No. 30036—*Jeanne Tennant, individually and as mother and next friend for Andrea Tennant and Addie Tennant, both infants v. Russell A. Smallwood, Jr.*

FILED
August 2, 2002
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OF WEST VIRGINIA

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McGraw, Justice, dissenting:

The majority opinion in this case is grossly misguided. First, the controlling emphasis placed upon W. Va. Code § 33-6-31(c) (1995) (2000 Repl. Vol.) is inappropriate in the current context, as there is nothing in the law of this jurisdiction that prohibits an insurer from providing uninsured motorist coverage which extends beyond the minimum requirements of the statute. While State Farm obviously cannot issue a policy with uninsured motorist coverage that does not meet these statutory requirements, there is no prohibition against an insurer offering *more expansive* coverage to the insured—even that which effectively approximates underinsured motorist coverage. Indeed, W. Va. Code § 33-6-31(k) (1995) (2000 Repl. Vol.), which provides in part that "[n]othing contained herein shall prevent any insurer from also offering benefits and limits other than those prescribed herein," clearly permits an insurer to go beyond the minimum statutory requirements. *See Mitchell v. Broadnax*, 208 W. Va. 36, 61, 537 S.E.2d 882, 907 (2000) (McGraw, J., concurring in part and dissenting in part) (noting that under § 33-6-31(k) it is "easily conceivable that an insurer could offer, in addition to the required offerings . . ., other forms of coverage, including

alternative uninsured or underinsured protection").[1] Thus, as Justice Starcher has stressed in his concurrence to this case, the majority opinion should have concentrated exclusively upon the language of State Farm's policy, since there is no question that the policy meets the minimum requirements of § 33-6-31.

Taking the analysis one step further, therefore, I fail to see how one could construe the language of State Farm's policy so as not to find coverage in the present case, particularly since "[i]t is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured." Syl. pt. 4, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987); *see also* syl. pt. 4, *Riffe v. Home Finders Assoc.*, 205 W. Va. 216, 517 S.E.2d 313 (1999). The policy uses the disjunctive term "or" to separate the various meanings of an uninsured motor vehicle.[2] This Court has previously observed that "the word 'or' is 'a

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[1]*See also Dairyland Ins. Co. v. Fox*, 209 W. Va. 598, 607-8, 550 S.E.2d 388, 397-98 (2001) (Starcher, J., dissenting) (stating that "W. Va. Code, 33-6-31(k) should be interpreted to mean that an insurance company may offer coverages other than those prescribed by W. Va. Code, 33-6-31").

[2]The specific provision at issue contains the following definition of an uninsured motor vehicle:

> Uninsured Motor Vehicle—means:
>
> 1. A motor vehicle, the ownership, maintenance or use of which is:
>
> (a) not covered by cash or securities on file with the West Virginia State Treasurer;

(continued...)

conjunction which indicate[s] the various objects with which it is associated are to be treated separately.'" *Holsten v. Massey*, 200 W. Va. 775, 790, 490 S.E.2d 864, 879 (1997) (quoting *State v. Carter*, 168 W. Va. 90, 92 n.2, 282 S.E.2d 277, 279 n.2 (1981)). Moreover, the use of this term "ordinarily connotes an alternative between the two clauses it connects." *Albrecht v. State*, 173 W. Va. 268, 271, 314 S.E.2d 859, 862 (1984) (citing *State v. Elder*, 152 W. Va. 571, 577, 165 S.E.2d 108, 112 (1968)).

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[2](...continued)

(b) not insured or bonded for bodily injury and property damage liability at the time of the accident; *or*

(c) insured or bonded for bodily injury and property damage at the time of the accident; but

(1) these limits of liability are less than required by the West Virginia Motor Vehicle Safety Responsibility Law; or

(2) the insuring company:

(a) legally denies coverage;

(b) is insolvent; or

(c) has been placed in receivership; or

2. A "hit and run" motor vehicle whose owner or driver remains unknown and which strikes:

(a) the insured;

(b) the vehicle the insured is occupying; *or*

(c) other property of the insured and causes bodily injury to the insured or property damage.

(Emphasis added.)

By employing the conjunctive term "or" in defining what constitutes an uninsured motor vehicle, State Farm has written a policy that provides uninsured motorist coverage where any one of the three enumerated circumstances is satisfied. Thus, since the tortfeasor in this case, Mr. Smallwood, had not obtained a certificate of self-insurance by depositing the required sum of money with the State Treasurer, his vehicle should be deemed uninsured under the provisions of the State Farm policy.

What the Court has done in this case is to effectively "chang[e] the disjunctive word, 'or,' . . . to the conjunctive 'and.'" *Crown Life Ins. Co. v. Garcia*, 424 So.2d 893, 894 n.1 (Fla. Dist. Ct. App. 1983) (citation omitted). "Courts are forbidden, however, from engaging in any such rewriting process, even in the guise of 'interpreting' an insurance policy . . . ." *Id.* (citation omitted). This admonition has even greater force in the current context, where the policy employs the very same term and grammatical structure in the following paragraph to indicate the separate, alternative claims that are compensable under the uninsured motorist coverage in the event of an incident involving "hit and run." State Farm certainly cannot be assumed to have intended that the term "or" should have entirely different meanings within the space of a single section of the policy.

While it may be true that State Farm did not purposely write a policy with such broad uninsured motorist coverage, the fact remains that the language of the policy is, at the very least, ambiguous as to what constitutes an uninsured vehicle. The Court in this case

should therefore have construed the policy in favor of the insured, and accordingly affirmed the circuit court's grant of summary judgement.

I therefore respectfully dissent.