FILED
September 14, 1999
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
September 15, 1999
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 25539 - Paul Mitchell, as Executor of the Estate of Mary S. Mitchell v. Anthony George Broadnax
and
Naomi S. Mitchell and Geraldine O'Dell v. Anthony Broadnax

Davis, Justice, concurring:

With the decision reached by the majority of the Court, I resolutely agree. Nevertheless, I feel duty-bound to write separately in an attempt to halt the erosion of longstanding principles of insurance law proposed by my dissenting colleagues. As I carefully articulated in the *Imgrund v. Yarborough* opinion, 199 W. Va. 187, 483 S.E.2d 533 (1997), and as implied by the majority opinion herein, the decisions of this Court in the field of motor vehicle insurance litigation are shaped, in extraordinarily large part, by the pronouncements of the West Virginia Legislature. This is so because the Legislature, by statute, expressly "requir[es] every owner or registrant of a motor vehicle licensed in this State to maintain certain security during the registration period for such vehicle." W. Va. Code § 17D-2A-1 (1981) (Repl. Vol. 1996).[1] Once the Legislature has spoken on an issue, the canons of statutory construction require this Court to apply, not construe, the

[1]*See also* W. Va. Code § 17D-2A-3 (1988) (Repl. Vol. 1996) (listing types of "security" contemplated by mandatory language of W. Va. Code § 17D-2A-1); 10A Michie's Jurisprudence *Insurance* § 24, at 434 (Repl. Vol. 1990) (noting that "[t]he courts have neither the duty nor the power to make [insurance] contracts; their function is only to construe them" (footnote omitted)).

Legislature's plain intention in that arena.[2] True to these principles, this Court frequently has recognized and adopted the expressed intention of the Legislature, set forth in W. Va. Code § 33-6-31(k), to permit exclusions to coverage to be incorporated into policies of motor vehicle insurance.[3] *Imgrund* was decided with this longstanding precedential trend in mind. In the absence of a contrary expression of legislative intent, the decision of the case *sub judice* has followed.

A brief review of the history of the allowance of motor vehicle insurance exclusions illuminates the result obtained by the majority of the Court in the instant appeal.

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[2]*See, e.g.*, Syl. pt. 3, *Webster County Comm'n v. Clayton*, ___ W. Va. ___, ___ S.E.2d ___ (No. 25625 July 16, 1999) ("'"When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syllabus point 5, *State of West Virginia v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959).' Syllabus point 1, *VanKirk v. Young*, 180 W. Va. 18, 375 S.E.2d 196 (1988)."); Syl. pt. 4, *Daily Gazette Co., Inc. v. West Virginia Dev. Office*, ___ W. Va. ___, ___ S.E.2d ___ (No. 25437 May 19, 1999) ("'"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. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951).' Syllabus point 1, *State v. Jarvis*, 199 W. Va. 635, 487 S.E.2d 293 (1997).").

[3] *See, e.g.*, Syl. pts. 6 and 14, *Cox v. Amick*, 195 W. Va. 608, 466 S.E.2d 459 (1995); Syl. pts. 3 and 4, *Miller v. Lemon*, 194 W. Va. 129, 459 S.E.2d 406 (1995); Syl. pts. 2 and 3, *Arndt v. Burdette*, 189 W. Va. 722, 434 S.E.2d 394 (1993); Syl. pts. 2 and 3, *Keiper v. State Farm Mut. Auto. Ins. Co.*, 189 W. Va. 179, 429 S.E.2d 66 (1993); Syl. pts. 1 and 2, *Thomas v. Nationwide Mut. Ins. Co.*, 188 W. Va. 640, 425 S.E.2d 595 (1992); Syl. pts. 4 and 5, *Russell v. State Auto. Mut. Ins. Co.*, 188 W. Va. 81, 422 S.E.2d 803 (1992); Syl. pts. 2, 3, and 4, *Alexander v. State Auto. Mut. Ins. Co.*, 187 W. Va. 72, 415 S.E.2d 618 (1992); Syl. pt. 3, *Deel v. Sweeney*, 181 W. Va. 460, 383 S.E.2d 92 (1989).

The current treatment of "owned but not insured" exclusions begins with this Court's previous decision of *Bell v. State Farm Mutual Automobile Insurance Company*, 157 W. Va. 623, 207 S.E.2d 147 (1974). In *Bell*, the injured plaintiff, at the time of the motor vehicle accident, was riding a motorcycle, which she owned but on which she had no insurance. Ms. Bell also owned an automobile, for which she had obtained the statutory minimum limits of uninsured coverage. Her father, in whose household she was residing at the time of the relevant events, likewise owned an automobile and carried the minimum statutory limits of uninsured motorist insurance thereon. The *Bell* Court allowed the injured plaintiff to recover uninsured motorist benefits under both her policy of insurance and her father's policy. *See Imgrund*, 199 W. Va. at 190-91, 483 S.E.2d at 536-37 (and references to *Bell* cited therein). This result arose from our holding in Syllabus point 2 of *Bell*:

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

157 W. Va. 623, 207 S.E.2d 147.

When faced with a similar issue in *Imgrund*, we were constrained to evaluate the parties' arguments in light of all of the applicable law, including statutory amendments and intervening decisions of this Court. Following the *Bell* decision, the West Virginia Legislature amended the uninsured/underinsured motorists statute, W. Va. Code § 33-6-31

(1982) (Supp. 1983), to add a subsection of particular import to both our prior decision in *Deel v. Sweeney*, 181 W. Va. 460, 383 S.E.2d 92 (1989), and our recent decision in *Imgrund*. Subsection (k) provides:

> 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.[4]

W. Va. Code § 33-6-31 (footnote added). The facts of *Deel* involved a motorist who was involved in a motor vehicle accident with an uninsured motorist. Mr. Deel owned and insured the car he was driving at the time of the accident, and recovered his policy limits of uninsured motorist coverage. Because his uninsured motorist coverage did not satisfy his damages claims and because he did not have underinsured motorist coverage on this vehicle, Mr. Deel sought to recover such benefits under his father's policy, in whose household he was residing at the time of his accident. Denying Mr. Deel's request to proceed against his father's underinsured motorist coverage, this Court distinguished the case based upon the differences between uninsured motorist coverage, which was at issue in *Bell*, and underinsured motorist coverage, which was the issue raised in *Deel*. *See Imgrund*, 199 W. Va. at 191-92, 483 S.E.2d at 537-38 (and citations to *Deel* contained therein). The *Deel* Court also discussed the Legislature's enactment of subsection (k) and held, in accordance

[4]Although various portions of W. Va. Code § 33-6-31 have been modified since the statutory amendment in 1982 which added subsection (k), this subsection has remained unchanged. *See* W. Va. Code § 33-6-31(k) (1995) (Repl. Vol. 1996). *See also* W. Va. Code § 33-6-31(k) (1998) (Supp. 1999) (same).

therewith:

> 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.

Syl. pt. 3, 181 W. Va. 460, 383 S.E.2d 92.

To arrive at our decision in *Imgrund*, then, we not only relied upon this Court's prior decision in *Bell*, but also upon the precedent established by *Deel* and the legislative enactment of W. Va. Code § 33-6-31(k). To modify our decision in *Imgrund*, as proposed by the dissenters, would require the consequent abrogation of the entire body of law, both judicial and statutory, which allows an insurer to include exclusions to coverage in policies of motor vehicle insurance.[5] Our holding in Syllabus point 4 of *Imgrund* carefully balanced the "spirit and intent of the uninsured . . . motorist[] statute[]" with the ability of insurers to incorporate exclusions to coverage in such policies of insurance:

> 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).

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[5]*See* W. Va. Code § 33-6-31(k). *See also* note 3, *supra*.

199 W. Va. 187, 483 S.E.2d 533.

It is upon this foundation that the Court's decision of the present case rests. While the dissenting members of this Court make compelling arguments to alter the heretofore-accepted interpretation and application of exclusions to motor vehicle insurance policies, this case, simply stated, is not an appropriate forum for such judicial forays. First, and foremost, this Court is limited in its ability to recognize new principles of law in areas in which the Legislature has seen fit to legislate. The realm of motor vehicle insurance law is one such field. *See* W. Va. Code § 17D-2A-1.[6] The reason for this Court's deference to the Legislature is none other than the separation of powers doctrine, which recognizes that it is the province of the legislative branch of government to make laws while the judicial branch interprets those laws.[7] The creation of new legal precepts is just not within the domain of the courts. To adopt the dissenters's proposed eradication of "owned but not insured" exclusions, despite the Legislature's authorization of exclusions to motor vehicle

[6]*See also* note 1, *supra*, citing Michie's Jurisprudence.

[7]*See* W. Va. Const. art. V, § 1 ("The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others . . . ."); *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 168, 279 S.E.2d 622, 630-31 (1981) ("The powers and duties of each of our three branches of government are set forth in the constitution. . . . Generally speaking, the Legislature enacts the law, the Governor and the various agencies of the executive implement the law, and the courts interpret the law, adjudicating individual disputes arising thereunder." (citations omitted)). *See also Jones v. Rockefeller*, 172 W. Va. 30, 46, 303 S.E.2d 668, 684 (1983) (Neely, J., dissenting) ("The American tradition of separation of powers and the principle of court deference to the executive and legislative branches deserves respect.").

insurance and without clear legislative guidance indicating that such exclusions are unlawful, amounts to improper and impermissible "judge-made law." I cannot countenance such an unwarranted erosion of the established law of motor vehicle insurance.

Furthermore, the tenor of the case *sub judice* does not support the detailed examination and review of the applicable law suggested by the dissenting members of this Court. When deciding a matter on appeal from a circuit court, this Court can address only those issues which previously have been determined by the circuit court from which the appeal has been taken.[8] It is not apparent from the record in this case that the parties presented the arguments advanced by the dissent to the circuit court for its consideration. Likewise, there is no indication that the circuit court determined the issues which the dissent would have this Court raise and decide *sua sponte*.

Finally, upon appealing a case to this institution, an appellant is expected to present his/her arguments in conformity with the West Virginia Rules of Appellate

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[8]*See* Syl. pt. 3, *Voelker v. Frederick Bus. Properties Co.*, 195 W. Va. 246, 465 S.E.2d 246 (1995) (""'In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken." Syllabus Point 1, *Mowery v. Hitt*, 155 W. Va. 103[, 181 S.E.2d 334] (1971).' Syl. pt. 1, *Shackleford v. Catlett*, 161 W. Va. 568, 244 S.E.2d 327 (1978)."); Syl. pt. 6, in part, *Parker v. Knowlton Constr. Co., Inc.*, 158 W. Va. 314, 210 S.E.2d 918 (1975) ("[T]he Supreme Court of Appeals is limited in its authority to resolve assignments of nonjurisdictional errors to a consideration of those matters passed upon by the court below and fairly arising upon the portions of the record designated for appellate review.").

Procedure. W. Va. R. App. P. 1, *et seq.* In neither her appellate brief nor her petition for rehearing does counsel for the appellant refer to specific portions of the record to buttress her potentially valid public policy argument nor does she provide supportive authority for many of her contentions.[9] This Court previously, and repeatedly, has cautioned that it is imperative for parties to provide us with this vital information:

> "Failure to [heed the applicable court rules] not only wastes the precious and limited resources of this Court, but also those of the lawyers and their clients. We do not wish to be perceived as 'sticklers, precisians, nitpickers, or sadists. But in an era of swollen appellate dockets, courts are entitled to insist' on diligence and good faith efforts from the practicing bar so that the appellate decisional process can proceed as it should."

Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 310 n.17, 496 S.E.2d 447, 452 n.17 (1997) (quoting *Coleman v. Sopher*, 194 W. Va. 90, 96, 459 S.E.2d 367, 373 (1995) (quoting *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1224 (7th Cir. 1995))). Absent supporting authority and an evidentiary basis for her position, we are unable to consider

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[9]*See* W. Va. R. App. P. 10(d) (requiring appellant's brief to "follow the same form as the petition for appeal"); W. Va. R. App. P. 3(c) (commanding petition for appeal to include "1. The kind of proceeding and nature of the ruling in the lower tribunal[;] 2. A statement of the facts of the case[;] 3. The assignments of error relied upon on appeal and the manner in which they were decided in the lower tribunal[; and] 4. Points and authorities relied upon, a discussion of law, and the relief prayed for."). *See also State v. Honaker*, 193 W. Va. 51, 56 n.4, 454 S.E.2d 96, 101 n.4 (1994) ("It is counsel's obligation to present this Court with specific references to the designated record that is relied upon by the parties. . . . In this context, counsel must observe the admonition of the Fourth Circuit that '"[j]udges are not like pigs, hunting for truffles buried in briefs" [or somewhere in the lower court's files]. . . . We would in general admonish all counsel that they, as officers of this Court, have a duty to uphold faithfully the rules of this Court.'" (quoting *Teague v. Bakker*, 35 F.3d 978, 985 n.5 (4th Cir. 1994) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam)))).

counsel's contentions.[10]

In conclusion, I reiterate my belief that the majority obtained the correct decision in this case, and I hereby concur with the decision to affirm the ruling of the Circuit Court of Raleigh County.

[10]*See, e.g., Ohio Cellular RSA Ltd. Partnership v. Board of Pub. Works of West Virginia*, 198 W. Va. 416, 424 n.11, 481 S.E.2d 722, 730 n.11 (1996) (declining to address inadequately briefed issue); *Addair v. Bryant*, 168 W. Va. 306, 320, 284 S.E.2d 374, 383 (1981) (same).