IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2001 Term

FILED
June 28, 2001
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
June 29, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 28481

DAIRYLAND INSURANCE CO.,
Plaintiff below,

v.

JOYCE FOX, Administratrix of the
Estate of Ivan Fox, Jr.;
THE ESTATE OF ANTHONY ADKINS;
THE ESTATE OF STEPHEN ADKINS;
WILLIAM HAGA and STEPHEN LOWRY,
Defendants below,

THE ESTATE OF ANTHONY ADKINS,
Defendant below, Appellee,

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,
Intervenor below, Appellant

Appeal from the Circuit Court of Summers County
Honorable Robert A. Irons, Judge
Civil Action 98-C-62

REVERSED AND REMANDED

Submitted: June 5, 2001
Filed: June 28, 2001

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The Opinion of the Court was delivered PER CURIAM.

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

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

SYLLABUS BY THE COURT

1. "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)

2. "West Virginia Code § 33-6-31 (1992) does not forbid the inclusion and application of an anti-stacking provision in an automobile insurance policy where a single insurance policy is issued by a single insurer and contains an underinsured endorsement even though the policy covers two or more vehicles. Under the terms of such a policy, the insured is not entitled to stack the coverages of the multiple vehicles and may only recover up to the policy limits set forth in the single policy endorsement." Syllabus Point 5, *Russell v. State Automobile Mutual Insurance Co.*, 188 W.Va. 81, 422 S.E.2d 803 (1992).

Per Curiam:

In this appeal from the Circuit Court of Summers County, we are asked to determine the enforceability of an exclusion prohibiting the "stacking" of underinsured motorist coverage in two separate insurance policies issued by an insurance company upon two vehicles. The circuit court concluded that because the insurance company issued two separate policies to the policyholders, such an exclusion could not be enforced and the underinsured motorist coverage in each policy could be stacked.

As set forth below, we reverse the circuit court's ruling. We hold that because the policyholders received a multi-car premium discount on both policies as consideration for the "anti-stacking" exclusion, the coverage cannot be stacked.

I.

On October 1, 1998, Anthony Adkins was riding as a passenger in a vehicle with several friends. The driver of the vehicle lost control and went left of the center of the road. The vehicle collided head-on with another car, and Mr. Adkins was ejected from the vehicle along with two of his friends, resulting in his death.

The insurance carrier for the driver filed a declaratory judgment action in the circuit court seeking to deposit the limits of the driver's liability insurance policy with the circuit court.[1] Because the

[1]On December 16, 1998, Dairyland Insurance Company initiated the instant action against the appellee, the estate of Anthony Adkins; against the estate of the driver, Stephen Adkins, who was apparently no relation to Anthony Adkins; against Joyce Fox, the administrator of another person killed (continued...)

limits of the driver's liability insurance policy were clearly less than the damages caused to the Adkins' family, the appellees, Danny and Brenda Adkins, made a claim against their own underinsured motorist insurance carrier, appellant State Farm Mutual Automobile Insurance Company ("State Farm").

The appellees owned two vehicles, and each vehicle was insured with a separate policy from State Farm. The parties agree that Anthony Adkins was covered by both policies. Each policy contained an endorsement for $20,000.00 in coverage against underinsured motorists.

The appellees made a claim to State Farm for underinsured motorist coverage, arguing they were entitled to stack the coverage available under both policies, for a total of $40,000.00 in coverage. State Farm paid the appellees only $20,000.00, and argued that both policies contained an "anti-stacking" exclusion which limited the coverage available under both policies to a maximum of $20,000.00. The exclusion stated:

> If other underinsured motor vehicle coverage issued by us to you, your spouse, or any relative applies, the total limits of liability under all such policies shall not exceed that of the policy with the highest limit of liability.

State Farm further argued that the appellees had received a multi-car discount for insuring both cars through State Farm, and that the discount -- which was noted on the declarations page of both policies -- served as consideration for enforcing the exclusion.

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[1](...continued)
by the collision, Ivan Fox, Jr.; against William Haga, a passenger of the vehicle who was allegedly injured; and against Stephen Lowery, the individual who was driving the on-coming car. Dairyland sought to deposit the limits of Stephen Adkins' liability insurance, a total of $40,000.00, into the circuit court for equitable distribution to the various people injured in the collision.

To resolve this dispute, State Farm intervened in the underlying circuit court action and initiated a declaratory judgment action against the appellees to resolve the amount of underinsured motorist coverage available to the appellees through the two policies. The appellees subsequently filed a motion for summary judgment asking the circuit court to declare that they could stack the coverage available under the two policies, for a total of $40,000.00 in coverage.

In an order dated December 7, 1999, the circuit court granted a declaratory judgment to the appellees. The circuit court concluded that State Farm had issued two separate policies to the appellees, and that anti-stacking language is void when a policyholder is covered by two or more underinsured motorist policy endorsements. The circuit court therefore allowed the appellees to stack their two policies together.

State Farm now appeals the circuit court's order.

II.

We review *de novo* the circuit court's declaratory judgment order interpreting the State Farm insurance policy. We have previously stated that a circuit court's entry of a declaratory judgment is reviewed *de novo*, since the principal purpose of a declaratory judgment action is to resolve legal questions. Syllabus Point 3, *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995). When a declaratory judgment proceeding involves the determination of an issue of fact, that issue may be tried and determined by a judge or jury in the same manner as issues of fact are tried and determined in other civil actions. *W.Va. Code*, 55-13-9 [1941]. Any determinations of fact made by the circuit court or jury in

reaching its ultimate resolution are reviewed pursuant to a clearly erroneous standard. *Cox*, 195 W.Va. at 612, 466 S.E.2d at 463.

In this case we are asked to review the circuit court's interpretation of an insurance contract. In *Payne v. Weston*, 195 W.Va. 502, 506-7, 466 S.E.2d 161, 165-66 (1995), we discussed the applicable standard of review in such cases, stating that "[t]he interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination which, like the court's summary judgment, is reviewed *de novo* on appeal." "Determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law." *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, ___, 509 S.E.2d 1, 7 (1998), *quoting Pacific Indemnity Co. v. Linn*, 766 F.2d 754, 760 (3d Cir. 1985).

III.

In *W.Va. Code*, 33-6-31(b) [1998], the Legislature requires insurance companies to offer an individual buying an automobile insurance policy the option to purchase insurance against underinsured motorists. However, the Legislature also, in *W.Va. Code*, 33-6-31(k), authorizes insurance companies to include in each policy "exclusions as may be consistent with the premium charged."[2]

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[2]*W.Va. Code*, 33-6-31(k) 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.

In *Mitchell v. Broadnax*, 206 W.Va. 36, 537 S.E.2d 882 (2000), we held that *W.Va. Code*, 33-6-31(k) requires an insurance company to prove that it has adjusted its premiums to reflect the reduction in

(continued...)

In *Deel v. Sweeney*, 181 W.Va. 460, 383 S.E.2d 92 (1989), we recognized the Legislature's enactment of *W.Va. Code*, 33-6-31(k), and the effect of the enactment on underinsured motorist insurance policies. We stated, in Syllabus Point 3, that as a result of *W.Va. Code*, 33-6-31(k):

> 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.

Relying upon this authorization, insurance companies began including exclusions in automobile insurance policies to prevent the "stacking" of underinsured motorist coverages on multiple vehicles.

We considered the effect of an "anti-stacking" exclusion on underinsured motorist coverage contained in a policy covering multiple cars in *Russell v. State Automobile Mutual Insurance Co.*, 188 W.Va. 81, 422 S.E.2d 803 (1992). In *Russell*, the exclusion was contained within a single insurance policy that covered two separate vehicles.

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[2](...continued)
coverage caused by an exclusion, and that the failure to show such an adjustment will render the exclusion void. We held, in Syllabus Points 5 and 6:

> 5. 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."
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> 6. When an insurer has failed to satisfy the statutory criteria of W.Va. Code § 33-6-31(k) (1995) (Repl.Vol.1996) requisite to incorporating an exclusion in a policy of motor vehicle insurance, the enforcement of such an exclusion is violative of this State's public policy.

In the instant case, the appellees did not challenge below, as was discussed in *Mitchell*, whether the State Farm anti-stacking exclusion was "consistent with the premium charged." We therefore decline to consider this issue on appeal.

As in the instant case, the policy in *Russell* provided underinsured motorist coverage for both vehicles of $20,000.00 per person, and the premium for the coverage reflected a multi-car discount for underinsured motorist coverage. The policy also contained anti-stacking language that limited the policy's underinsured motorist coverage to the highest limit applicable for any one vehicle covered by the policy.

This Court examined the anti-stacking exclusion and ruled that, when a multi-car discount has been given to a policyholder, the underinsured motorist coverage in a policy cannot be stacked. The Court stated, in Syllabus Point 5 of *Russell*:

> West Virginia Code § 33-6-31 (1992) does not forbid the inclusion and application of an anti-stacking provision in an automobile insurance policy where a single insurance policy is issued by a single insurer and contains an underinsured endorsement even though the policy covers two or more vehicles. Under the terms of such a policy, the insured is not entitled to stack the coverages of the multiple vehicles and may only recover up to the policy limits set forth in the single policy endorsement.

The Court concluded that because the policyholder had received the benefit of their bargain -- a multi-car discount -- that the policyholder was not entitled to stack multiple insurance coverages in light of a clear exclusion prohibiting stacking.

In the instant case, State Farm argues that, like in *Russell*, the appellee-policyholders received the benefit of their bargain -- a multi-car discount -- and that clear anti-stacking language contained in both State Farm policies should be enforced to prevent the stacking of the underinsured motorist coverages.

The appellees, however, argue that *Russell* applies only to instances where the policyholder buys one insurance policy that covers multiple vehicles, and receives a multi-car discount. The

appellees point out that, in the instant case, State Farm sold the policyholders two separate policies for their two vehicles. The policies have different policy numbers and different renewal dates. However, the declarations pages for both policies have a notation that a multi-car discount has been given and that the discount applies to underinsured motorist coverage. Still, the appellees argue that *Russell* is inapplicable.

State Farm counters that in 1995, the Legislature revised the underinsured motorist insurance statutes to expand the application of *Russell*. State Farm argues that the statute stretched the application of *Russell* from a single insurance company selling a single policy that covers multiple vehicles, to situations such as the instant case where a single insurance company sells multiple policies to the same policyholders covering different vehicles. *W.Va. Code,* 33-6-31(b) now states, in part, with the 1995 amendment:

> Regardless of whether motor vehicle coverage is offered and provided to an insured through a multiple vehicle insurance policy or contract, or in separate single vehicle insurance policies or contracts, no insurer or insurance company providing a bargained for discount for multiple motor vehicles with respect to underinsured motor vehicle coverage shall be treated differently from any other insurer or insurance company utilizing a single insurance policy or contract for multiple covered vehicles for purposes of determining the total amount of coverage available to an insured.

State Farm argues that even though its underinsured motorist coverage was provided to the appellees in two "separate single vehicle insurance policies," it provided the appellees with a "discount for multiple motor vehicles," and therefore argues it is entitled, under *W.Va. Code,* 33-6-31(b), to be treated no differently than an insurance company utilizing a single insurance policy to cover multiple vehicles. We agree.

Accordingly, we hold that the anti-stacking exclusion contained in the State Farm policies is enforceable in the underinsured motorist insurance policies purchased by the appellees. Applying the clear language of the State Farm policy, the appellees are entitled to recover the limits of "the policy with the highest limit of liability" -- that is, $20,000.00. We therefore find that the circuit court erred in its holding that the appellees were entitled to stack the coverages available under their two insurance policies.

IV.

The circuit court's December 7, 1999 order is reversed, and the case is remanded for further proceedings.

Reversed and Remanded.