IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2003 Term

FILED
April 21, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30850

SHEILA CANTRELL,
Plaintiff Below, Appellant

v.

JOSEPH CANTRELL,
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AND
JACK D. BREWSTER,
Defendants Below, Appellees

Appeal from the Circuit Court of Mingo County
Honorable Michael Thornsbury, Judge
Civil Action No. 00-C-335

AFFIRMED

Submitted: March 26, 2003
Filed: April 21, 2003

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The Opinion of the Court was delivered PER CURIAM.
CHIEF JUSTICE STARCHER and JUSTICE McGRAW dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "A circuit court's entry of summary judgment is reviewed *de novo*." Syllabus Point 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

2. """A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).' Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992)." Syllabus Point 2, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

3. "'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, *Deel v. Sweeney*, 181 W.Va. 460, 383 S.E.2d 92 (1989)." Syllabus Point 1, *Thomas v. Nationwide Mut. Ins. Co.*, 188 W.Va. 640, 425 S.E.2d 595 (1992).

4. "When an insurer issues an automobile insurance policy which provides both liability and underinsured motorists coverage, but which policy contains what is commonly referred to as a 'family use exclusion' for the underinsured motorist coverage, and when, in a single car accident, the passenger/wife receives payments under the liability coverage for the negligence of the driver/husband, such exclusion is valid and not against the

public policy of this state. That exclusion, which excludes from the definition of 'underinsured motor vehicle' any automobile owned by or furnished for the regular use of the insured or a relative, has the purpose of preventing underinsured coverage from being converted into additional liability coverage." Syllabus Point 2, *Thomas v. Nationwide Mut. Ins. Co.*, 188 W.Va. 640, 425 S.E.2d 595 (1992).

Per Curiam:

The appellant, Sheila Cantrell, appeals the December 31, 2001 order of the Circuit Court of Mingo County which granted summary judgment to the appellees, State Farm Mutual Automobile Insurance Company and agent Jack D. Brewster (State Farm). The appellant avers that summary judgment was granted in error because underinsured motorist benefits should be available to her under her husband's policy of insurance in addition to the bodily injury liability limits which she received. We find no error.

I.

FACTS

The facts are not in dispute. On February 28, 2000, the appellant was a passenger in a 1983 Chevrolet truck which was owned by her husband, appellee Joseph Cantrell. While driving on Route 52 near Taylorville in Mingo County, West Virginia, Mr. Cantrell lost control of the vehicle, ran off the roadway, and struck a tree. The appellant was injured. The Cantrell vehicle was insured by State Farm with per person bodily injury liability limits of $100,000 and underinsured motorist coverage (UIM) with per person bodily injury limits of $100,000.

Shortly after the accident but before she retained legal counsel, State Farm offered the appellant the bodily injury liability limit of $100,000 to settle her claim. State

Farm subsequently received a letter from the appellant's attorney demanding payment of the liability limits and reserving the right to contest UIM coverage in a declaratory judgment action. State Farm agreed to the liability settlement but maintained that the Cantrell vehicle did not meet the definition of an underinsured motor vehicle so as to afford UIM coverage to the appellant. On July 5, 2000, State Farm issued a check in the amount of $100,000 for the per person bodily injury liability limit. In exchange, the appellant executed a full and final release of her husband, Joseph Cantrell. She then filed a complaint in circuit court seeking, *inter alia*, UIM benefits.

State Farm removed the action to federal court on the basis of diversity of citizenship and fraudulent joinder of claim representative Jack Brewster. The appellant filed a motion to remand. An order was entered on July 19, 2001, remanding the case back to the Circuit Court of Mingo County. State Farm filed a motion for summary judgment asserting that UIM coverage was not available to the appellant under the Cantrell policy because the vehicle in which the appellant was riding did not qualify as an underinsured motor vehicle under the insurance policy. On December 31, 2001, the circuit court entered an order which granted summary judgment to State Farm and dismissed the appellant's complaint. It is from this order that the appellant appeals.

II.

STANDARD OF REVIEW

The circuit court found, as a matter of law, that State Farm and its agent, Jack Brewster, were entitled to summary judgment. It is well-settled that "[a] circuit court's entry of summary judgment is reviewed *de novo*." Syllabus Point 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Moreover,

> "'A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992).

Syllabus Point 2, *id.*

III.

DISCUSSION

In her petition for appeal filed in this Court, the appellant claimed that the circuit court erred in two respects. First, she argued that the circuit court granted summary judgment to State Farm prior to the completion of discovery. Second, she argued that summary judgment was granted without a proper legal analysis of her husband's insurance policy under the principles set forth by this Court in the case of *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (2000). After we handed down our subsequent opinion in the case of *Findley v. State Farm Mut. Auto. Ins. Co.*, ___ W.Va. ___, 576 S.E.2d 807 (2002), the appellant abandoned her *Broadnax* argument. Instead, she argues in her brief submitted on appeal that

the clear language of W.Va. Code § 33-6-31 (1998) requires underinsurance coverage to apply to a spouse of an underinsured driver.

The appellant maintains that the circuit court erred by holding that she cannot stack UIM coverage onto the liability insurance which she already collected under the Cantrell insurance policy. She reasons that W.Va. Code § 33-6-31(b)[1] does not permit exceptions or exclusions to the definition of "underinsured motor vehicle;" therefore, State Farm's definition of "underinsured motor vehicle" violates public policy in that it is more restrictive than the statute. As a result, the appellant concludes that the statutory provision is void. The appellee argues that the policy language is valid, enforceable, and does not violate public policy.

The appellant's reasoning overlooks the fact that this Court has on prior occasions approved language similar to that contained in Mr. Cantrell's policy. In fact, during oral argument, counsel for the appellant admitted as much and asked us to revisit two opinions previously published by this Court that deal with this issue. Counsel contends that our holdings in *Deel v. Sweeney*, 181 W.Va. 460, 383 S.E.2d 92 (1989), and *Thomas v. Nationwide Mut. Ins. Co.*, 188 W.Va. 640, 425 S.E.2d 595 (1992), cannot be reconciled with W.Va. Code § 33-6-31(b); consequently, the exclusion cannot apply to the appellant. We disagree.

[1]The pertinent sections of W.Va. Code § 33-6-31 are quoted later in this opinion.

There is no doubt that "'[i]nsurers 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, *Deel v. Sweeney*, 181 W.Va. 460, 383 S.E.2d 92 (1989)." Syllabus Point 1, *Thomas v. Nationwide Mut. Ins. Co.*, 188 W.Va. 640, 425 S.E.2d 595 (1992). The UIM clause in the Cantrell policy of insurance specifically states:

> We will pay damages for *bodily injury* and *property damage* an *insured* is legally entitled to collect from the owner or driver of an *underinsured motor vehicle*. The *bodily injury* or *property damage* must be caused by accident arising out of the operation, maintenance or use of an *underinsured motor vehicle*.
>
> * * *
>
> An *underinsured motor vehicle* does not include a land motor vehicle:
>
> 1. insured under the liability coverage of this policy;
> 2. furnished for the regular use of *you*, *your spouse* or any *relative*[.]

This clause is commonly referred to as the "family use exclusion."

W.Va. Code § 33-6-31 (1998), states in pertinent part:

> (b) "Underinsured motor vehicle" means a motor vehicle with respect to the ownership, operation or use of which there is liability insurance applicable at the time of the accident, but the limits of that insurance are either: (i) Less than limits the insured carried for underinsured motorists' coverage; or (ii) has been reduced by payments to others injured in the accident to limits less than limits the insured carried for underinsured motorists' coverage. No sums payable as a result of underinsured

> motorists' coverage shall be reduced by payments made under the insured's policy or any other policy.
>
> (c) As used in this section, the term "bodily injury" shall include death resulting therefrom and the term "named insured" shall mean the person named as such in the declarations of the policy or contract and shall also include such person's spouse if a resident of the same household and the term "insured" shall mean the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person, except a bailee for hire, who uses, with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies or the personal representative of any of the above[.]

This precise statute was applied to a "family use exclusion" included in an insurance policy purchased by the plaintiff's husband in the case of *Thomas v. Nationwide Mut. Ins. Co.*, 188 W.Va. 640, 425 S.E.2d 595 (1992). The facts of *Thomas* are similar to the facts in the case now before us. In *Thomas*, Deborah Thomas was riding with her husband when he went off the road and struck a utility pole at a high rate of speed. Ms. Thomas sustained multiple fractures to her hips and legs which resulted in permanent impairment. The Thomases owned two vehicles which were insured under a single insurance policy. The vehicles carried liability and UIM limits of $100,000/$300,000 each. The insurance company paid the full $100,000 liability coverage but denied UIM coverage. Ms. Thomas filed a declaratory judgment action in circuit court to determine the rights and obligations of the parties. The circuit court certified questions to this Court.

The primary question addressed by the *Thomas* Court reads as follows:

> 3. Whether in the instant case the following definitional exclusion (known as the Family Use Exclusion) is a valid exclusion in light of the current law and public policy of the State of West Virginia?
>
> '2. We will not consider as an underinsured motor vehicle: (e) any vehicle owned by or furnished for the regular use of you or a relative.'

Id., 188 W.Va. at 642, 425 S.E.2d at 597. After discussing applicable case law, this Court reasoned that:

> Because recovery by a plaintiff of underinsured motorist benefits is dependent on the existence of two policies, the tortfeasor's and the plaintiff insured's, when a tortfeasor is underinsured, the plaintiff insured normally recovers third-party liability benefits from the tortfeasor's insurance coverage and supplements this recovery, if necessary, with underinsured motorist benefits through his or her own insurance. A family use exclusion, which excludes from the definition of "underinsured motor vehicle" any vehicle owned by or furnished for the regular use of the insured or a relative, or in like terms, has the purpose of preventing underinsured coverage from being converted into additional liability coverage, because when the exclusion is applied, it is the liability coverage that has been paid for by the insured, and not underinsured coverage. Therefore, such an exclusion would not violate the public policy of full compensation of an insured.

Id., 188 W.Va. at 645, 425 S.E.2d at 600. The holding expressed in Syllabus Point 2 of *Thomas* is dispositive of the issue presently before us:

> When an insurer issues an automobile insurance policy which provides both liability and underinsured motorists coverage, but which policy contains what is commonly referred to as a "family use exclusion" for the underinsured motorist coverage, and when, in a single car accident, the passenger/wife receives payments under the liability coverage for the negligence

> of the driver/husband, such exclusion is valid and not against the public policy of this state. That exclusion, which excludes from the definition of "underinsured motor vehicle" any automobile owned by or furnished for the regular use of the insured or a relative, has the purpose of preventing underinsured coverage from being converted into additional liability coverage.

We reiterate that the purpose of optional UIM coverage "is to enable the insured to protect himself [or herself], if he [or she] chooses to do so, against losses occasioned by the negligence of *other drivers* who are underinsured." *Deel*, 181 W.Va. at 463, 383 S.E.2d at 95. (Emphasis added). "Other drivers" necessarily infers the drivers of vehicles other than the vehicle owned and operated by the insured.

Mr. Cantrell's insurer promptly paid the appellant the liability limits available under the insurance policy. We reject the appellant's public policy argument that underinsurance benefits should be stacked on liability coverage.

For the foregoing reasons, the judgment of the Circuit Court of Mingo County is affirmed.

Affirmed.