No. 24487 -- Donald C. McCormick v. Allstate Insurance Company

Starcher J., concurring in part and dissenting in part:

I agree with the majority that the punitive damages rule espoused in *Hayseeds, Inc. v. State Farm Fire & Cas. Co.*, 177 W.Va. 323, 352 S.E.2d 73 (1986) should be extended to actions under the Unfair Trade Practices Act, *W.Va. Code* 33-11-1 to -10. I believe that before a policyholder can recover punitive damages against an insurance carrier in an unfair trade practices action, the policyholder must show actual malice on the part of the insurance carrier. I dissent, however, to the majority's application of this rule to the evidence in this case.

The general standard for recovering punitive damages in West Virginia was established in 1895 when we held that:

> In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive or vindictive damages; these terms being synonymous.

Syllabus Point 4, *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895). Punitive damages are intended to act as "a warning to [the wrongdoer] and others to prevent a repetition or commission of similar wrongs." Syllabus Point 1, *Id.*[1]

[1]A similar standard was adopted by the Court in Syllabus Point 3 of *Jopling v. Bluefield Water Works & Improvement Co.*, 70 W.Va. 670, 74 S.E. 943 (1912), where we stated:

> To sustain a claim for punitive damages the wrongful act must have been done maliciously, wantonly, mischievously or

> with criminal indifference to civil obligations. A wrongful act done under a bona fide claim of right and without malice in any form, constitutes no basis for such damages.

In accord, *Jarvis v. Modern Woodmen of America*, 185 W.Va. 305, 406 S.E.2d 736 (1991) (*per curiam*); Syllabus Point 3, *Warden v. Bank of Mingo*, 176 W.Va. 60, 341 S.E.2d 679 (1985).

Mayer v. Frobe formed the basis for Syllabus Point 3 of *Stevens v. Friedman*, 58 W.Va. 78, 51 S.E. 132 (1905), quoted by the majority opinion. However, the majority reasoned that *Mayer*'s general rule of punitive damages was inapplicable in this case because "*Stevens* was an action to recover damages for assault and battery," whereas this case involves the "highly specialized area of property insurance." ___ W.Va. at ___, ___ S.E.2d at ___ (Slip op. at 8).

This reasoning fails to address the fact that *Mayer v. Frobe* has been "our law with regard to what evidence will justify an award of punitive damages . . . for nearly [now over] one hundred years." *Davis v. Celotex Corp.*, 187 W.Va. 566 ___, 420 S.E.2d 557, ___ (1992). Applying *Mayer v. Frobe*, we have said that punitive damages can be awarded for handicap and workers' compensation discrimination,[2] for the reckless infliction of emotional distress,[3] in product liability actions,[4] in actions against car dealers making misrepresentations about vehicles,[5] and in lawsuits involving reckless driving.[6]

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[2]*Vandevender v. Sheetz*, 200 W.Va. 591, 490 S.E.2d 678 (1997).

[3]*Stump v. Ashland, Inc.*, ___ W.Va. ___, ___, 499 S.E.2d 41, 53 (1997).

[4]*Davis v. Celotex Corp.*, 187 W.Va. 566, 420 S.E.2d 557 (1992).

[5]*Muzelak v. King Chevrolet*, 179 W.Va. 340, 368 S.E.2d 710 (1988) (dealer misrepresented vehicle repair history); *Painter v. Raines Lincoln Mercury*, 174 W.Va. 115, 323 S.E.2d 596 (1984) (*per curiam*) (dealer misrepresented prior owner of used car to induce its purchase).

[6]*Smith v. Perry*, 178 W.Va. 395, 359 S.E.2d 624 (1987) (*per curiam*); *Bond v. City of Huntington*, 166 W.Va. 581, 276 S.E.2d 539 (1981) (reckless driving by a police

Hayseeds, supra, represents a deviation from the general punitive damages rule. We viewed the policy issued to the policyholder in *Hayseeds* as a contract, and said that "punitive damages are unavailable in an action for breach of contract unless the conduct of the defendant [insurance carrier] constitutes an independent, intentional tort." 177 W.Va. at 330, 352 S.E.2d at 80. Rather than allow an award of punitive damages to be awarded for an insurance company's wanton, willful, or reckless conduct or criminal indifference towards a policyholder, in *Hayseeds* we required a policyholder to prove his or her insurance company acted with actual malice in the settlement process. "Actual malice" means that "the company actually knew that the policyholder's claim was proper, but willfully, maliciously and intentionally denied the claim." 177 W.Va. at 330-331, 352 S.E.2d at 80-81.[7]

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officer); *Hensley v. Erie Ins. Co.*, 168 W.Va. 172, 283 S.E.2d 227 (1981) (driving while intoxicated).

[7]The conduct that will support a finding of "actual malice" does not necessarily have to be focused specifically on the plaintiff, but can be a general policy. As we said in *Hayseeds*,

> One example of "actual malice" would be a company-wide policy of delaying the payment of just claims through barraging the policyholder with mindless paperwork. For example, in a claim for household contents in a burned out house, the company should simply pay the face amount of the policy. Since the companies themselves often require a certain level of insurance on contents, it shows actual malice to require the policyholder to fill out form after form and argue for months over what, in nearly every case, is a foregone conclusion. Here the actual malice is a desire to keep millions of dollars in claims money at interest within the company.

177 W.Va. at 330-31 n. 2, 352 S.E.2d at 81 n.2.

In tandem with our holding on punitive damages in *Hayseeds* was our holding that a policyholder can recover damages for attorney's fees, aggravation, and inconvenience from the insurance company merely upon showing that the policyholder "substantially prevailed" in enforcing the insurance contract. This "low threshold" of proof for consequential damages effectively counterbalances the "high threshold" of proof required for punitive damages.

So, if an insurance company denies a policyholder's claim because of reckless incompetence, lack of judgment or bureaucratic confusion, a policyholder will still get the benefit of his or her contractual bargain: policy benefits plus reimbursement for attorney's fees, aggravation, inconvenience, and prejudgment interest on any out-of-pocket expenses. The incentive for the insurance carrier to correct the problem with the settlement process exists in the fact that it will have to pay consequential damages to its policyholder for each day it delays paying claims.[8] These consequential damages are to be awarded to policyholders regardless of whether the insurance carrier acted in "bad faith."

[8]I cannot say, however, that the award of consequential damages to a policyholder is a perfect disincentive to insurance company misfeasance. One commentator recently suggested that it is in an insurance company's best interest to dispute coverage with policyholders "because, for every dollar spent to lure lawyers in coverage litigation, the insurers make conservatively five dollars in interest on the money that would have been paid to the policyholder. Thus, coverage litigation is a moneymaker for insurance companies." Eugene Anderson, *Insurance Coverage Litigation* at viii (1997).

In an action under the Unfair Trade Practices Act, a policyholder can recover as damages increased attorney's fees and other increased costs and expenses resulting from the insurance company's use of an unfair business practice in the settlement of a claim. Further, as with *Hayseeds*, the Act is in part designed to encourage insurance companies to correct negligent settlement practices harmful to the policyholder. A policyholder need not prevail against the insurance company on the underlying claim in order to recover damages under the Act. The policyholder need only show the insurance company engaged in an unfair settlement practice as defined by the statute. *See McCormick v. Allstate Ins. Co.*, 197 W.Va.415, 475 S.E.2d 507 (1996).

Therefore, because the damages under an unfair trade practices action are similar to those recoverable in an action under *Hayseeds,*[9] and the purposes for the two actions are similar, I believe it is justified that a policyholder must show "actual malice" by the insurance carrier in order to support an award of punitive damages in either type of action.

[9]As Justice Workman discusses in her concurring opinion, while the damages between the two types of actions are duplicitous, the difference between a *Hayseeds* action and a first-party action under the Unfair Trade Practices Act lies in the elements of proof necessary to support a claim. To recover damages under *Hayseeds*, a policyholder must substantially prevail on the underlying contract action. A recovery under the Act is predicated solely upon the insurance company engaging in an unfair settlement practice as defined by the statute, and a recovery can occur regardless of whether the policyholder prevails on the underlying insurance claim. *See McCormick v. Allstate Ins. Co.*, 197 W.Va. 415, 475 S.E.2d 507 (1996).

That being said, I am confounded by the majority's application of this rule to the record in this case. When a circuit court considers a motion for summary judgment, and this Court reviews *de novo* an order granting summary judgment, "the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party[.]" *Painter v. Peavy*, 192 W.Va. 189, 193, 451 S.E.2d 755, 759 (1994). The majority's opinion in this case fails to acknowledge any of the evidence in the record favorable to the appellant, and instead adopts Allstate Insurance Company's recitation of the facts.

I am primarily at a loss as to how the majority concluded that "the appellant's experiences do not include Allstate's use of unsubstantiated deductions in adjusting his claim." ___ W.Va. at ___, ___ S.E.2d at ___ (Slip op. at 13). The evidence in the record shows (1) that the $595.00 in deductions taken by Allstate *were* unsubstantiated, and (2) that such deductions have been routinely taken by Allstate in other cases over the last 30 years, thereby circumstantially suggesting that Allstate acted with actual malice towards the appellant and all other policyholders with total vehicle losses.

The appellant below proffered the testimony of four former Allstate insurance adjusters, each of whom would testify to a "general business practice" by Allstate of taking "reconditioning" or "cleaning" fees on every total vehicle loss claim. Prior to 1987, it appears that Allstate would take an automatic $35.00 reconditioning fee in every case. In 1987, the Arizona Supreme Court issued its opinion in *Hawkins v.*

Allstate Ins. Co., 152 Ariz. 490, 733 P.2d 1073 (Ariz. 1987) and affirmed a $3.5 million verdict against Allstate for taking automatic "cleaning fee" deductions when a vehicle was declared a total loss.

After the *Hawkins* decision was issued, Allstate allegedly informed its adjusters to continue taking unsubstantiated deductions, but to vary the amounts of or reasons for the deductions. In this case, the Allstate adjuster did not take an "automatic" $35.00 deduction for cleaning fees -- instead, the adjuster deducted $575.00 for paint scratches, rust, worn tires, plus $10.00 "for cleaning the interior" and another $10.00 because he "felt [the engine] was excessively dirty."[10]

An expert for Allstate conceded that it was improper for Allstate to have deducted $10.00 for a scratch on the *inside* of the trunk lid of the appellant's car, characterizing that action as "nitpicking." Further, the NADA Official Used Car Guide, contrary to the majority's conclusion, does not support deductions for "worn tires" or an "excessively dirty" engine. As the insurance commissioner stated in a letter issued in September 1988:

[10]The form used by the Allstate adjuster suggests that the adjuster deducted $20.00 for cleaning the exterior of the vehicle and $50.00 for cleaning the engine. *See State ex rel. McCormick v. Zakaib*, 189 W.Va. 258, 259 n. 1, 430 S.E.2d 316, 317 n. 1 (1993). However, the adjuster testified that an illegible note scribbled to one side of the form indicates the adjuster found the power steering was disconnected, and that he assigned the $50.00 figure as the cost of reconnecting the power steering. He testified that the $20.00 figure represented his estimate of $10.00 to clean the interior and $10.00 to clean the engine of the appellant's vehicle.

> While the West Virginia Insurance Commission is aware that the current "Official Used Car Guide" makes mention of "reconditioning charges" it must be considered that *such guide is written with the assumption that those vehicles listed are to be resold.* This is not the case with total loss vehicles.
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> While the "Official Used Car Guide" is a useful tool in determining a vehicle's value its limitations must be recognized and it must be construed reasonably. The deduction of such "reconditioning fees" when applied to a total loss vehicle which will only be resold for salvage and which will never see a used car lot is simply too far removed from reality to be permissible.

See West Virginia Insurance Commission Informational Letter No. 55 (September 1988).[11]

The majority implicitly holds that Informational Letter No. 55 is inapplicable to this case because the appellant's car was totaled in late August 1988, and the letter was not mailed to all insurance companies until early October 1988. However, even in the absence of this Informational Letter, two facts are clear. First, in August 1988, the NADA Official Used Car Guide was written with the assumption that the vehicles listed therein were to be resold, and there is nothing in the record to show Allstate had any intention of selling the appellant's car. Hence, Allstate taking any "reconditioning fee" to place the car in salable condition was patently unreasonable.

[11]This informational letter states that "any deduction of 'reconditioning' charges from the book value of total loss automobiles is highly artificial and is improper . . . [and] will be treated as unfair trade practices." The majority opinion has relegated this relevant portion of Informational Letter No. 55 to a footnote. *See* ___ W.Va. at ___ n. 6, ___ S.E.2d at ___ n. 6 (Slip op. at 14, n. 6).

Second, and more importantly, a jury of six members of the community determined that Allstate's $595.00 in deductions were not "fair and reasonable" and were a breach of the insurance contract. That jury verdict was affirmed by this Court. *McCormick v. Allstate Ins. Co.*, 197 W.Va. 415, 475 S.E.2d 507 (1996). The appellant's experts were willing to testify that Allstate had a general business practice of taking such deductions. Allstate's theory was that if the insurance company saved one dollar through deductions on every claim, on a million claims the company would make a million dollars in profit.[12] Policyholders apparently rarely question such deductions. As the Arizona court held in *Hawkins*, "[e]vidence of previous, similar acts alters the probability that the conduct in question was unintentional; the more frequently an act occurs, the more probable it is intentional." 152 Ariz. at 498, 733 P.2d at 1081. Thus, the testimony of the appellant's experts (evidence overlooked by the majority opinion) made it more probable that the unfair and unreasonable deductions taken by Allstate were not mistakenly or inadvertently made, but were done with actual malice.[13]

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[12]The jury in *Hawkins v. Allstate Ins. Co.*, *supra*, adopted Allstate's reasoning in its award of $3.5 million in punitive damages. The jury's award was apparently based on the plaintiff's argument that that was how much profit Allstate would make by taking a $35.00 reconditioning fee on 100,000 vehicles.

[13]Circumstantial evidence is admissible to prove actual malice in an unfair trade practices action. As the *Hawkins* court stated,

> We note that unless the defendant is willing to take the stand and admit its 'evil mind,' the plaintiff must prove entitlement to punitive damages with circumstantial evidence. Thus, whether the defendant intended to injure the plaintiff or consciously disregard the plaintiff's rights may be suggested

by a pattern of similar unfair practices.

152 Ariz. at 498, 733 P.2d at 1081. *See also, State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W.Va. 622, 627, 425 S.E.2d 577, 582 (1992) ("[I]n a bad faith claim against an insurance carrier, previous similar acts can be shown to demonstrate that the conduct was intentional.")

I am also disconcerted about the majority's focus on the fact that the appellant never made a counteroffer to Allstate's settlement offer. While it is true that the appellant never made a counteroffer, the testimony in the record suggests that the Allstate adjuster was rude and would not negotiate with the appellant. Further, Allstate wrote the check and mailed it to the appellant's bank, the lienholder on the car, without the appellant's knowledge. Even assuming the appellant could have negotiated with the Allstate adjuster, my question is this -- *why* should he have to negotiate? The principle underlying *Hayseeds* and the Unfair Trade Practices Act is that insurance companies are supposed to deal fairly with policyholders, without prompting or cajoling. Allstate should have made an objective offer based solely on the Official Used Car Guide without taking the deductions that a jury found to be unwarranted.

The majority's spin on the factual record suggests that its okay for insurance companies to lie, cheat and steal from a policyholder, and if the policyholder doesn't object, then as a matter of law that conduct is not "actual malice." Such a holding is contrary to a fundamental sense of fairness.

Therefore, while I concur in the rule adopted by the majority opinion, I dissent to the application of that rule to the record.