No. 30850 *Sheila Cantrell v. Joseph Cantrell, State Farm Mutual Automobile Insurance Company, and Jack D. Brewster*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, C.J., dissenting:

I dissent, because I agree with the appellant's argument: the policy language at issue in this case (and in many of the precedents relied upon by the majority) is contrary to our automobile insurance statutes and therefore unenforceable.

Insurance cases should begin with a word-by-word comparison of the language in the insurance policy with the language of our automobile insurance statutes. As we held in *Adkins v. Meador*, 201 W.Va. 148, 153, 494 S.E.2d 915, 920 (1997), "In construing any insurance policy, it is appropriate to begin by considering whether the policy language is in accord with West Virginia law. The terms of the policy should be construed in light of the language, purpose and intent of the applicable statute." Provisions in an insurance policy that are more restrictive than statutory requirements are void and ineffective as against public policy. *See* Syllabus Point 2, *Universal Underwriters Ins. Co. v. Taylor*, 185 W.Va. 606, 408 S.E.2d 358 (1991); Syllabus Point 1, *Bell v. State Farm Mut. Auto. Ins. Co.*, 157 W.Va. 623, 207 S.E.2d 147 (1974); Syllabus Point 2, *Johnson v. Continental Casualty Co.*, 157 W.Va. 572, 201 S.E.2d 292 (1973).

When the language of an insurance policy is contrary to statute and therefore void, the policy should be construed to contain the coverage required by West Virginia law. *W.Va. Code*, 33-6-17 [1957] mandates that:

> Any insurance policy, rider, or endorsement hereafter issued and otherwise valid which contains any condition or provision not in compliance with the requirements of this chapter, shall not be thereby rendered invalid but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider, or endorsement been in full compliance with this chapter.

To understand why the State Farm policy in this case is contrary to our insurance statutes, and therefore void, requires an understanding of the facts. The facts are very simple: State Farm issued an insurance policy on a car that contained two kinds of coverage: liability insurance, and insurance against underinsured motorists. *The owners of the car paid separate premiums for both kinds of insurance.*

The plaintiff was a passenger in the car. The defendant driver of the car was negligent and drove the car off the road. Put another way, the driver of the car is a tortfeasor who breached his duty of care to his passenger, thereby causing her bodily injury.

Through the operation of our common law of torts, we can say that *liability* has been imposed upon the driver for his passenger's bodily injuries. West Virginia law requires that every car carry *liability* insurance that insures "the person named therein and any other person . . . using such vehicle . . . against loss from the *liability imposed by law for damages* arising out of the ownership, operation, maintenance or use of such vehicle[.]" *W.Va. Code*, 17D-4-12 [1991] (emphasis added). This requirement is mirrored in another statute, which

states that "[n]o policy or contract of bodily injury liability insurance . . . covering *liability* arising from the ownership, maintenance or use of any motor vehicle, shall be issued or delivered . . . unless it shall contain a provision insuring the named insured and any other person . . . against liability for death or bodily injury sustained . . . as a result of negligence in the operation or use of such vehicle." *W.Va. Code*, 33-6-31(a) [1998] (emphasis added).

In this case, there was in effect a State Farm liability insurance policy that insured the driver, or any other person using the vehicle, "against loss from the liability imposed by law for damages arising out of the ownership, operation, maintenance or use of such vehicle[.]" Under this liability portion of the State Farm policy, State Farm paid the passenger of the car the full limits of the liability policy.

The passenger of the car did not, however, receive her full damages, because the driver of the car was "underinsured." To protect the citizens of West Virginia from drivers who buy insufficient amounts of liability insurance, the Legislature decreed that in every motor vehicle policy that is sold in West Virginia, the insurance company must "provide an option" for the "insured" to buy coverage that will "pay the insured all sums [up to the limits of underinsured motorist coverage purchased] which he shall legally be entitled to recover as damages from the owner or operator of an . . . underinsured motor vehicle . . . without setoff against the insured's policy *or any other policy*." *W.Va. Code*, 33-6-31(b) (emphasis added). In sum, to recover benefits under this type of insurance coverage, the "insured" must prove that he or she is legally entitled to recover damages from a tortfeasor who doesn't have enough coverage to fully indemnify the insured's losses.

The statute defines an "insured" to mean the person named on the declarations page of the policy; if living in the same household, the spouse and relatives of the person named on the declarations page; and any other person who "uses" the vehicle. *W.Va. Code*, 33-6-31(c).

The statute plainly mandates that coverage against a driver or operator of an underinsured motor vehicle protects the person named on the declarations page of the policy and their spouse and their relatives, against bodily injuries caused by the underinsured driver, regardless of where they are when the injury occurs. There is no spatial or temporal requirement that the insured be riding in the insured car for coverage to apply. As one court stated, underinsured motorist coverage

> . . . is portable: The insured and family members are covered not only when occupying the covered vehicle, but also when in another automobile, and when on foot, on a bicycle or even sitting on a porch. . . .
>
> The status of the named insured and his relatives as persons insured against negligent uninsured motorists is not altered by there being other family vehicles having no uninsured motorist coverage. They acquire their insured status when coverage is purchased for any household vehicle. Thereafter, they are insured no matter where they are injured. They are insured when injured in an owned vehicle named in the policy, in an owned vehicle not named in the policy, in an unowned vehicle, on a motorcycle, on a bicycle, whether afoot or on horseback or even on a pogo stick.

Bradley v. Mid-Century Ins. Co., 409 Mich. 1, 24-38, 294 N.W.2d 141, 145-152 (1980). *See also*, 1 Alan I. Widiss, *Uninsured and Underinsured Motorist Insurance* § 4.2, at 60-61 (2d ed. 1992) ("Persons who are either named insureds or family members residing with a named

insured . . . are afforded relatively comprehensive protection by the provisions used in most uninsured motorist insurance coverages." As insureds they "are protected when they are operating or are passengers in a motor vehicle, as well as when they are engaged in any other activity such as walking, riding a bicycle, driving a hay wagon, or even sitting on a front porch.")

In this case, State Farm admits that it sold underinsured motorist coverage to the plaintiff-passenger. West Virginia law mandates that the coverage is supposed to follow her wherever she might be, whether walking down the road, riding a bicycle, driving a hay wagon, riding on horseback, bouncing on a pogo stick, or sitting on a front porch. *W.Va. Code*, 33-6-31(b) and (c) make no exceptions.

State Farm, however, ignored the statute and went ahead and made an exception to the requirements of *W.Va. Code*, 33-6-31(b) and (c), and squeezed an exclusion in its policy that denied the plaintiff-passenger any protection if the underinsured motorist happened to be her "spouse or any relative" or the vehicle that was being driven was "insured under the liability coverage of this policy."

Furthermore, *W.Va. Code*, 33-6-31(b) defines an "underinsured motor vehicle" as "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." Remarkably, the Legislature repeats the

statement that "[n]o sums payable as a result of underinsured motorists' coverage shall be reduced by payments made under the insured's policy or any other policy."

The State Farm policy limits this definition of underinsured motor vehicle to exclude such vehicles as those insured by the liability portion of the same policy, or vehicles routinely used by the family. Again, State Farm ignored the statute, and gives less coverage than what the Legislature mandated when it passed the statute. And again, it ignored the mandate that is found *twice* in *W.Va. Code*, 33-6-31(b) that underinsured motorist coverage cannot "be reduced by payments made under the insured's policy or any other policy."

To summarize, first, the exceptions contained in the State Farm policy are found nowhere in the *West Virginia Code*. If the Legislature wanted insurance consumers to be able to buy protection against underinsured motorists that had more holes than Swiss cheese, it would have said so. It didn't, and the law mandates comprehensive coverage.

Second, the Legislature mandates that underinsured motorist coverage pay the "insured" his or her damages "without setoff against the insured's policy or any other policy." State Farm's policy language violates this statutory provision, because it essentially offsets the insured's underinsured motorist coverage by any amounts recovered under another policy.

Third, State Farm argued – and the majority opinion appears to have bought it – that the plaintiff-passenger was trying to convert "relatively inexpensive underinsured coverage to liability coverage." In other words, the plaintiff-passenger was trying to get a "double recovery" under the policy. This is just wrong. Two separate premiums were paid

for these two coverages, and the coverages protect two different people, regardless of the amount the insurance company charged for a premium. The plaintiff-passenger bought underinsured motorist coverage to protect *herself* against the liability of a motorist with too little insurance. The tortfeasor bought liability insurance coverage to protect *himself* should he ever become liable for bodily injury damages to someone else. Both parties should be allowed to get that for which they paid.

The plaintiff-passenger in this case paid for protection against bodily injuries that might be caused by an underinsured driver. As fate would have it, that underinsured driver was her husband. Our automobile insurance laws mandate that underinsured motorist protection follow the plaintiff-passenger wherever she goes, but State Farm's exclusion is blatantly contrary to that statutory mandate.

State Farm's policy language is contrary to the statute, and denies the plaintiff that for which she bargained and paid. I therefore respectfully dissent.