

No. 30842 – Laura A. Findley, individually and on behalf of all other persons similarly situated v. State Farm Mutual Automobile Insurance Company

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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Starcher, Justice, concurring:

I concur with the majority opinion, but I write separately to express my confusion over the firestorm that has been whipped into being about the true meaning of *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (2000).

Our Legislature, in its wisdom, followed in the footsteps of many other states in the 1960s and began to require insurance companies to provide uninsured and underinsured motorist insurance. The Legislature – not the insurance industry – defines what an uninsured motorist is and what an underinsured motorist is, and basically says this coverage protects policyholders wherever they are, so long as they are injured by an uninsured or underinsured motorist.

For example, in *Hamric v. Doe*, 201 W.Va. 615, 499 S.E.2d 619 (1997) we said a teenager injured when she dove out of the way of a swerving uninsured driver and into a ditch was protected by her parents' uninsured motorist coverage. She was not in, on, upon, or using a particular vehicle. She was simply walking down the road on her way to a football game – and under West Virginia law, her injuries caused directly by the uninsured driver were covered.

Mitchell v. Broadnax involved a little old lady who bought an uninsured motorist insurance policy – with \$300,000.00 in coverage – on a car she probably never drove. She

religiously paid her premiums for several decades. She was seriously injured on her way home from church when an uninsured drunk driver plowed head-on into a car in which she was a passenger. Ms. Mitchell sought uninsured motorist benefits from her insurance policy, but the insurance company refused to pay.

Buried in the insurance policy was an exclusion that said if Ms. Mitchell was hurt by an uninsured motorist while she was riding in a car that she owned, but did not insure under the insurance policy she paid for, then she had no coverage. When Ms. Mitchell was injured by the drunk driver, she was a passenger in a car she owned 50-50 with her daughter. Since her daughter bought insurance coverage for the car in which they were riding from another company, Ms. Mitchell's insurance company refused to pay her anything.

In other words, Ms. Mitchell paid premiums for \$300,000.00 in insurance to protect her in case she was injured by an uninsured motorist. But because she helped her daughter buy a car, and then didn't encourage her daughter to buy insurance from the same insurance company as Ms. Mitchell, when she was injured by an uninsured motorist her insurance company refused to pay her the coverage for which she had paid her premiums. The circuit court upheld this decision by the insurance company.

All we said in *Mitchell v. Broadnax* was that under West Virginia law, if an insurance company wants to use an "owned-but-not-insured" exclusion to reduce its statutorily-required uninsured motorist coverage, like the one that surprised Ms. Mitchell, the insurance company has to prove that it appropriately adjusted its premiums to reflect a reduction in coverage for the exclusion. The insurance company couldn't just slip the

exclusion in a policy without also showing it appropriately changed the premiums – both actions were required by West Virginia law. Otherwise, the exclusion would be invalid. We remanded the case back to circuit court to determine if the insurance company ever told Ms. Mitchell it was changing her coverage and/or her premiums.

Somehow, *Mitchell v. Broadnax* has taken on epic proportions, with fears that every exclusion in every insurance policy ever issued in the market will be challenged, and the insurance industry panicking over the thought it might have to reveal to policyholders just how many exclusions they are packing into insurance policies without making any reductions to the premiums they are asking policyholders to pay. The facts in the instant case show why.

In the instant case, State Farm asked the Insurance Commissioner to approve the addition of at least sixteen different exclusions to its underinsured motorist insurance policy in November 1989. Yet even though coverage was substantially reduced, less than two years later, in May 1991, State Farm asked the Insurance Commissioner for permission to *increase* its premiums for underinsured motorist coverage by 92.7%. Another rate increase of 50% was sought in August 1993. Taken together, these increases resulted in an aggregate increase in rates of 188%, or a total of 288% of the base rate.¹ Then, in 1995, State Farm sought another

¹At the time, State Farm argued the rate increases were needed to offset this Court's opinion in *State Auto. Mut. Ins. Co. v. Youler*, 183 W.Va. 556, 396 S.E.2d 737 (1990), where we held that an exclusion prohibiting the stacking of separate automobile insurance policies was void as against public policy. However, the Legislature later authorized anti-stacking language, and when State Farm re-introduced an anti-stacking exclusion in its policy in 1995, it did not decrease its premiums.

rate increase in its underinsured motorist premiums, a rate increase that apparently offset State Farm's 10% multi-car discount to the penny.

The record establishes that State Farm consistently raised its premiums at the same time it lowered coverage, and never told its policyholders. Such actions would certainly be impermissible under *Mitchell v. Broadnax*, but it would be unfair to State Farm to retroactively impose that case's interpretation of *W.Va. Code*, 33-6-31(k).²

²This is not to say that these exclusions cannot be found to be void for other reasons. As we stated in Syllabus Point 2 of *Shamblin v. Nationwide Mut. Ins. Co.*, 175 W.Va. 337, 337 S.E.2d 640 (1985):

Where provisions in an insurance policy are plain and unambiguous and where such provisions are not contrary to a statute, regulation, or public policy, the provisions will be applied and not construed.

In other words, an exclusion adopted prior to *Mitchell v. Broadnax* could still be found unenforceable if its wording is ambiguous, or the exclusion is contrary to statute, regulation or public policy.

Furthermore, while the Legislature enacted *W.Va. Code*, 33-6-30 [2002] as a "clarification of the existing law as previously enacted," the Legislature did nothing to clarify the confusing language used in *W.Va. Code*, 33-6-31(k), which 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.

Justice McGraw discussed the problems with the language contained in *W.Va. Code*, 33-6-31(k) in his separate opinion in *Mitchell v. Broadnax*, and offered a plausible interpretation of the statute that courts could consider:

The first clause of the subsection straightforwardly permits insurers to "offer[] benefits and limits other than those prescribed [in § 33-6-31]." This language obviously permits an automobile insurer to "offer" any type of coverage (together with particular policy limits) that it chooses. It is therefore easily conceivable that an insurer could offer, in addition to the required offerings

(continued...)

I therefore respectfully concur.

²(...continued)

set forth in subsection (b) of the statute, other forms of coverage, including alternative uninsured or underinsured protection. What this language clearly does not sanction, however, is an automobile insurer failing in the first instance to present consumers with the prescribed optional coverages.

The more crucial question in interpreting subsection (k) is whether the second clause of the statute merely applies to the subject of the first clause to the “benefits and limits other than those prescribed herein” or whether it instead has freestanding significance such that insurers have broad authority to impose exclusions upon all motor vehicle coverages, even the “optional” uninsured and underinsured coverages required under subsection (b). The *Deel* [v. *Sweeney*, 181 W.Va. 460, 383 S.E.2d 92 (1989)] Court apparently chose the latter construction.

Deel misconstrued the second clause of subsection (k), an error that has been repeated in subsequent cases. This result is perhaps explained in no small part by the fact that the *Deel* Court misapprehended the relevant statutory language. The opinion, in fact, misquotes the second clause of subsection (k), by omitting the crucial word “in.” *Deel*, 181 W.Va. at 463, 383 S.E.2d at 95.

Although not a model of textual clarity, the word “in” was plainly intended to be synonymous with “therein,” which in effect limits the second clause to the subject of the first. Subsection (k) therefore merely permits an insurer to impose “terms, conditions and exclusions” upon “benefits and limits other than those prescribed herein.” In other words, the statute allows an insurer to impose limitations or exclusions on offerings that are otherwise not specified in the statute. There is simply nothing in this language that could, by any stretch of the imagination, be construed to permit an insurance company to corrupt or curtail the coverages specifically prescribed in subsection (b), regardless of whether those coverages are mandatory or optional to the policyholder.

208 W.Va. at 61, 537 S.E.2d at 907 (McGraw, J., concurring, in part, and dissenting, in part).