

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No: 34862

GUY R. CUNNINGHAM and
BRIDGETT L. CUNNINGHAM, his wife,

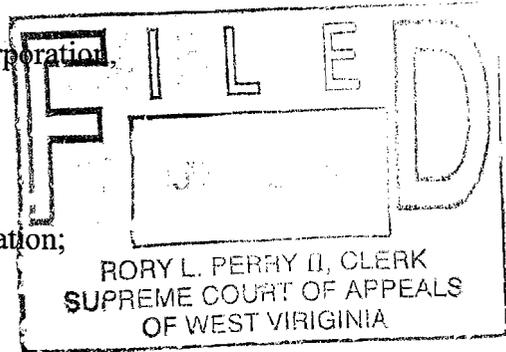
Plaintiffs,

v.

(Civil Action No. 07-C-51
Circuit Court of Boone County)

WALTER LEE HILL, an individual;
ERIE INSURANCE PROPERTY AND
CASUALTY COMPANY, a Pennsylvania corporation;
B. MICHAEL BENTLEY, an individual;
ENCOMPASS INSURANCE COMPANY
OF AMERICA, an Illinois corporation;
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, an Illinois corporation;
and WILLIAM WILSON, an individual,

Defendants.



AMICUS BRIEF OF WEST VIRGINIA ASSOCIATION
FOR JUSTICE UPON CERTIFIED QUESTION

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INTRODUCTION

This dispute does not involve policy provisions which seek to block duplicative recovery, i.e. twice recovering for the same loss, by an insured. This dispute does not involve an exclusion protecting an insurer from a risk it did not seek to take, for instance, by virtue of “an owned but not insured vehicle.” Rather, this dispute involves a risk of loss that was intentionally covered in return for a premium set by the insurer, a loss that was then realized, and the attempt by insurers to reduce the amount of coverage available due to the existence of “other insurance”, regardless of the extent of the insureds’ damages.¹

Resolving this matter is best served by first identifying, more clearly than the defendants have done, the material elements of the dispute. Upon this, it can be realized that much, if not all, of the issues have already been resolved by prior decisions of this Court. The following facts are important to the outcome of this matter:

(A) State Farm Mutual Automobile Insurance Company (hereinafter “State Farm”) and Erie Insurance Company (hereinafter “Erie”) each sold Mr. and Mrs. Cunningham an insurance policy which included underinsured motorist bodily injury coverage. Erie and State Farm agree that the policies provide coverage for damages arising from the crash which underlies this action.

(B) Neither State Farm nor Erie knew, or perhaps more importantly, neither sought to learn, whether plaintiffs purchased underinsured motorist coverage from any other carrier

¹While your respectful Amicus recognizes that the trial court’s ruling on coverage relied in part upon a finding of ambiguity in certain policy language, and while your Amicus contends that the trial court was right in that regard, because the trial court’s ruling should be upheld regardless of the inartful wording of the policies, the issue of ambiguity is not the focus of this brief.

including each other.

(C) Neither State Farm nor Erie gave a discount to Mr. and Mrs. Cunningham in return for a reduction in the underinsured motorist coverages limit due to the presence of coverage from a different carrier.

(D) Each defendant is attempting to reduce the amount of underinsurance coverage available due to the presence of coverage provided by another insurer.

(E) Under defendants' theory, despite the fact that plaintiffs purchased a combined total of \$150,000 in underinsurance, plaintiffs may obtain only 2/3 of that amount, i.e., \$100,000, even though \$100,000² is not sufficient to fully compensate the plaintiffs for the damages arising from the wreck.

**SALIENT CONCEPTS PERTAINING TO WEST VIRGINIA'S
UNINSURANCE/UNDERINSURANCE STATUTE**

As recognized by this Court in its various travels into the realm of uninsurance and underinsurance, W.Va. Code §33-6-31 "is remedial in nature, and therefore, must be construed liberally in order to effect its purpose." Syllabus Pt.7, Perkins v. Doe, 177 W.Va. 84, 350 S.E.2d 711 (1986); Mitchell v. Broadnax, 208 W.Va. 36, 537 S.E.2d 882, 892 (2000). As further observed in State Auto. Mut. Ins. Co. v. Youler,

[t]he legislature has articulated a public policy of full indemnification or compensation underlying both uninsured or underinsured motorist coverage in the State of West Virginia. That is, the preeminent public policy of this state in uninsured or underinsured motorist cases is that the injured person be *fully compensated* for his or her *damages* not compensated by a negligent tortfeasor, up to the limits of the uninsured or underinsured motorist coverage.

²It seems clear that \$150,000 in underinsurance would not serve to fully compensate plaintiffs either.

183 W.Va. 556, 564, 396 S.E.2d 737, 745 (1990)(emphasis in original).

Underlying public policy is, of course, important whenever interpreting a statute. The Court is to apply and not construe the enactment's plain language. Mitchell, 208 W.Va. at 46, 537 S.E.2d at 892. Moreover, as stated in Joslin v. Mitchell 213 W.Va. 771, 777, 584 S.E.2d 913, 919 (2003):

In interpreting any statute, this Court looks to the intent of the Legislature. "It is a cardinal rule of construction governing the interpretation of statutes that the purpose for which a statute has been enacted may be resorted to by the courts in ascertaining the legislative intent." Syllabus Point 4, *State ex rel. Bibb v. Chambers*, 138 W.Va. 701, 77 S.E.2d 297 (1953). Whenever we interpret a statute, it "should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith." Syllabus Point 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908).

These rules of statutory interpretation are vitally important in this case given the last sentence of §33-6-31(b), which states:

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.

Inasmuch as the public policy underlying the underinsurance statute fosters full compensation to an insured, the reason for this provision can be readily understood, and it could not be stated any more plainly. Regardless how it may be attempted by the policy, an underinsurer simply can not reduce the monetary extent of its coverage based upon coverage afforded by any other insurance policy. Of course, this is exactly what both Erie and State Farm are attempting to do.

Defendants attempt to evade the force of this provision by suggesting that the Supreme

Court has limited this proscription to scenarios involving underinsurance vis-à-vis the tortfeasor's liability insurance. (See, State Farm's *Brief* at pages 22, 23) However, State Farm and Erie fail to disclose that this same provision has been the object of this Court's attention in the setting of two uninsurers. In Morrison v. Haynes, plaintiff's decedent was killed while occupying the tortfeasor's vehicle. 192 W.Va. 303, 452 S.E.2d 394 (1994). Multiple uninsurance policies issued by different companies applied to the same loss. Nationwide Insurance Company had \$100,000 in uninsured motorist coverage upon some vehicles owned by plaintiff's decedent and his family and Erie Insurance Company carried \$200,000 in uninsurance coverage on other vehicles owned by the decedent's family. Before trial of the underlying issues of liability and damages, Nationwide paid its limits but Erie did not. A verdict was returned well beyond the aggregated amount of coverage and on appeal the Supreme Court addressed various issues respecting Erie's overall exposure. An issue addressed was the significance of the "no sums payable" provision of §33-6-31(b) in determining Erie's financial liability given the fact that Nationwide had already paid plaintiff its full amount of coverage. There was no need for the Court to discuss the language of the Erie policy provisions to determine that the statute, standing alone, disallows an insurer or underinsurer to reduce the amount of coverage available because coverage is provided by another insurer or underinsurer.

In situations involving uninsured motorist coverage, ordinarily there is no automobile liability insurance coverage carried by the tortfeasor and, therefore, an offset question does not arise from liability insurance payments. However, in this case, the decedent had the benefit of two uninsured motorist policies issued by Nationwide on other vehicles owned by his parents. Under Youler, these payments cannot be used to offset the uninsured policy limits of Erie so long as the plaintiff's verdict exceeded these payments and the limits of Erie's uninsured motorist coverage. Thus, we conclude under W.Va. Code 33-6-31(b), an offset is not available to an uninsured or underinsured motorist carrier where the plaintiff's

jury verdict exceeds both the amount he has received from other insurance arising from the tortfeasor's negligence and the amount available under the plaintiff's own uninsured or underinsured motorist carrier.

192 W.Va. at 309, 452 S.E.2d. at 400.

Morrison is on point here. Damages exceed the combined total of the stated limits of Erie's and State Farm's policies. Under these circumstances, §33-6-31(b) blocks the reduction of both insurers' coverage amounts, regardless of how the insurer tries to write the policy to accomplish the reduction.

Both insurers torture the statute by claiming they are not really seeking a reduction of their coverage amount; rather, they contend that their reduced amount is actually the "sum payable", which they say is not thereafter reduced. This nonsensical construction turns the statute on its head. If the Erie policy did not exist, State Farm would concededly owe \$50,000 in coverage. If the State Farm policy did not exist, Erie would owe \$100,000. Defendants are attempting to reduce each insurers' sum payable because of the existence of another insurer - each other. To suggest that accomplishing their anti-statutory desire by artful insurance policy interpretation, by merely denominating the reduction a "coordination of benefits", only serves to reveal the weakness of the insurers' respective positions overall.

Thus, all else aside, §33-6-31(b) precludes the pro rata reductions which have been attempted by the defendants.

**WEST VIRGINIA CASE LAW RELATING TO
MULTIPLE UNDERINSURANCE COVERAGES**

The trial court properly attached substantial significance to the absence of a multi-vehicle discount afforded by either underinsurer to the plaintiffs. Setting aside the implications of the “no sums payable” provision, the absence of the discount proves fatal to the defendants in attempting to evade paying the full amount of their respective policy limits.

Youler, supra, serves as the starting point for the Supreme Court’s substantial line of cases addressing when, and the circumstances under which, coverages, both within a single policy and spanning multiple policies, may be combined or limited respecting a loss. 183 W.Va. 556, 396 S.E.2d 737 (1990). Youler recognized that there are various policy mechanisms which purportedly serve to reduce an insurer’s exposure, referencing what is commonly known as “anti-stacking” language and “setoff” or “reduction” language (used synonymously). 183 W.Va. at 559, 396 S.E.2d at 740. Regardless of the various methods by which an insurer may attempt to relieve itself of coverage, the law of Youler was that when an insured is covered simultaneously by two or more uninsured or underinsured motorist policy endorsements, the insured may recover under all of the endorsements up to the total aggregated or stacked limits of the same, conditioned upon sufficiency of damages. *See, Youler*, Syllabus Pt. 3.

Of course, this was just the beginning on these issues and since then there have been various cases which serve to clarify, if not limit, the law of Youler. This history is chronicled in the 2003 decision Joslin v. Mitchell, 213 W.Va. 771, 584 S.E.2d 913. In discussing the significance of a multi-vehicle discount, Joslin reflected on the ruling of Russell v. State Auto. Mut. Ins. Co., 188 W.Va. 81, 422 S.E.2d 803 (1992) where it was held that at Syllabus Point 5:

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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.

Joslin, 213 W.Va. at 776, 584 S.E.2d at 918.

Pointing out that Russell “turned on” the existence of a multi-vehicle discount, Joslin then historically observed,

Insurance carriers interpreted” the court’s decision in Russell as permitting the inclusion of anti-stacking language in insurance policies, so long as the insured has received a multi-car discount in return.

213 W.Va. at 777, 584 S.E.2d at 919.

Russell was cited, quoted and reaffirmed in Dairyland Ins. Co. v. Fox, 209 W.Va. 598, 550 S.E.2d 388 (2001). Fox was a death case. The insurer, State Farm, issued two separate policies covering two separate vehicles. Both policies contained anti-stacking language. Furthermore, the declaration page for both policies indicated that a multi-car discount had been given. Even though the case involved the issuance of multiple policies, the court found Russell to be controlling. However, the antistacking language was found to be enforceable only because the decedent had received a multi-car discount and thus had received the benefit of his bargain.

Russell’s discussion of the significance of the multi-vehicle discount lends much support to the significance placed on the absent discount by the trial court.

This multi-car discount of is of particular import since it signifies that the respondent was receiving a reduced rate on his automobile insurance in return for taking out only one policy instead of two. Meanwhile the insurer was assuming an increased risk of injury which could occur while the insured was occupying the second vehicle as consideration for the second premium. The insured was

therefore receiving the benefit of that which he bargained for and should not receive more. Had this multi-car discount not been given by the insurer and had the insured paid a full premium for both vehicles, a different result may have been reached by this court.

188 W.Va. at 85, 422 S.E.2d at 807.

The prerequisite necessity of the presence of a multicar discount to allow for the enforceability of antistacking language has been recognized in each and every case decided by this court since Russell. See Jenkins v. State Farm Mut. Auto. Ins Co., 219 W.Va. 190, 632 S.E.2d 346 (2006); Joslin v. Mitchell, 213 W.Va. 771, 584 S.E.2d 913 (2003); Findley v. State Farm Mut. Auto. Ins. Co., 213 W.Va. 80, 576 S.E.2d 807 (2002); Dairyland Ins. Co. v. Fox, 209 W.Va. 598, 550 S.E.2d 388 (2001); Iafolla v. Trent, 207 W.Va. 711, 536 S.E.2d 135 (2000); Cupano v. West Virginia Ins. Guar. Ass'n, 207 W.Va. 703, 536 S.E.2d 127 (2000); Mitchell v. Federal Kemper Ins. Co., 204 W.Va. 543, 514 S.E.2d 393 (1998); Linkinoggor v. Nationwide Mut. Ins. Co., 200 W.Va. 265, 489 S.E.2d 19 (1997); Imgrund v. Yarborough, 199 W.Va. 187, 483 S.E.2d 533 (1997); Payne v. Weston, 195 W.Va. 502, 466 S.E.2d 161 (1995); Tiller v. Blevins, 194 W.Va. 338, 460 S.E.2d 473 (1995); Marvin v. Lavender, 194 W.Va. 319, 460 S.E.2d 454 (1995); Miller v. Lemon, 194 W.Va. 129, 459 S.E.2d 406 (1995); Adkins v. Sperry, 190 W.Va. 120, 437 S.E.2d 284 (1993); Arndt v. Burdette, 189 W.Va. 722, 434 S.E.2d 394 (1993); Keiper v. State Farm Mut. Auto. Ins. Co., 189 W.Va. 179, 429 S.E.2d 66 (1993); Arbogast v. Nationwide Mut. Co., 189 W.Va. 27, 427 S.E.2d 461 (1993); Thomas v. Nationwide Mut. Ins. Co., 188 W.Va. 640, 425 S.E.2d 595 (1992).

In this case State Farm and Erie³ are attempting to eliminate the requirement of a multi-car

³ While Erie did provide a multi-car discount for three cars listed on the policy it issued, the plaintiffs do not and have not contended that they are entitled to stack the \$100,000 in coverage on each of those three vehicles. The

discount to enforce antistacking language by and between different automobile insurers. The position being advanced by State Farm and Erie, if adopted, would essentially eviscerate and abrogate all of the law that has been developed since Russell was decided in 1992, and would further render meaningless much of the language of our underinsured motorist coverage statute. In addition to the “sums payable” language discussed supra, the defendants’ position, if adopted, would render meaningless the “bargained for” language of W.Va. Code §33-6-31(b)

This court recognized in Joslin that an insurer could unilaterally give an insured a multi-car discount and that the discount would be considered bargained for so as to allow for the enforcement of antistacking language. Joslin, 213W.Va. at 920, 584 S.E.2d at 778. Thus, insureds were left with the choice of purchasing policies from different carriers and not being forced to accept a multi-car discount so as to allow them to buy full protection for their families. State Farm and Erie’s position in this case would eliminate this option. Without such an option, policyholders could never “bargain for” a multi-car discount, because they could never exercise the option of purchasing coverage from different carriers so as to allow for the stacking coverage.⁴

Joslin also recognized that in 1995 the Legislature amended §33-6-31 to statutorily put an insurer which provides uninsurance/underinsurance through multiple policies on the same footing as an insurer which uses a single policy covering multiple vehicles, so that both types of insurers

presence of a multicar discount for those three vehicles does, as per the current state of the law, prevent such a recovery.

⁴ In fact, State Farm specifically indicated in its briefs filed with this court in Joslin that “Insureds wishing to obtain ‘stackable’ coverage had the option of seeking such coverage elsewhere.” See page 17 of State Farm’s Petition for Appeal and page 20 of State Farm’s opening brief filed in Joslin.

can prevent stacking of underinsured coverages on multiple policies issued by the same insurer, conditioned expressly on the provision of a bargained for multi-vehicle discount. Id.

We concluded in *Dairyland v. Fox*, 209 W.Va. 598, 550 S.E.2d 388 (2001) (*per curiam*) that the amendment 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 insureds covering different vehicles. The 1995 amendment to *W.Va. Code*, 33-6-31(b) premises the enforceability of anti-stacking language on the notion that the insurance company has given the insured a “bargained for discount for multiple motor vehicles[.]”

Id.

State Farm and Erie’s position in this case is directly contrary to this legislation and the court’s application of the same in Joslin. That is, if the plaintiffs in this case had two policies issued by the same carrier and no multi-car discount was provided, unquestionably they would be permitted to stack their coverage. However, according to Erie and State Farm, because the plaintiffs purchased coverage from different carriers and received no multi-car discount, they are not permitted to stack their coverages.

Upon this foundation, it is determinable that separate insurance policies issued by different insurers covering the same loss can be combined to the full amount of the stated policy limits absent multi-vehicle discounts based on the co-existence of those policies. Both Erie and State Farm accepted a full premium to cover the very losses that were occasioned by the underlying crash. Each agreed to assume the risks associated with the crash up to the full amount of their coverage unknowing, and uncaring when setting premiums, that insurance for the same loss existed through a policy sold by the other. It can not be said that either Erie or State Farm is being taken advantage of by imposing upon them the obligation to pay the stated limits upon

which a premium was gauged in covering a loss that was specifically contemplated by the policy.

DEFENDANTS' INSURANCE COMMISSIONER CONTENTION

Defendants suggest that Insurance Commissioner approval has the force of law in validating an insurance policy provision or term. While not expressly contending, State Farm implies that Insurance Commissioner approval conclusively means that the language complies with West Virginia law. (See, State Farm's *Brief* at page 14). Supposedly, this power emanates solely from W.Va. Code §33-6-9 which charges the Insurance Commissioner with disapproving policies which violate insurance laws. However, the fact that the Insurance Commissioner is supposed to police policies does not somehow render a challengeable term unchallengeable in courts of law. To suggest that the contraband found in your possession is legal simply because the guard let you through the door with it would not get a defendant far in court.

The same argument advanced by defendants was apparently advanced to this Honorable Court in Mitchell v. Broadnax, 208 W.Va. 36, 537 S.E.2d 882 (2000). There, instead of contemplating the weight which should be afforded the approval of the Insurance Commissioner, the Court admonished the Commissioner to do a better job. If anything, this case calls for an explicit rejection of this repeated argument by insurers that Insurance Commissioner approval equates with legal validation.

In fact, any argument based upon the Commissioner's power to approve insurance policies is doomed to fail. Every insurance policy issued in the state of West Virginia must be approved by the Commissioner. If the defendants were right, this court would have no power to independently review policy language because the Commissioner's approval would be final and conclusive. Dozens of cases from this court finding policy provisions to be in violation of the law

and striking them down would literally be wiped from the books! Obviously, then, as Mitchell suggests, it is ultimately this court's responsibility to determine whether the provisions of a particular insurance policy comply with the law.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

Service of the foregoing **AMICUS BRIEF OF WEST VIRGINIA ASSOCIATION FOR JUSTICE UPON CERTIFIED QUESTION** was had upon the defendants by mailing a true copy thereof, by United States Mail, postage-prepaid, to their attorneys at their last-known addresses shown below, this **1st day of July, 2009** as follows:

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