No. 32573 – *Pamela E. Howe, individually, and as adoptive parent and next friend of Trey J. Howe, a minor v. Duane A. Howe, American Standard Insurance Company of Ohio, a foreign insurer, and American Family Insurance Company, a foreign insurer*

FILED
December 16, 2005
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., dissenting:

I echo the dissenting opinion of my colleague, Chief Justice Albright. I was struck when I read the majority opinion's statement that "[a]ppellant cannot point to any decision of this Court that declares 'household' exclusions are a violation of West Virginia public policy," *supra*, ___ W.Va. at ___, ___ S.E.2d at ___ (Slip. Op. at 16). Like Chief Justice Albright, I too nodded my head in agreement with the majority's statement and said, "Yes, and this opinion blows a great opportunity to do just that!"

But after doing a little extra research, I discovered just how wrong the majority opinion is in its conclusion that there is no expression of West Virginia public policy disfavoring "household" or "family member" exclusions.

First, this Court suggested that "household" or "family member" exclusions violate West Virginia policy as early as 1978. In *Coffindaffer v. Coffindaffer*, 161 W.Va. 557, 244 S.E.2d 338 (1978), we abolished immunity between spouses, and said:

> [T]he door is now open to permit husbands or wives, who in a moment of inadvertence or negligence by their spouse have been substantially injured, *to recover from applicable insurance* a fair and reasonable amount for the hospital and other medical expenses and for pain and suffering.

161 W.Va. at 567, 244 S.E.2d at 343 (emphasis added). The majority's opinion overlooked this statement, and now essentially holds that husbands and wives can sue one another for negligence, but *cannot recover from applicable insurance a fair and reasonable amount*.

Second, even if the Court has never made an explicit expression of public policy, without a doubt the Insurance Commissioner has declared that "household" or "family member" exclusions are a violation of West Virginia public policy. Insurance regulations promulgated by the Commissioner specifically state what can and cannot be in a standard motor vehicle insurance policy. Plain as day, those regulations state:

> Motor vehicle liability policies shall not contain family member exclusions.

144 C.S.R. § 63.3.5 [2003]. The majority opinion sidestepped this clear regulatory statement of West Virginia public policy on this exact issue.

Additionally, the majority opinion wrongly mixes apples and oranges in its reasoning upholding the "family member" exclusion. The majority opinion chides the appellant for failing to "address or acknowledge prior decisions of this Court *upholding* similar family use exclusions as valid and not against the public policy of this State in the context of underinsured motorist coverage." ___ W.Va. at ___, ___ S.E.2d at ___ (Slip. Op. at 16-17). The problem is that the "family use" exclusion is different from the "family member" exclusion. The majority opinion misapprehends West Virginia law and mistakenly merges two completely different insurance concepts.

The instant case involves a "family member" exclusion in a liability policy. A "family member" exclusion prohibits a family member from filing a liability claim against another family member. The cases relied upon by the majority opinion, *Thomas v. Nationwide Mutual Ins. Co.*, 188 W.Va. 640, 425 S.E.2d 595 (1992) and *Cantrell v. Cantrell*, 213 W.Va. 372, 582 S.E.2d 819 (2003) (*per curiam*), center upon a "family use" exclusion in an underinsured motorist policy. The "family use" exclusion prohibits a family member who files a liability claim against another family member from also recovering underinsured motorist benefits under the same policy once the liability limits are exhausted. Essentially, the "family use" exclusion prevents a policyholder from receiving a double recovery under one policy.

Both *Thomas* and *Cantrell* involved a single-car accident in which the passenger was the wife of the negligent driver. In both cases, this Court permitted the injured passenger/wife to receive payments under the family's liability coverage for the negligence of the driver/husband. What was prohibited in both cases was recovery by Mrs. Thomas and Mrs. Cantrell against their underinsured motorist coverage once the liability policy limits were exhausted.

In the instant case, appellant Howe is not attempting a double recovery. She is attempting a single recovery against her husband's liability insurance coverage. If *Thomas* and *Cantrell* are controlling, then Mrs. Howe should prevail and be permitted to recover against her husband's liability insurance policies – not the other way around.

Even though Mr. Howe purchased his liability insurance policies in Ohio, I believe that the Court should have refused to enforce the "family member" exclusion in those policies because the exclusion is offensive to West Virginia's public policy. The exclusion serves no legitimate purpose. It is "offensive,"[1] "perverse,"[2] "deleterious to our community interests" and "socially destructive"[3] is an "anachronism" that violates "fundamental principles of justice,"[4] and "excludes from protection an entire class of innocent victims for no good reason."[5]

The Howes were married in Ohio on September 9, 2000, and Mrs. Howe was injured by Mr. Howe's negligence on September 13th, on the first day of their honeymoon. If Mrs. Howe had been injured five days earlier, before the wedding bells rang, she would have been entitled to coverage. If the Howes had foregone marriage and "shacked-up," Mrs. Howe would have been protected by her husband's liability coverage. I cannot see any valid reason why Ohio would permit its citizens to be punished by insurance companies for entering into a state of marriage – unless Ohio's goal is to discourage marriage. Such

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[1]*Geico v. Welch*, 135 N.M. 452, 457, 90 P.3d 471, 477 (2004).

[2]*Safeco Ins. Co. v. Auto. Club Ins. Co.*, 108 Wash.App. 468, 477, 31 P.3d 52, 56 (2001).

[3]*Lewis v. West American Ins. Co.*, 927 S.W.2d 829, 834 (Ky. 1996).

[4]*State Farm Mut. Auto. Ins. Co. v. Ballard*, 132 N.M. 696, 699-700, 54 P.3d 537, 540-41 (2002).

[5]*Mutual of Enumclaw Ins. Co. v. Wiscomb*, 97 Wash.2d 203, 207, 643 P.2d 441, 443 (1982).

insurance policy language is clearly contrary to West Virginia's laws and public policy, and wholly unenforceable when included in a policy issued under the laws of this State. I therefore cannot understand why the majority opinion refused to protect Mrs. Howe, an individual injured on the roads of West Virginia, and refused to afford her the protection of our laws.

I respectfully dissent.