No. 26558 -- Anthony Iafolla v. Thomas Ray Trent, individually and as Administrator of the Estate of Brian Keith Robinette, and Travelers Insurance Companies

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OF WEST VIRGINIA

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Starcher, J., dissenting:

I dissent because the majority opinion chose not to apply, for reasons not discussed, our recent holding in *Mitchell v. Broadnax*, ___ W.Va. ___, ___ S.E.2d ___ (No. 25339, February 18, 2000). In *Mitchell*, this Court applied several insurance statutes enacted by the Legislature, and held that when an insurance company relies upon an exclusion in an insurance policy to avoid providing coverage, then the insurance company bears the burden of proving (1) that it adjusted the policy premium so that the premium was consistent with the amount of coverage; and (2) that the premium adjustment and the exclusion were plainly communicated to the policyholder. Neither one of these requirements was met in this case.

It is well-settled law that an insurance company may include an "anti-stacking" exclusion in an automobile insurance policy pursuant to *W.Va. Code*, 33-6-31(k)[1995]. *See Russell v. State Auto Mut. Ins. Co.*, 188 S.E.2d 81, 422 S.E.2d 595 (1992). As we stated in *Miller v. Lemon*, 194 W.Va. 129, 459 S.E.2d 406 (1995), when a policyholder buys a single policy to cover two or more vehicles, and as part of the "bargain" with the insurance company gets a multi-car discount on the premiums, then any "anti-stacking" exclusion in the policy can be enforceable. The Court's thinking in *Miller v. Lemon* was that, in theory, the policyholder and insurance company had reached an arms-length

agreement: in return for lower premiums on two vehicles, the policyholder agreed to lower coverage through the operation of the anti-stacking exclusion.

The key to enforcing an anti-stacking exclusion is that the policyholder must have somehow known about and agreed to the exclusion, and at a minimum, known about and agreed to the reduced premiums. The policyholder must learn about the reduced premium and reduced coverage before a loss occurs -- otherwise, how can there be an agreement on the policy terms? In explaining how courts are to apply *W.Va. Code*, 33-6-31(k) to an exclusion such as an anti-stacking one, this Court stated, at Syllabus Point 5 of *Mitchell*, that:

> When an insurer incorporates, into a policy of motor vehicle insurance, an exclusion pursuant to *W.Va. Code* § 33-6-31(k) (1995)(Repl. Vol. 1996), the insurer must adjust the corresponding policy premium so that the exclusion is "consistent with the premium charged."

Additionally, citing to our seminal case adopting the doctrine of reasonable expectations, we stated at Syllabus Point 8:

> "An insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, placing them in such a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured." Syllabus point 10, *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987).

In the instant case, the circuit court found that Travelers Insurance Companies filed an affidavit -- after the loss occurred, during the course of litigation -- indicating that the policyholder had received a multi-car discount on his various policies, and that because of this adjustment to the policy premiums, the policyholder had "bargained" for the anti-stacking language in his three automobile insurance

policies. We made clear in *Mitchell*, however, that an "after-the-fact" affidavit showing a premium adjustment, an affidavit that magically appears during the course of a lawsuit well after a policyholder has made a claim, is insufficient alone to support the enforceability of a policy exclusion.

Our uninsured motorist statutes require that the policyholder be told, up front, when they are buying the policy, in conspicuous, plain, clear language, that their premiums have been adjusted to reflect an exclusion or other condition in a policy. There was no evidence in the record of this case that the policyholder was ever told he received a "multi-car discount" in return for his "agreeing" to the anti-stacking language in the policy. In fact, there was no evidence to even show he was told about the existence of the anti-stacking language, or any evidence that its effect on his coverage was explained to him. As we said repeatedly in *Mitchell*, state law prohibits an insurance company from including in a policy "exceptions or conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract" -- and an exclusion is deceptive when its existence and effect is not explained to a policyholder.

In sum, there was no bargaining going on between the policyholder and the insurance company in this case. The insurance company surprised the policyholder, and told him he didn't buy what he thought he was buying long after it took -- and kept -- his money. The Legislature did not intend such a patently unfair result when it enacted *W.Va. Code*, 33-6-31(k).

I would have reversed the circuit court's order and remanded the case for further hearings pursuant to our holding in *Mitchell*. I therefore respectfully dissent.