

35698

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MICHAEL W. WITT,
Plaintiff,

vs.

CIVIL ACTION NO. 05-C-1224
Honorable James C. Stucky, Judge

ROBERT K. SUTTON; STATE FARM
MUTUAL AUTOMOBILE INSURANCE
COMPANY; an Illinois corporation; and
ST. PAUL FIRE AND MARINE INSURANCE
COMPANY, a Minnesota corporation,
Defendants.

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KAWAHA COUNTY CIRCUIT COURT

**ORDER GRANTING SUMMARY JUDGMENT
TO THE DEFENDANT, STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY**

On the 11th day of January, 2010, came the plaintiff, Michael W. Witt, by counsel, Kelly L. Elswick-Hall, and came the defendant, State Farm Mutual Automobile Insurance Company, by counsel, Charles S. Piccirillo and Sabrena Olive Gillis, in connection with the previously scheduled hearing upon State Farm Mutual Automobile Insurance Company's Motion for Summary Judgment.

THEREUPON, the Court, after having reviewed State Farm's Motion for Summary Judgment, plaintiff's Response in Opposition to the Motion for Summary Judgment, State Farm's Reply Memorandum of Law in Support of its Motion for Summary Judgment and after hearing the argument of counsel, makes the following findings of fact, conclusions of law and rulings:

I. FINDINGS OF FACT

1. On June 11, 2003, the plaintiff, Michael Witt, was riding in a 1999 GMC Sierra truck owned by the South Charleston Sanitary Board while in the scope of his employment with the South Charleston Sanitary Board.

2. The aforesaid South Charleston Sanitary Board truck was rear-ended by a 1999 Chevy 1500 truck operated by Robert Sutton.

3. The plaintiff filed suit against Robert K. Sutton, State Farm Mutual Automobile Insurance Company and St. Paul Fire and Marine Insurance Company alleging various physical injuries from the accident.

4. The plaintiff, Michael Witt, was the named insured under a State Farm policy bearing Policy No. 248 3887-B23-48F which insured a 2001 Chevrolet 1500 pickup.

5. The 1999 GMC Sierra truck owned by the South Charleston Sanitary Board was insured by St. Paul Fire and Marine Insurance Company.

6. The plaintiff resolved his claim against Nationwide, the liability carrier for the defendant, Robert Sutton, for the sum of \$25,000.00.

7. The plaintiff, Michael Witt, resolved his underinsured claim and extra-contractual claim against St. Paul Fire and Marine Insurance Company for the sum of \$100,000.00.

8. The plaintiff, Michael Witt, previously stipulated that he is not making an underinsured claim against St. Farm Mutual Automobile Insurance Company in this matter.

9. The only remaining claims in connection with the above-referenced civil action are claims for medical payment coverage under the State Farm policy and alleged extra-contractual claims against State Farm.

10. At the time of the accident, the language of the plaintiff's State Farm policy, bearing Policy No. 248 3887-B23-48F, reads as follows:

Persons for Whom Medical Expenses Are Payable

We will pay medical expenses for *bodily injury* sustained by:

1. a. the first *person* named in the declarations;
- b. his or her *spouse*; and
- c. their *relatives*.

These *persons* have to sustain the *bodily injury*:

- a. while they operate or occupy a vehicle covered under the liability section; or (Emphasis added)
- b. through being struck as a *pedestrian* by a motor vehicle or trailer.

A *pedestrian* means a *person* not an occupant of a motor vehicle or trailer.

You have this coverage if "A" appears in the "Coverages" space on the declarations page. We will:

1. pay damages which an *insured* becomes legally liable to pay because of:
 - a. *bodily injury* to others, and
 - b. damage to or destruction of property including loss of its use, caused by *accident* resulting from the ownership, maintenance or use of *your car*; and (Emphasis added)
2. defend any suit against an *insured* for such damages with attorneys hired and paid by us. We will not defend any suit after we have paid the applicable limit of our liability for the *accident* which is the basis of the lawsuit.

The liability provisions of the policy continue as follows:

Coverage for the Use of Other Cars

The liability coverage extends to the use, by an *insured* of a *newly acquired car*, a *temporary substitute car* or a *non-owned car*. (Emphasis added)

Who Is an Insured

When we refer to *your car*, a *newly acquired car* or a *temporary substitute car*, *insured* means:

1. *you*;
2. *your spouse*;
3. the *relatives* of the first *person* named in the declarations;
4. any other *person* while using such a *car* if its use is with the permission of *you* or *your spouse*; and
5. any other *person* or organization liable for the use of such a *car* by one of the above *insureds*.

When we refer to a *non-owned car*, *insured* means:

1. the first *person* named in the declarations;
2. his or her *spouse*;
3. their *relatives*; and
4. any *person* or organization which does not own or hire the *car* but is liable for its use by one of the above *persons*.

The State Farm policy issued to Michael Witt defines a non-owned car as follows:

Non-Owned Car - means a *car* not owned, registered or leased by:
(Emphasis added)

1. *you, your spouse*;
2. any *relative* unless at the time of the accident or *loss*:
 - a. the *car* currently is or has within the last 30 days been insured for liability coverage; and
 - b. The driver is an *insured* who does not own or lease the *car*;

3. Any other *person* residing in the same household as *you, your spouse* or any *relative*; or
4. an employer of *you, your spouse* or any *relative*. (Emphasis added)

Non-owned car does not include a:

1. rented *car* while it is used in connection with the *insured's* employment or business; or
2. *car* which has been operated or rented by or in the possession of an *insured* during any part of each of the last 21 or more consecutive days. If the *insured* is an *insured* under one or more other car policies issued by us, the 21 day limit is increased by an additional 21 days for each such additional policy."

A *non-owned car* must be a *car* in the lawful possession of the *person* operating it.

11. Pursuant to the above-referenced policy language, State Farm denied the plaintiff's medical payment claim under the policy because the plaintiff was operating his employer's vehicle at the time of the accident, which vehicle does not qualify as a non-owned car.

II. SUMMARY JUDGMENT STANDARD

1. The legal standard for granting summary judgment is now well established in West Virginia. Summary judgment should be granted if "there is no genuine issue as to any material fact and [the] moving party is entitled to a judgment as a matter of law." W. Va. R.C.P., Rule 56.

2. The West Virginia Supreme Court has routinely said "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 1,

Raines Imps., Inc. v. Am. Honda Motor Co., 674 S.E.2d 9 (W.Va. 2009) (quoting *Aetna Casualty and Surety Company v. Federal Insurance Company of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963)).

III. CONCLUSIONS OF LAW

1. Whether a contract or a provision thereof is ambiguous is a legal determination encompassed within a Court's interpretation of the entire contract. Thus, determination of the proper coverage of an insurance policy when the facts are not disputed is a question of law. *Pacific Indemnity Company v. Linn*, 766 F.2d 754 (3d Cir. 1985), cited in *Murray v. State Farm Fire and Casualty Company*, 203 W.Va. 477, 509 S.E.2d 1 (1998).

2. In interpreting an insurance policy, the policy's language is to be given its plain, ordinary meaning, *Murray v. State Farm Fire and Casualty Company*, *supra*, quoting Syl. Pt.1, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W. Va. 430, 345 S.E.2d 33 (1986).

3. Where the provisions of an insurance policy contract are clear and unambiguous, they are not subject to judicial construction or interpretation, but full effect will be given to their plain meaning. *Murray v. State Farm Fire and Casualty Company*, *supra*.

4. Where provisions in an insurance policy are plain and unambiguous and where such provisions are not contrary to a statute, regulation, or public policy, the provisions will be applied and not construed. *Castle v. Williamson*, 453 S.E.2d 624, 630.

5. The West Virginia Supreme Court of Appeals in *Drake v. Snyder*, 216 W.Va. 574, 608 S.E.2d 191 (2004) determined that the term "household" was ambiguous based on the possibility of dual residencies for dual households and in no way impacts the issues before the Court regarding the non-owned car definition.

6. The “non-owned car” definition in the State Farm policy has been upheld in a variety of factual scenarios throughout the United States as being clear, unambiguous and enforceable. *Bryan J. Gartner, Alias v. State Farm Mutual Automobile Insurance Company*, 2000 R.I. Super. LEXIS 105; *State Farm Mutual Automobile Insurance Company v. Leon LaRoque, and Monica Baker, a minor child, and Donna White Tail, individually and as parent and guardian of Monica Baker, a minor child*, 486 N.W.2d 235; 1992 N.D. LEXIS 147; *Kenon v. Liberty Mutual*, 398 F.2d 958 (8th Cir. 1968); *Lewis v. State Farm*, 247 Ga.App., 518, 544 S.E.2d, 212 (Ga. 2001); *City of Rainsville v. State Farm*, 716 So.2d. 710 (Ala. 1998); *State Farm v. Ferster*, 2007 Pa. Dist. & Cnty. LEXIS 242; *Crull v. State Farm Fire & Casualty*, 225 A.D.2d 1071, 639 N.Y.S.2d 601 (1996); *State Farm v. Fultz*, 2007 U.S. Dist. LEXIS 71099 (U.S. Dist. Ct. for Northern District of W. Va.).

7. The State Farm policy language, particularly the non-owned car definition, does not violate West Virginia public policy as medical payment coverage is an optional and not a mandatory coverage. The Supreme Court of Appeals of West Virginia has held that “[i]nsurers 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 motorist statutes.” *Dairyland Ins. Co. v. Fox*, 209 W. Va. 598, 550 S.E.2d 388 (2001)(per curium)(quoting Syl. pt. 3, *Deel v. Sweeney*, 181 W. Va. 460, 383 S.E.2d 92 (1989)). See also *Imgrund v. Yarborough*, 199 W. Va. 187, 438 S.E.2d 533 (1997). The Supreme Court of Appeals of West Virginia has held that exclusionary language in a policy, in the absence of legislative mandate, is valid and not contrary to the state’s public policy and that “in the absence of such legislative mandate, the parties are free to accept

or reject the insurance contract and risks provided for therein. *Rich v. Allstate Insurance Company*, 445 S.E.2d 249 (1994).

8. Exclusions within a policy are presumed to be valid and consistent with the premium charged if the policy language and rate have been approved by the state insurance commissioner. *Findley v. State Farm Mut. Automobile. Ins. Co.*, 213 W. Va 80, 576 S.E.2d 807 (2002).

9. In this particular factual situation, there is no legislative mandate in regard to medical payments coverage.

10. The sole issue before this Court is a question of law and the interpretation of the State Farm insurance contract.

11. The expert affidavit from Marshall Reavis attached to plaintiff's Response to State Farm's Motion for Summary Judgment must be stricken from the record as an "expert witness may not give his [or her] opinion on a question of domestic law [as opposed to foreign law] or on matters which involve questions of law, and an expert witness cannot instruct the Court with respect to the applicable law of the case, or infringe on the Judge's role to instruct the jury on the law. So an expert may not testify as to such questions of law as the interpretation of a statute ... where case law ... or the meaning of terms in a statute ... or the legality of conduct. *Jackson v. State Farm*, 215 W.Va. 634, 600 S.E.2d 346 (2004).

12. The trial judge is the "sole source of the law and witnesses should not be allowed to testify on the status of the law. *Jackson v. State Farm*, 215 W.Va. 634, 600 S.E.2d 346 (2004).

13. No additional discovery is necessary in this matter as the only pertinent genuine issue of material fact is that the plaintiff was driving his employer's vehicle on the date of loss, which fact is undisputed.

14. The Court finds that the policy language contained in Mr. Witt's State Farm policy is clear and unambiguous and should be given its plain and ordinary meaning.

15. The Court further finds that the City of South Charleston Sanitary Board vehicle operated by the plaintiff at the time of the accident does not meet the definition of a non-owned car under the policy and, therefore, there is no medical payment coverage available to the plaintiff for this loss.

THEREUPON, the Court, after due consideration and for the reasons set forth above, find as a matter of law that the defendant, State Farm Mutual Automobile Insurance Company, is entitled to summary judgment since there is no genuine issue of material fact that any party could maintain that medical payment coverage is available for the accident subject to this litigation.

THEREUPON, the Court does hereby GRANT State Farm Mutual Automobile Insurance Company's Motion for Summary Judgment, with prejudice.

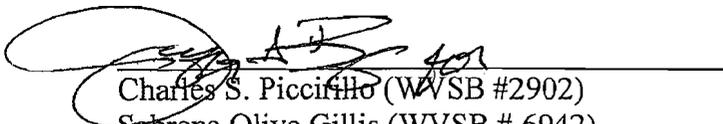
THEREUPON, the Court hereby ORDERS the Clerk of this Court to provide a certified copy of this Order upon entry to all counsel of record.

ENTERED this 21 day of Jan., 2010.

James C. Stucky
THE HONORABLE JAMES C. STUCKY, JUDGE,
CIRCUIT COURT OF KANAWHA COUNTY

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF Jan 22nd 2010
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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