No. 26650 -- Antoinette Cupano v. West Virginia Insurance Guaranty Association

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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Starcher, J., dissenting:

Everyone knows what it means to "bargain": two parties interact and reach an agreement on the terms of a transaction. By "agreement," everyone comprehends that both sides have reached a mutual understanding.

I dissent because Syllabus Point 2 of the majority opinion throws these basic rules of contract law to the wind. Applying the majority's reasoning, as long as one party to an insurance contract understands the terms of the agreement, it is irrelevant what the other side understands. The agreement can be unilateral by the insurance company; it need not be mutual.

The insurance company in this case sold the policyholders a policy which plainly, unequivocally said: "Rates . . . do not include multi-car discount." If the insurance company says there was no multi-car discount, then the plaintiff obviously could not have known about a multi-car discount. If they did not know, they could not have agreed to the discount. And if they did not even agree on the discount that was not noted on the declarations page on the cover of the policy, how in the world could they have agreed to the anti-stacking exclusion buried inside the policy?

I also 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 said 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 West Virginia Insurance Guaranty Association -- after the loss occurred, during the course of litigation -- showed up in place of the insurance company and did some math based upon the West Virginia Automobile Insurance Plan Manual Private Passenger Auto Rating Worksheet. I am at a loss what this manual has to do with this case, since its pretty clear that the policyholders never got a copy, and therefore couldn't have relied upon it to calculate their own premiums.

Anyway, the Association submitted an affidavit indicating that, even though they didn't know it, the policyholders had received a multi-car discount on their various policies, and that because of this adjustment to the policy premiums, the policyholders had "bargained" for the anti-stacking language in their automobile insurance policies. We made clear in *Mitchell*, however, that such 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 policyholders were ever told they received a "multi-car discount" in return for their "agreeing" to the anti-stacking language in the policy. There was certainly 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 policyholders and the insurance company in this case. There was certainly no evidence that the premium charged was consistent with the anti-stacking exclusion, as is required by *W.Va. Code*, 33-6-31(k). The insurance company surprised the policyholders, and told them they didn't buy what they thought they were buying long after it took -- and kept -- their 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 longstanding contract law principles and our holding in *Mitchell*. I therefore respectfully dissent.