

11-1142

m. Stevens

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

JILL F. SCHATKEN and  
STEVEN N. SCHATKEN,

RECEIVED

FEB 3 - 2011

*Plaintiffs,*

JEFFERSON COUNTY  
CIRCUIT CLERK

AC

CIVIL ACTION NO. 10-C-367

v.

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY, *a foreign*  
*corporation*, CATHI THOMPSON, *claim*  
*representative for State Farm*, JOHN OR  
JANE DOE 1, *the unidentified supervisor*  
*for Cathi Thompson*, and JOHN OR JANE  
DOE 2, *the unidentified director and/or*  
*supervisor for all bodily injury claims in*  
*West Virginia for State Farm,*

FEB 8 2011

*Defendants.*

**ORDER GRANTING PARTIAL SUMMARY JUDGMENT  
AS TO DECLARATORY JUDGMENT ACTION**

This motion comes on for consideration upon the Plaintiff's Motion for Partial Summary Judgment as to the Declaratory Judgment Action. After having reviewed the motion and all documents offered in support and in opposition to Plaintiffs' Motion, the Court makes the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

1. On December 19, 2008, Plaintiff Jill Schatken was a front-seat passenger in a car driven by her husband, Steve Schatken, a tortfeasor driving in the opposite direction on Route 230, went left of center and hit the Schatkens' car head-on. (Complaint, ¶ 9, State Farm's Answer, ¶ 9).

2. Plaintiffs assert that both of the Schatkens were taken by ambulance to the

hospital and that after Mrs. Schatken was stabilized in the ER, she was transferred to the hospital's ICU for close observation and pain control.

3. Plaintiffs allege that Mrs. Schatken spent several nights in the hospital and was eventually discharged home with a portable oxygen unit.

4. Plaintiffs assert that Mrs. Schatken suffered serious, painful, and debilitating personal injuries as a result of the December 19<sup>th</sup> head-on crash. (Complaint, ¶ 18, Answer, ¶ 18).

5. The parties do not disagree that as a result of the head-on crash, Mrs. Schatken suffered medical bills for treatment in the amount of \$29,368.47. (Complaint, ¶ 26, Answer, ¶ 26).

6. At the time of the crash, the tortfeasor only had liability coverage limits of \$25,000 per person, which limits were tendered to the Plaintiff Jill Schatken. (Complaint, ¶ 28, Answer, ¶ 28).

7. The tortfeasor's vehicle was an "underinsured motor vehicle" and Ms. Schatken is entitled to underinsured motorist coverage benefits under her State Farm policy. (Complaint, ¶ 29, Answer, ¶ 29).

8. On August 20, 2010, State Farm made an offer of \$30,000 to settle Mrs. Schatken's underinsured motorist claim. (Exhibit A to Plaintiff's Motion).

9. In State Farm's settlement offer to Mrs. Schatken, it reiterated an offer of \$37,000. (Exhibit B to Plaintiff's Motion).

10. State Farm has admitted that its underinsured motorist settlement offers to Ms. Schatken took into consideration both the amount of liability coverage as well as the

\$5,000 in medical payments coverage paid under Ms. Schatken's own State Farm policy. (Complaint, ¶ 32, Answer, ¶ 32).

11. Plaintiffs' Declarations Page reveals that the Plaintiffs paid separate premiums for medical payments coverage and underinsured motorist coverage. (Exhibit C to Plaintiff's Motion).

12. State Farm reduced its offer of underinsured motorist benefits by the amount of medical payments coverage tendered.

13. State Farm's "offset" of its prior medical payments coverage has logically resulted in lower underinsured motorist settlement offers to Mrs. Schatken.

14. The language upon which State Farm relies to reduce the available underinsured motorist coverage to Mrs. Schatken states, in pertinent part:

#### Limits

The Underinsured Motorist Vehicle Coverage limits for *bodily injury* are shown on the Declarations Page under "Underinsured Motor Vehicle Coverage—Bodily Injury Limits—Each Accident."

The most we will pay for all damages resulting from *bodily injury* to any one *insured* injured in any one accident, including all damages sustained by other *insureds* as a result of that *bodily injury* is the lesser of:

1. the limit shown under "Each Person"; or
2. the amount of all damages resulting from that *bodily injury*, reduced by:
  - a. the sum of the full policy limits of all applicable liability policies insuring any *persons* or organizations who are or may be held legally liable for that *bodily injury*;
  - b. any damages that:
    - (1) have already been paid;

(2) could have been paid; or

(3) could be paid

to or for the insured under any workers' compensation law, disability benefits law, or similar law; and

c. **any damages that have already been paid or that are payable as expenses under Medical Payments Coverage of this policy, the medical payments coverage of any other policy, or other similar vehicle insurance.**

The limit shown under "Bodily Injury Limits—Each Accident" is the most we will pay, subject to the limit for "Each Person," for all damages resulting from *bodily injury* to two or more *insureds* injured in the same accident.

(Exhibit D to Plaintiff's Motion, p. 18, emphasis added).

15. West Virginia Code § 33-6-31(b) provides, in pertinent part:

That such policy or contract shall provide an option to the insured with appropriately adjusted premiums to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle up to an amount not less than limits of bodily injury liability and property damage liability insurance purchased by the insured without setoff against the insured's policy or other policy. . . . **No sums payable as a result of underinsured motorists' coverage shall be reduced by payments made under the insured's policy or any other policy.**

(Emphasis added).

16. Notwithstanding the plain language of W. Va. Code § 33-6-31(b), State Farm's underinsured motorist policy states that underinsured motorist coverage will be "**reduced by**" all damages "paid or that are payable as expenses under medical payments coverage." (See Exhibit D, p. 18).

17. Plaintiffs assert that State Farm's "reduction of benefits" language is violative of W. Va. Code § 33-6-31(b) and the public policy of West Virginia and is unenforceable.

## LEGAL STANDARD

Rule 56 of the West Virginia Rules of Civil Procedure sets forth that “a party seeking . . . declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action . . . move with or without supporting affidavits for summary judgment in the party’s favor upon all or any part thereof.” W.Va.R.Civ.P. 56(a). The Supreme Court has observed that summary judgment is “‘designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,’ if there essentially ‘is no real dispute as to salient facts’ or if it only involves a question of law.” *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 58, 459 S.E.2d 329, 335 (1995)(quoting *Painter v. Peavy*, 192 W. Va. 189, 192 n. 5, 451 S.E.2d 755, 758, n. 5 (1994)).

In considering a motion for summary judgment all facts and inferences “are viewed in the light most favorable to the nonmoving party”; however, the nonmoving party must offer some “some ‘concrete evidence from which a reasonable ... [finder of fact] could return a verdict in ... [its] favor’ or other ‘significant probative evidence[.]’” *Precision Coil, Inc.*, 194 W.Va. at 60, 459 S.E.2d at 337 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202, 217 (1986). “[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Precision Coil, Inc.*, 194 W.Va. at 61, 459 S.E.2d at 338 (citing *Anderson*, 477 U.S. at 247-48, 106 S.Ct. at 2510, 91 L.Ed.2d at 211)(emphasis in original). The essence of the inquiry the court must make is “whether

the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Id.* (citing *Anderson*, 477 U.S. at 251-52, 106 S.Ct. at 2512, 91 L.Ed.2d at 214).

Further, it is well-settled in this jurisdiction that the “[d]etermination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law.” *Reed v. Orme*, 221 W.Va. 337, 655 S.E.2d 83 (2007)(citing Syl.Pt. 1, *Tennant v. Smallwood*, 211 W.Va. 703, 568 S.E.2d 10 (2002); Syl. Pt. 2, *Howe v. Howe*, 218 W.Va. 638, 625 S.E.2d 716 (2005); *Payne v. Weston*, 195 W.Va. 502, 506-07, 466 S.E.2d 161, 165-66 (1995)). The Supreme Court explained that “[i]n construing any insurance policy, it is appropriate to begin by considering whether the policy language is in accord with West Virginia law. The terms of the policy should be construed in light of the language, purpose and intent of the applicable statute.” *Adkins v. Meador*, 201 W.Va. 148, 153, 494 S.E.2d 915, 920 (1997). The applicable statute in this case is West Virginia Code § 33-6-31(b) which provides, in pertinent part:

That such policy or contract shall provide an option to the insured with appropriately adjusted premiums to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle up to an amount not less than limits of bodily injury liability and property damage liability insurance purchased by the insured without setoff against the insured’s policy or other policy. . . . **No sums payable as a result of underinsured motorists’ coverage shall be reduced by payments made under the insured’s policy or any other policy.**

(Emphasis added). It is black letter law that “[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.” Syl. Pt. 1, *State v. Jarvis*, 199 W.Va. 635,

487 S.E.2d 293 (1997); see also *Cunningham v. Hill*, 226 W.Va. 180, \_\_\_\_, 698 S.E.2d 944, 949 (2010) (“courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”)(citing *Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 312, 465 S.E.2d 399, 414 (1995)).

The Supreme Court of Appeals has also repeatedly held that

[t]he underinsured motorist statute is remedial and it should be liberally construed. ‘[T]he preeminent public policy of this state in uninsured and underinsured motorist cases is that the injured person be fully compensated for his or her damages **not compensated by a negligent tortfeasor, up to the limits of the uninsured or underinsured motorist coverage.**’ *State Auto. Mut. Ins. Co. v. Youler*, 183 W.Va. 556, 564, 396 S.E.2d 737, 745 (1990). Accordingly, if the language of [an insurer’s] policy does not comply with the broad terms of *W.Va.Code*, 33-6-31, then the policy language is void and the policy must be construed to contain the coverage provided for by statute.

*Adkins v. Meador*, 201 W.Va. at 153, 494 S.E.2d at 920 (emphasis added). Thus, if provisions in a policy “are more restrictive than statutory requirements,” they must be found “void and ineffective as against public policy.” *Id.* (citing Syl.Pt. 2, *Universal Underwriters Ins. Co. v. Taylor*, 185 W.Va. 606, 408 S.E.2d 358 (1991); Syl.Pt. 1, *Bell v. State Farm Mut. Auto. Ins. Co.*, 157 W.Va. 623, 207 S.E.2d 147 (1974); Syl.Pt. 2, *Johnson v. Continental Casualty Co.*, 157 W.Va. 572, 201 S.E.2d 292 (1973)).

#### CONCLUSIONS OF LAW

The Court believes that the underinsured motorist statute could not be more clear. West Virginia Code § 33-6-31(b) plainly states that “[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.” W.Va. Code § 33-6-31(b)(emphasis added).

Thus, pursuant to the clear and unambiguous language of the statute, underinsured motorist coverage may not be reduced by any other insurance including, but not limited to, an insured's own medical payments coverage.

In spite of this clear dictate, State Farm seeks to reduce the available underinsured motorist benefits under its policy by amounts that are "paid or that are payable as expenses under medical payments coverage." (Exhibit D to Plaintiff's Motion, p. 18). State Farm's "reduction of benefits" language is violative of W. Va. Code § 33-6-31(b) and the public policy of West Virginia.

State Farm was recently involved in a case before the Supreme Court of Appeals wherein the validity of a similar "non-duplication of benefits" provision in State Farm's policy was challenged as violative of W. Va. Code § 33-6-31(b). *Cunningham*, 226 W. Va. 180, 698 S.E.2d at 948-49. Justice Benjamin writing for the majority found that the "other insurance" provision, which attempted to reduce an insured's underinsured motorist coverage by other available insurance, violated public policy and was unenforceable. *Id.*

The Court noted that

the legislature . . . articulated a public policy of full indemnification or compensation underlying both uninsured or underinsured motorist coverage in the State of West Virginia. That is, the preeminent public policy of this state in uninsured or underinsured motorist cases is that the injured persons be *fully compensated* for his or her *damages* not compensated by a negligent tortfeasor, up to the limits of the uninsured or underinsured motorist coverage.

*Id.* (citing *State Auto. Mut. Ins. Co. v. Youler*, 183 W. Va. 556, 396 S.E.2d 737 (1990)).

Where provisions of an insurance policy are more restrictive than the statutory requirements, such provisions are void and ineffective as against public policy. *Id.* (citing Syl, Pt. 2, *Universal Underwriters Ins. Co. v. Taylor*, 185 W.Va. 606, 408 S.E.2d 358 (1991); Syl. Pt. 1, *Bell v. State Farm Mutual Automobile Insurance Co.*, 157 W.Va. 623, 207 S.E.2d 147 (1974).

The Supreme Court of Appeals noted that it would remain “vigilant in holding the insurer’s feet to the fire in instances where [terms, conditions and] exclusions or denials of coverage strike at the heart of the purpose of the uninsured and underinsured motorist statute provisions.” *Id.* (citing *Deel v. Sweeney*, 181 W.Va. 460, 461, 383 S.E.2d 92, 93 (1989)). This Court must do the same and examine State Farm’s policy in light of the plain language, purpose, and intent of West Virginia Code § 33-6-31(b). Because this Court finds that State Farm’s policy language seeks to reduce available underinsured motorist benefits by Plaintiffs’ medical payments coverage, said provision clearly violates the language, purpose, and intent West Virginia Code § 33-6-1(b). As such, it is violative of the public policy of this State and unenforceable as a matter of law.

WHEREFORE, based upon the forgoing, it is **ORDERED** and **ADJUDGED** that the Plaintiff’s Motion for Partial Summary Judgment as to the Declaratory Judgment Action be and hereby is **GRANTED**.

The Court notes any objections of the parties for the record.

The Clerk is directed to enter this Order and transmit copies of this Order to all *pro se* parties and counsel of record.

Entered: 2/3/11



David H. Sanders, Judge of the 23rd Judicial Circuit

3 cc's

L. Davis

M. Stevens

C. Thompson

2-4-11 -BC

A TRUE COPY  
ATTEST:

LAURA E. RATTENNI  
CLERK, CIRCUIT COURT  
JEFFERSON COUNTY, W.VA.

BY B. Chase  
DEPUTY CLERK