.* at 93-94, 511 S.E.2d at 504-05.

Even in the area of uninsured motorist coverage, minimum limits of which are mandatory, this Court has recognized that coverage may be limited, or even excluded, in certain circumstances. The Court, in reliance upon *Deel*, has held that an insurer may exclude uninsured motorist coverage, so long as the insured has received the mandatory minimum uninsured motorist coverage limits. *Imgrund v. Yarborough*, 199 W. Va. 187, 483 S.E.2d 533 (1997)

In *Imgrund*, plaintiff was operating his motorcycle, insured by Colonial Insurance Company, when he was involved in an accident with an uninsured motorist. *Id.* at 188-89, 483 S.E.2d at 534-35. Colonial Insurance Company paid plaintiff his uninsured motorist coverage limits of \$20,000. Plaintiff, who resided with his parents, then made a claim for uninsured motorist coverage with his parents' insurer, Nationwide Mutual Insurance Company ["Nationwide"]. *Id.* at 189, 483 S.E.2d at 535. His parents had two vehicles insured with Nationwide, with uninsured motorist coverage of up to \$100,000 per vehicle. *Id.*

Nationwide denied coverage, relying upon the "owned but not insured exclusion." The *Imgrund* Court declared the exclusionary language valid, holding that Nationwide was not required to provide uninsured motorist coverage to the plaintiff

as he had received the mandatory minimum limits from the policy covering the vehicle he was operating at the time of the accident. *Id.* at 194-95, 483 S.E.2d at 541-42.

These examples illustrate this Court's willingness to uphold exclusionary or limiting language, even in instances where no multi-vehicle discount is given or, as in this case, where no multi-vehicle discount can be given. Applying the unambiguous policy language in the instant case does not preclude Mr. Cunningham's recovery of underinsured motorist coverage. It merely limits his recovery, as permitted by W. Va. Code §33-6-31(k), to the highest available coverage limits.

II. The State Farm policy language violates neither West Virginia law nor West Virginia public policy.

A. Application of State Farm's policy language is not dependent upon the existence of a multi-vehicle discount.

The Circuit Court reasoned that, because Erie and State Farm were unaware they each insured vehicles in the Cunningham household and did not provide a multi-vehicle discount, enforcement of the State Farm policy language would violate West Virginia law and West Virginia public policy favoring full compensation. The lower court did not explain the significance of its conclusion that neither Erie nor State Farm "were aware of the presence of the other." (See Order, p. 8.)

Whether State Farm knew of the existence of the Erie policy is immaterial to the validity of the State Farm policy

language. State Farm does not need to know of the existence of a specific second policy before it issues a policy limiting recovery to the highest available underinsured motorist coverage limits when more than one policy applies. The State Farm policy language is written to cover various situations where more than one policy might apply and is not limited solely to circumstances where the insured happens to purchase separate policies from different insurers.

The lower court's flawed analysis would require every insured to report all policies he or she has with other insurers so that State Farm would "be aware of the presence" of other insurers. This requirement imposed by the lower court has no bearing upon the validity of the State Farm policy language and the policy language is enforceable regardless of whether State Farm is aware that the insured may have other policies. In other situations, such as the "owned but not insured" exclusion, there is no requirement that an insured inform State Farm of other vehicles in the household before the "owned but not insured" exclusion may be enforced. Likewise, there is no legitimate reason why the validity of State Farm's policy language hinges upon whether State Farm was aware of the policy issued by Erie.

The Circuit Court's reasoning does not withstand scrutiny, particularly in light of its recognition "that a

general discount may have been applied or given by either insurer to the plaintiffs." (See Order, p. 8.) As the lower court implicitly noted, the premium charged by State Farm was consistent with the policy language. Inexplicably, however, the lower court failed to apply the unambiguous policy language.

The State Farm policy provision at issue was filed with the Insurance Commissioner, as required by W. Va. Code §33-6-8. The Insurance Commissioner is charged with disapproving a form filing if it "is in any respect in violation of or does not comply with this chapter." W. Va. Code §33-6-9(a). W. Va. Code §33-6-9(e) also requires the Insurance Commissioner disapprove a filing in the event "the benefits provided therein are unreasonable in relation to the premium charged."

Plaintiffs have complained that State Farm cannot rely upon the provisions of W. Va. Code §33-6-9 because the "presumption" afforded by the statute arose as a result of a 2002 amendment and, therefore, does not apply to the Insurance Commissioner's approval, in 2001, of State Farm's policy language. Plaintiffs' position is without foundation, for W. Va. Code §33-6-9 was enacted in 1957 and has not been amended since its enactment.

They also contended the lower court did not rule upon the effect of the Insurance Commissioner's approval of State Farm's form filing and, therefore, that approval cannot be

considered by this Court. There is no prohibition which bars this court from considering and respecting the Insurance Commissioner's conclusion that State Farm's policy language comported with West Virginia law. The lower court need not issue a specific ruling on every argument presented to it in support of a party's position. Nonetheless, by answering the certified question in the negative, the lower court necessarily rejected State Farm's position that the Insurance Commissioner's failure to disapprove of its form filing under W. Va. Code §33-6-9 indicates the benefits provided are commensurate with the premium charged.

The Insurance Commissioner's approval of State Farm's filing demonstrates that the Commissioner found the policy provisions in compliance with West Virginia law. See W. Va. Code §33-6-9. (See Ex. A attached to State Farm's Resp. to Pls.' Combined Mot. for Summ. J. against Def. Erie Ins. Prop. & Cas. Co. and State Farm Mut. Auto. Ins. Co. with Regard to Applicable UIM Limits.) The Commissioner's approval further demonstrates the premium charged was consistent with and appropriately adjusted to reflect the policy language limiting underinsured motorist coverage to the highest limits of liability when more than one policy applies. Because the premium charged was commensurate with the risk and was based upon the validity of the language limiting liability to the highest

available limits, disregarding the policy language will result in increased insurance costs to reflect the increased risk not currently contemplated under the policy.

B. State Farm's policy language comports with W. Va. Code §33-6-31(b).

Plaintiffs argued that the State Farm policy language could not be applied because it violated the portion of W. Va. Code §33-6-31(b), which provides "[n]o sums payable as a result of underinsured motorists' coverage shall be reduced by payments made under the insured's policy or any other policy." The lower court apparently accepted that argument, for it also relied upon W. Va. Code §33-6-31(b) to support its incorrect answer to the certified question.

The assertion that W. Va. Code §33-6-31(b) renders the State Farm policy language invalid is misplaced. The issue in this case is the coordination of benefits when two policies apply to the same loss -- not whether State Farm is entitled to an offset from any payments made. Instead, the State Farm policy provision is an "other insurance" provision, governing coordination of benefits, applicable only in instances where more than one underinsured motorist coverage policy applies to the same loss.

W. Va. Code §33-6-31(b) prohibits a reduction of "sums payable as a result of underinsured motorists' coverage." The threshold inquiry is, of course, the amount of "sums payable as

a result of underinsured motorist coverage." It is the policy language that determines the amount of "sums payable."

One must first look to the policy to ascertain the amount of the "sums payable." It is that amount which cannot be reduced or offset by "payments made under the insured's policy or any other policy." The State Farm policy language provides the total "sums payable," from all insurers, shall not exceed the liability limits of the policy with the highest limits of liability.

This Court consistently has interpreted that portion of W. Va. Code §33-6-31(b) as pertaining to and preventing an offset of liability coverage limits against underinsured motorist coverage limits when determining whether underinsured motorist coverage is triggered. Beginning with *State Automobile Mutual Insurance Company v. Youler*, 183 W. Va. 556, 567, 396 S.E.2d 737, 748 (1990), the Court held, pursuant to W. Va. Code §33-6-31(b), "that the tortfeasor's liability insurance coverage is to be set off against the amount of *damages* sustained by the injured person, not against the underinsured motorist coverage limits." [Emphasis in original].

Shortly thereafter, in *Pristavec v. Westfield Insurance Company*, 184 W. Va. 331, 400 S.E.2d 575 (1990), the Court relied upon *Youler* for the proposition, under W. Va. Code §33-6-31(b), liability coverage is to be set off against the injured

person's damages, not against the underinsured motorist coverage. Likewise, in *Brown v. Crum*, 184 W. Va. 352, 355, 400 S.E.2d 596, 599 (1990), the Court made clear its view that W. Va. Code §33-6-31(b)'s prohibition against offsets applied to liability coverage:

In the present case, we reemphasize that W.Va.Code § 33-6-31(b) precludes offsets of amounts paid by a tortfeasor's insurer against the underinsured motorist policy limits of an insurance carrier.

As these decisions illustrate, W. Va. Code §33-6-31(b) operates to prohibit the underinsured motorist coverage carrier from offsetting the liability coverage limits against the underinsured motorist coverage limits. That is not the situation in this case, for the State Farm policy provision at issue does not involve an offset.

The fallacy of the lower court's reliance upon W. Va. Code §33-6-31(b) is the failure to recognize that, if State Farm was attempting to invoke an offset, offsetting the Erie underinsured motorist coverage policy limits of \$100,000 against the State Farm underinsured motorist coverage limits of \$50,000 would have resulted in no payment at all by State Farm. Subtracting Erie's \$100,000 limits from State Farm's \$50,000 produces a negative amount of \$50,000. Offsetting Erie's payment of \$66,666.67 against the State Farm policy limits of \$50,000 likewise would have resulted in no payment from State Farm. As this mathematical exercise unequivocally demonstrates, the State

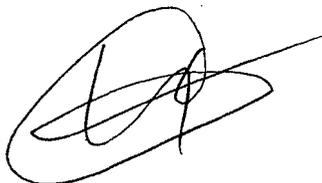
Farm policy language does not involve an offset and, therefore, does not violate W. Va. Code §33-6-31(b).

There is no valid reason why the State Farm policy language should not be applied as written. It is plain, unambiguous and does not violate W. Va. Code §33-6-31(b). The policy language comports with West Virginia law, as evidenced by the Insurance Commissioner's approval of the language. The lower court erred when answering the certified question in the negative and refusing to apply and enforce the provisions of the contract between Mr. Cunningham and State Farm.

RELIEF REQUESTED

State Farm Mutual Automobile Insurance Company respectfully requests that this Court answer the question certified from the Circuit Court of Boone County in the affirmative.

Respectfully submitted,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GUY R. CUNNINGHAM and
BRIDGETT L. CUNNINGHAM, his wife,

Plaintiffs,

v.

No.: 34862
(Civil Action No. 07-C-51
Circuit Court of Boone County)

WALTER LEE HILL, an individual;
ERIE INSURANCE PROPERTY AND
CASUALTY COMPANY, a Pennsylvania
corporation; B. MICHAEL BENTLEY,
an individual; ENCOMPASS INSURANCE
COMPANY OF AMERICA, an Illinois
corporation; STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY, an
Illinois corporation; and WILLIAM
WILSON, an individual,

Defendants.

CERTIFICATE OF SERVICE

The undersigned, of counsel for defendant, State Farm Mutual Automobile Insurance Company, does hereby certify that the foregoing State Farm Mutual Automobile Insurance Company's Brief upon Certified Question was this day served upon the following by mailing a true copy of the same this date, postage prepaid, to:

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Done this 4th day of June, 2009.



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