IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1999 Term

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No. 25539

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PAUL MITCHELL, as Executor of the
ESTATE OF MARY S. MITCHELL,
Plaintiff below, Appellant,

vs.

ANTHONY GEORGE BROADNAX,
Defendant below, Appellee.

AND

NAOMI S. MITCHELL and
GERALDINE O'DELL,
Plaintiffs below,

vs.

ANTHONY BROADNAX,
Defendant below.

Appeal from the Circuit Court of Raleigh County
Honorable Harry L. Kirkpatrick, III, Judge
Civil Action Nos. 97-C-241-K and 97-C-481-K

AFFIRMED

Submitted: April 14, 1999
Filed: July 16, 1999

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The Opinion of the Court was delivered PER CURIAM.

CHIEF JUSTICE STARCHER dissents and reserves the right to file a dissenting opinion.

JUSTICE DAVIS concurs and reserves the right to file a concurring opinion.

JUSTICE MCGRAW dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "An 'owned but not insured' exclusion to *uninsured* motorist coverage is valid and enforceable above the mandatory limits of *uninsured* motorist coverage required by W.Va. Code §§ 17D-4-2 (1979) (Repl.Vol.1996) and 33-6-31(b) (1988) (Supp.1991). To the extent that an 'owned but not insured' exclusion attempts to preclude recovery of statutorily mandated minimum limits of *uninsured* motorist coverage, such exclusion is void and ineffective consistent with this Court's prior holding in Syllabus Point 2 of *Bell v. State Farm Mutual Automobile Insurance Company*, 157 W.Va. 623, 207 S.E.2d 147 (1974)." Syllabus Point 4, *Imgrund v. Yarborough*, 199 W.Va. 187, 483 S.E.2d 533 (1997).

2. "Insurers 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 motorists statutes." Syllabus Point 3, *Deel v. Sweeney*, 181 W.Va. 460, 383 S.E.2d 92 (1989).

Per Curiam:

In this appeal from the Circuit Court of Raleigh County, the appellant contends that the circuit court erred in granting summary judgment to the appellee insurance company in an order dated April 15, 1998. The circuit court concluded that an "owned but not insured" exclusion in an uninsured motorist insurance policy issued by the appellee limited the appellant to recovering only $20,000 in proceeds, because the appellant's decedent was injured by an uninsured motorist while riding inside of a car that the decedent owned, but did not insure, through the appellee insurance company.

The circuit court concluded that the appellant could recover only the statutory mandatory minimum amount of uninsured motorist proceeds, or $20,000, in light of our holding in *Imgrund v. Yarborough*, 199 W.Va. 187, 483 S.E.2d 533 (1997), even though the appellant's decedent had purchased $300,000 in uninsured motorist coverage from the appellee insurance company. After reviewing the record before the circuit court, and the briefs and arguments of the parties, we find no error on the part of the circuit court.

We therefore affirm the circuit court's granting of summary judgment to the appellee.

I.

On November 9, 1996, Mary Mitchell was riding as a passenger in a 1989 Pontiac Grand Am automobile that was being operated by her daughter, Naomi Mitchell. The Pontiac was jointly owned by Mary and Naomi Mitchell.[1] As the Mitchells were driving home from church, appellee Anthony George Broadnax was driving toward the Mitchells. Broadnax, who was intoxicated and driving without a valid driver's license, crossed the center line and collided head-on with the Mitchells' Pontiac. Mary Mitchell was seriously injured in the accident, and it is alleged that she later died as a result of her injuries.

The vehicle driven by Broadnax was owned by his mother, Mary Broadnax. However, Anthony Broadnax was not a member of his mother's household, and did not have his mother's permission or consent to operate her car. Ms. Broadnax's automobile liability insurance carrier therefore refused coverage for appellee Broadnax under the terms of the liability policy; accordingly, the Broadnax vehicle meets the statutory definition of an "uninsured" vehicle.[2]

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[1]Mary and Naomi Mitchell were also residents of the same household.

[2]As we held in Syllabus Point 2 of *Metropolitan Property and Liability Ins. Co. v. Acord*, 195 W.Va. 444, 465 S.E.2d 901 (1995) individuals such as appellee Broadnax may properly be denied liability insurance coverage:

> Consistent with the omnibus clause of West Virginia Code § 33-6-31(a) (1992), an insurer may properly deny liability coverage where the express terms of an automobile insurance policy provide that in order for liability coverage to exist, a driver, who is not otherwise insured under the policy, must

have received the named insured's permission to use the automobile, and said driver lacked the express or implied permission of the named insured prior to using the vehicle.

W.Va. Code, 33-6-31(c) [1995] defines an "uninsured motor vehicle" as:

> [A] motor vehicle as to which there is no: (i) Bodily injury liability insurance and property damage liability insurance both in the amounts specified by section two, article four, chapter seventeen-d of this code, as amended from time to time; or (ii) there is such insurance, but the insurance company writing the same denies coverage thereunder. . . .

The Pontiac owned by Mary and Naomi Mitchell was insured by Kentucky Central Insurance Company ("Kentucky Central"). The Kentucky Central insurance policy included uninsured motorist coverage with limits of $100,000 per person and $300,000 total per occurrence for bodily injury.

In addition to the Kentucky Central policy on the Pontiac, Mary Mitchell was insured by a second automobile policy. Mary Mitchell was the sole owner of a 1981 Buick Century that was insured by Anthem Casualty Insurance Company ("Anthem"), the appellee in this case.[3] The Anthem policy included liability coverage with a limit of $300,000 per person and per occurrence, and uninsured motorist coverage with a limit of $300,000 per person and per occurrence for bodily injury.

[3] When an uninsured motorist such as Broadnax is sued, West Virginia law requires an insured plaintiff intending to rely upon uninsured or underinsured motorist insurance coverage to serve a copy of the summons and complaint upon the insurance company providing the coverage sought as though the insurance company were a named party defendant. The insurance company may then file pleadings and take any action in the name of the uninsured or underinsured defendant. *See W.Va. Code*, 33-6-31(d) [1995]. The insurance carrier is, however, entitled to defend in its own name. Syllabus Point 4, *State ex rel. State Farm Mut. Auto. Ins. Co. v. Canady*, 197 W.Va. 107, 475 S.E.2d 107 (1996).

On March 24, 1997, the instant action was filed against appellee Broadnax by the appellant, Paul Mitchell, acting as the executor of the estate of Mary Mitchell.[4] Believing that appellee Broadnax was an "uninsured" motorist, the appellant sought to recover proceeds from the Kentucky Central uninsured motorist policy, purchased jointly by Mary and Naomi Mitchell, and the Anthem uninsured motorist policy, purchased solely by Mary Mitchell. Kentucky Central tendered the limits of its policy to the appellant.

However, Anthem refused to provide uninsured motorist coverage to the appellant, citing to an "owned but not insured" exclusion[5] in its policy. That exclusion states:

> We do not provide Uninsured Motorist Coverage under this endorsement for property damage or bodily injury sustained by any person while occupying, or when struck by, any motor vehicle owned by you or any family member which is not insured for Uninsured Motorist Coverage under this policy. This includes a trailer of any type used with that vehicle.

Because Mary Mitchell was a part owner of the Pontiac that she occupied when she was injured by Broadnax, and because the Pontiac was not insured through the Anthem

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[4] A separate action was also filed against appellee Broadnax by Naomi Mitchell and another passenger in the Mitchell Pontiac, Geraldine O'Dell. On September 25, 1997, the circuit court consolidated the Naomi Mitchell-Geraldine O'Dell action with that filed by appellant Paul Mitchell.

[5] This exclusion is sometimes referred to as the "family member" exclusion, "household family member" exclusion, or "other owned vehicle" exclusion. *See* 1 Alan I. Widiss, *Uninsured and Underinsured Motorist Insurance* § 4.19, 155 (2d. Rev. Ed., 1999).

policy, Anthem contended that she was within the bounds of the exclusion. Anthem therefore denied any underinsured motorist coverage.

On January 30, 1998, the circuit court entered an order explicitly finding that Broadnax was an "uninsured motorist." It appears that Anthem subsequently paid to the appellant $20,000 in uninsured motorist benefits. Additionally, Anthem filed a motion for summary judgment, asking the circuit court to find that the "owned but not insured" exclusion was valid and enforceable above the $20,000 amount.

On April 15, 1998, the circuit court entered a final summary judgment order holding that the exclusion was valid, and that the appellant was not entitled to coverage under the Anthem uninsured motorist policy in excess of the $20,000 amount.

The appellant now appeals the circuit court's summary judgment order.

II.

As we stated in Syllabus Point 1 of *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994), we review *de novo* a circuit court's entry of summary judgment under *West Virginia Rules of Civil Procedure* Rule 56 [1998].

III.

The appellee in this case, Anthem Casualty Insurance Company, contends that its "owned but not insured" exclusion is valid and enforceable in light of our opinion

in *Imgrund v. Yarborough*, 199 W.Va. 187, 483 S.E.2d 533 (1997). In *Imgrund*, we held at Syllabus Point 4 that:

> An "owned but not insured" exclusion to *uninsured* motorist coverage is valid and enforceable above the mandatory limits of *uninsured* motorist coverage required by W.Va. Code §§ 17D-4-2 (1979) (Repl.Vol.1996) and 33-6-31(b) (1988) (Supp.1991). To the extent that an "owned but not insured" exclusion attempts to preclude recovery of statutorily mandated minimum limits of *uninsured* motorist coverage, such exclusion is void and ineffective consistent with this Court's prior holding in Syllabus Point 2 of *Bell v. State Farm Mutual Automobile Insurance Company*, 157 W.Va. 623, 207 S.E.2d 147 (1974).

The "minimum limits" of uninsured motorist coverage currently required by *W.Va. Code*, 17D-4-2[6] and *W.Va. Code*, 33-6-31(b)[7] is $20,000 in bodily injury coverage per person,

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[6]*W.Va. Code*, 17D-4-2 [1979] states:

> The term "proof of financial responsibility" as used in this chapter shall mean: Proof of ability to respond in damages for liability, on account of accident occurring subsequent to the effective date of said proof, arising out of the ownership, operation, maintenance or use of a motor vehicle, trailer or semitrailer in the amount of twenty thousand dollars because of bodily injury to or death of one person in any one accident, and, subject to said limit for one person, in the amount of forty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and in the amount of ten thousand dollars because of injury to or destruction of property of others in any one accident.

[7]*W.Va. Code*, 33-6-31(b) [1995] states, in pertinent part:

> Nor shall any such policy or contract be so issued or delivered unless it shall contain an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which

$40,000 bodily injury coverage per occurrence, and $10,000 in property damage coverage. When an insurance company attempts to limit coverage below these "mandatory limits" through an "owned but not insured" exclusion, we have held that such an exclusion is void and unenforceable. As we stated in Syllabus Point 2 of *Bell v. State Farm Mut. Auto. Ins. Co.*, 157 W.Va. 623, 207 S.E.2d 147 (1974):

> An exclusionary clause within a motor vehicle insurance policy issued by a West Virginia licensed insurer which excludes uninsured motorist coverage for bodily injury caused while the insured is occupying an

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> shall be no less than the requirements of section two, article four, chapter seventeen-d of this code, as amended from time to time: Provided, 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 motor vehicle up to an amount of one hundred thousand dollars because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, in the amount of three hundred thousand dollars because of bodily injury to or death of two or more persons in any one accident and in the amount of fifty thousand dollars because of injury to or destruction of property of others in any one accident: Provided, however, That such endorsement or provisions may exclude the first three hundred dollars of property damage resulting from the negligence of an uninsured motorist: Provided further, 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 legally be 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 insurance and property damage liability insurance purchased by the insured without setoff against the insured's policy or any other policy.

> owned-but-not-insured motor vehicle is void and ineffective under Chapter 33, Article 6, Section 31, *Code of West Virginia*, 1931, as amended.

Conversely, above these "mandatory limits" of uninsured motorist coverage, an insurance company may include exclusions to coverage. Anthem insists that because it has paid the "minimum limit" of $20,000 in coverage, its policy exclusion is enforceable against the appellant to deny coverage for the remaining $280,000 in uninsured motorist policy proceeds.

The appellant, however, contends that *Imgrund* should not be construed to apply to situations such as that of Mary Mitchell. The appellant takes the position that this case is factually distinguishable from *Imgrund*, and that this Court should not allow insurers to include the exclusion in uninsured motorist policies to deny coverage to individuals such as Mary Mitchell who, in good faith, purchased, paid premiums for, and relied upon the insurance company's representation that they had, full uninsured motorist coverage.

We have carefully examined the record in this case, and can find no substantial distinction between the facts of this case and those of *Imgrund*. The "owned but not insured" exclusion in this case is nearly identical to that which we approved in *Imgrund*.[8] Furthermore, Anthem paid to the appellant $20,000 in uninsured motorist

[8]The exclusion that we held to be valid and enforceable in *Imgrund* stated:

> This Uninsured Motorists insurance does not apply:
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> ....

benefits, as it was required to do under *Imgrund*. Above that $20,000 limit, Anthem could properly deny coverage, because *W.Va. Code*, 33-6-31(k) allows insurance companies to include in an insurance policy "such terms, conditions and exclusions as may be consistent with the premium charged."[9] As we stated in Syllabus Point 3 of *Deel v. Sweeney*, 181 W.Va. 460, 383 S.E.2d 92 (1989):

> Insurers 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 motorists statutes.

Based upon our holding in *Imgrund*, we conclude that the circuit court correctly found that the "owned but not insured" exclusion in Anthem's policy was valid and enforceable, and therefore properly granted summary judgment to Anthem on this issue.

IV.

> 5. To bodily injury suffered while occupying a motor vehicle owned by you or a relative but not insured for Auto Liability coverage under this policy. It also does not apply to bodily injury from being hit by any such motor vehicle.

199 W.Va. at 189, 483 S.E.2d at 535.

[9]*W.Va. Code*, 33-6-31(k) [1995] states:

> Nothing contained herein shall prevent any insurer from also offering benefits and limits other than those prescribed herein, nor shall this section be construed as preventing any insurer from incorporating in such terms, conditions and exclusions as may be consistent with the premium charged.

The circuit court's April 15, 1998 summary judgment order is affirmed.

Affirmed.