

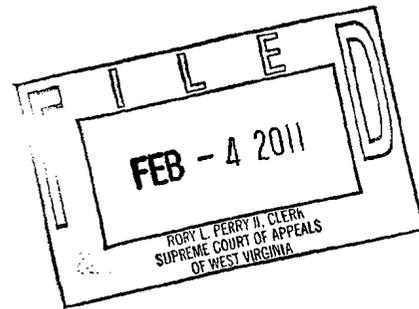
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35698

MICHAEL WITT

Appellant/Plaintiff-Below

vs.



STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, an Illinois corporation
and ST. PAUL FIRE AND MARINE
INSURANCE COMPANY, a Minnesota corporation

Appellees/ Defendants-Below

BRIEF OF APPELLEE, STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY

Charles S. Piccirillo (WVSB #2902)
Sabrena Olive Gillis (WVSB #6942)
SHAFFER & SHAFFER, PLLC
2116 Kanawha Boulevard, East
P.O. Box 3973
Charleston, WV 25333-3973
Counsel for Appellee
State Farm Mutual
Automobile Insurance Company

TABLE OF CONTENTS

KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL..... 1
STATEMENT OF THE FACTS.....1
STATEMENT TO MEET THE ASSIGNED ERROR.....4
POINTS AND AUTHORITIES RELIED UPON.....5
DISCUSSION OF THE LAW.....6
CONCLUSION.....14
CERTIFICATE OF
SERVICE.....15

TABLE OF AUTHORITIES

Cases

<i>Castle v. Williamson</i> , 453 S.E.2d 624, 630.....	5, 11
<i>Findley v. State Farm Mut. Automobile Ins. Co.</i> , 213 W.Va. 80, 576 S.E.2d 807 (2002).....	5, 10
<i>Jackson v. State Farm</i> , 215 W.Va. 634, 643, 600 S.E.2d 346, 355 (2004).....	4, 5, 12, 13
<i>Murray v. State Farm Fire and Casualty Company</i> , 203 W.Va. 477, 509 S.E.2d 1 (1998).....	5, 9, 10, 13
<i>Pacific Indemnity Company v. Linn</i> , 766 F.2d 754 (3d Cir. 1985).....	5, 9-10
<i>Prete v. Merchants Property Ins Co. of Indiana</i> , 159 W. Va. 508, 223 S.E.2d 441 (1976).....	5, 10, 13

I. KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

This matter is before the Court on an Appeal from an order of the Circuit Court of Kanawha County entered January 21, 2010, which granted Summary Judgment in favor of the Appellee/Defendant, State Farm Mutual Automobile Insurance Company, upon Appellant's claim for medical payments coverage ("MPC").

II. STATEMENT OF THE FACTS

This action arises from a June 11, 2003 automobile accident. Appellant, Michael Witt, was operating a 1999 GMC Sierra truck owned by his employer, the South Charleston Sanitary Board. Appellant was in the scope of his employment with the South Charleston Sanitary Board when, at the intersection of Kanawha Turnpike and Village Drive, the truck he was operating was rear-ended by a 1999 Chevy 1500 truck operated by Robert Sutton ("accident"). The Appellant, Mr. Witt, asserts he sustained various injuries from this accident for which he received treatment and incurred medical bills.

Appellant filed suit against Robert K. Sutton, State Farm Mutual Automobile Insurance Company ("State Farm") and St. Paul Fire and Marine Insurance Company. At the time of this accident, Appellant was the named insured under a State Farm policy bearing Policy No. 248 3887-B23-48F ("Witt policy") which insured his personal vehicle, a 2001 Chevrolet 1500 pickup. A certified copy of the policy, as well as the declarations sheet, is part of the record.

Originally, Appellant alleged State Farm owed him underinsured coverage as well as medical payment coverage under the policy. Appellant's Complaint also included an

allegation of bad faith or violation of the Unfair Trade Practices Act (“extra-contractual claim”). After the Complaint was filed, Appellant stipulated there was no underinsured coverage available for this loss under the policy. See entered Stipulation attached hereto as Exhibit 1. Appellant settled his claims with St. Paul Fire and Marine Insurance Company, the insurer for the South Charleston Sanitary Board.

Appellant maintained he was entitled to medical payment coverage under the State Farm policy, which covered his personal vehicle, for medical bills resulting from the accident. State Farm maintained that, because the vehicle Appellant was occupying at the time of the accident, was owned by Appellant’s employer, it was not a “non-owned car” as defined under the policy and, therefore, there is no MPC coverage available to Appellant for this loss.

Appellant’s claims for MPC benefits under the State Farm policy were brought before the Honorable James C. Stucky, Judge, Circuit Court of Kanawha County upon State Farm’s motion for summary judgment. The Court below granted State Farm’s Motion for Summary Judgment¹ and found *inter alia*:

6. The “non-owned car” definition in the State Farm policy has been upheld in a variety of factual scenarios throughout the United States as being clear, unambiguous and enforceable. *Bryan J Gartner, Alias v. State Farm Mutual Automobile Insurance Company*, 2000 RI. Super. LEXIS 105; *State Farm Mutual Automobile Insurance Company v. Leon LaRoque, and Monica Baker, a minor*

¹ The trial court entered an Agreed Order entered subsequent to the filing of the petition for appeal in this Court, making the trial court’s order of January 21, 2010, a final appealable order, staying the Appellant’s extra-contractual claims pending the outcome of Appellant’s attempt to appeal the trial court’s order granting State Farm summary judgment, and providing that if the Appellant’s appeal is unsuccessful the entirety of the Appellant’s extra-contractual claims asserted against State Farm are rendered moot and are dismissed. A copy of the Agreed Order is attached hereto as Exhibit 2.

child and Donna White Tail, individually and as parent and guardian of Monica Baker, a minor child, 486 N.W.2d 235; 1992 ND. LEXIS 147; *Kenon v. Liberty Mutual*, 398 F.2d 958 (8th Cir 1968); *Lewis v. State Farm*, 247 GaApp., 518, 544 S.E.2d, 212 (Ga. 2001); *City of Rainsville v. State Farm*, 716 So.2d. 710 (Ma 1998); *State Farm v. Ferster*, 2007 Pa. Dist. & Cnty. LEXIS 242; *Crult v. State Farm Fire & Casualty*, 225 A.D.2d 1071, 639 N.Y.S.2d 601 (1996); *State Farm v. Fultz*, 2007 U.S. Dist. LEXIS 71099 (US Dist.Ct. for the Northern District of W.Va.).

7. The State Farm policy language, particularly the non-owned car definition, does not violate West Virginia public policy as medical payment coverage is an optional and not a mandatory coverage. The Supreme Court of Appeals of West Virginia has held 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 motorist statutes.” *Dairyland Ins. Co. v. Fox*, 209 W. Va. 598, 550 S.E.2d 388 (2001 *per curiam*)(quoting Syl. pt. 3, *Deel v. Sweeney*, 181 W. Va. 460, 383 S.E.2d 92 (1989)). See also *Imgrund v. Yarborough*, 199 W. Va. 187, 438 S.E.2d 533 (1997). The Supreme Court of Appeals of West Virginia has held that exclusionary language in a policy, in the absence of legislative mandate, is valid and not contrary to the state’s public policy and that “in the absence of such legislative mandate, the parties are free to accept or reject the insurance contract and risks provided for therein. *Rich v. Allstate Insurance Company*, 445 S.E.2d 249 (1994).

11. The expert affidavit from Marshall Reavis attached to plaintiff's Response to State Farm's Motion for Summary Judgment must be stricken from the record as an "expert witness may not give his [or her] opinion on a question of domestic law [as opposed to foreign law] or on matters which involve questions of law, and an expert witness cannot instruct the Court with respect to the applicable law of the case, or infringe on the Judge's role to instruct the jury on the law. So an expert may not testify as to such questions of law as the interpretation of a statute . . . where case law or the meaning of terms in a statute . . . or the legality of conduct." *Jackson v. State Farm*, 215 W.Va. 634, 600 S.E.2d 346(2004).
12. The trial judge is the "sole source of the law and witnesses should not be allowed to testify on the status of the law." *Jackson v. State Farm*, 215 W.Va. 634, 600 S.E.2d 346.
14. The Court finds that the policy language contained in Mr. Witt's State Farm Policy is clear and unambiguous and should be given its plain and ordinary meaning.
15. The Court further finds that the City of South Charleston Sanitary Board vehicle operated by the Plaintiff does not meet the definition of a non-owned car under the policy and, therefore, there is no medical payment coverage available to the Plaintiff for this loss.

III. STATEMENT TO MEET THE ASSIGNED ERROR

The Circuit Court decided the insurance policy provisions at issue are valid, clear, unambiguous and are consistent with precedent. Appellant has offered no compelling

reason to depart from established law. Further, the trial court correctly disregarded Appellant's "expert witness" proffer upon the coverage issue before him, which was determined purely as a matter of law.

IV. POINTS AND AUTHORITIES RELIED UPON

1. The determination of the proper coverage of an insurance policy when the facts are not in dispute is a question of law. *Pacific Indemnity Company v. Linn*, 766 F.2d 754 (3d Cir. 1985), cited in *Murray v. State Farm Fire and Casualty Company*, 203 W.Va. 477, 509 S.E.2d 1 (1998).
2. Only where the court itself concludes that the language of a provision of an insurance policy is reasonably susceptible to two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning is it ambiguous. *Murray v. State Farm Fire and Casualty Company*, *supra*, citing Syl. Pt. 1, *Prete v. Merchants Property Ins Co. of Indiana*, 159 W. Va. 508, 223 S.E.2d 441 (1976).
3. 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. *See e.g., Castle v. Williamson*, 453 S.E.2d 624, 630.
4. As a general rule, an expert witness may not give his [or her] opinion on a question of domestic law [as opposed to foreign law] or on matters which involve questions of law, and an expert witness cannot instruct the court with respect to the applicable law of the case, or infringe on the judge's role to instruct the jury on the law. So an expert may not testify as to such questions of law as the interpretation of a statute ... or case law ... or the meaning of terms in a statute ... or the legality of conduct. *Jackson v. State Farm*, 215 W.Va. 634, 643, 600 S.E.2d 346, 355 (2004).
5. Exclusions within a policy are presumed to be valid and consistent with the premium charged if the policy language and rate have been approved by the state insurance commissioner. *See Findley v. State Farm Mut. Automobile. Ins. Co.*, 213 W. Va 80, 576 S.E.2d 807 (2002).

V. DISCUSSION OF THE LAW

1. **The Circuit Court correctly determined the State Farm policy language is clear and without ambiguity.**

The State Farm policy addresses MPC in SECTION II – MEDICAL PAYMENTS – COVERAGE C, of the policy at page 11, a copy of which is part of the record on appeal. The policy provides:

Persons for Whom Medical Expenses Are Payable

We will pay medical expenses for *bodily injury* sustained by:

1. a. the first *person* named in the declarations;
- b. his or her *spouse*; and
- c. their *relatives*.

These *persons* have to sustain the *bodily injury*:

- a. while they operate or *occupy* a vehicle covered under the liability section; or (Emphasis added)
- b. through being struck as a *pedestrian* by a motor vehicle or trailer.

A *pedestrian* means a *person* not an occupant of a motor vehicle or trailer.

Appellant is the first person named on the declarations page. Therefore, given that he was not a pedestrian at the time of the accident, he would be entitled to MPC, if he was operating or occupying a vehicle covered under the liability section of the policy.

The liability coverage portion of the policy provides:

LIABILITY COVERAGE

You have this coverage if “A” appears in the “Coverages” space on the declarations page. We will:

1. pay damages which an *insured* becomes legally liable to pay because of:
 - a. *bodily injury* to others, and
 - b. damage to or destruction of property including loss of its use,

caused by *accident* resulting from the ownership, maintenance or use of *your car*; and (Emphasis added)
2. defend any suit against an *insured* for such damages with attorneys hired and paid by us. We will not defend any suit after we have paid the applicable limit of our liability for the *accident* which is the basis of the lawsuit.

The liability provisions continue:

Coverage for the Use of Other Cars

The liability coverage extends to the use, by an *insured* of a *newly acquired car*, a *temporary substitute car* or a *non-owned car*. (Emphasis added)

Who Is an Insured

When we refer to *your car*, a *newly acquired car* or a *temporary substitute car, insured* means:

1. *you*;
2. *your spouse*;
3. the *relatives* of the first *person* named in the declarations;
4. any other *person* while using such a *car* if its use is with the permission of *you* or *your spouse*; and
5. any other *person* or organization liable for the use of such a *car* by one of the above *insureds*.

When we refer to a *non-owned car, insured* means:

1. the first *person* named in the declarations;
2. his or her *spouse*;
3. their *relatives*; and
4. any *person* or organization which does not own or hire the *car* but is liable for its use by one of the above *persons*.

Appellant was not driving or occupying his own personal car or “your car” as defined in the policy. For Appellant to qualify for MPC under the State Farm policy, the South Charleston Sanitary Board vehicle would have to qualify as a newly acquired car, temporary substitute car or a “**non-owned car.**”

The vehicle Appellant occupied clearly does not fall within the policy definitions of a “newly acquired car” or “temporary substitute car”. Appellant does not make any assertion that the South Charleston Sanitary Board vehicle he was occupying at the time of the accident would qualify under these provisions. The only issue presented is whether the South Charleston Sanitary Board truck can be considered a “non-owned car.”

The State Farm policy defines a “**non-owned car**” as follows:

Non-Owned Car - means a *car* not owned, registered or leased by:
(Emphasis added)

1. *you, your spouse*;
2. any *relative* unless at the time of the accident or *loss*:
 - a. the *car* currently is or has within the last 30 days been insured for liability coverage; and
 - b. The driver is an *insured* who does not own or lease the *car*;
3. Any other *person* residing in the same household

as *you, your spouse* or any *relative*; or

added) 4. an employer of *you, your spouse* or any *relative*. (Emphasis

Non-owned car does not include a:

1. rented *car* while it is used in connection with the *insured's* employment or business; or
2. *car* which has been operated or rented by or in the possession of an *insured* during any part of each of the last 21 or more consecutive days. If the *insured* is an *insured* under one or more other car policies issued by us, the 21 day limit is increased by an additional 21 days for each such additional policy."

A *non-owned car* must be a *car* in the lawful possession of the *person* operating it.

The Circuit Court correctly ruled medical payment coverage is not available to Appellant because the vehicle Appellant was occupying was not covered under the liability section of the policy as it was not a "non-owned car." It is undisputed the vehicle was owned by Appellant's employer, the South Charleston Sanitary Board. The Court was correct that it is not a "non-owned car" pursuant to paragraph 4 of the definition quoted above. The Circuit Court reasonably concluded the policy language is clear, unambiguous, valid and enforceable language under West Virginia law and, therefore, the State Farm policy provides no medical payment coverage for this accident. The Circuit Court relied upon well-established law that whether a contract or a provision thereof is ambiguous is a legal determination encompassed within a court's interpretation of the entire contract. Thus, determination of the proper coverage of an insurance policy when the facts are not in dispute is a question of law. See *Pacific Indemnity Company v. Linn*, 766 F.2d 754 (3d Cir. 1985), cited in *Murray v. State Farm Fire and Casualty*

Company, 203 W.Va. 477, 509 S.E.2d 1 (1998). Consequently, whether the parties to the contract in question differ as to its interpretation or are uncertain or differ in some way as to its meaning is irrelevant to a determination of whether the contract or any of its provisions are ambiguous or not. Only where the court itself concludes the language of a provision of an insurance policy is reasonably susceptible to two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning is it ambiguous. *Murray v. State Farm Fire and Casualty Company, supra*, citing Syl. Pt. 1, *Prete v. Merchants Property Ins Co. of Indiana*, 159 W. Va. 508, 223 S.E.2d 441 (1976).

In addition, exclusions within a policy are presumed to be valid and consistent with the premium charged if the policy language and rate have been approved by the state insurance commissioner. See *Findley v. State Farm Mut. Automobile. Ins. Co.*, 213 W. Va 80, 576 S.E.2d 807 (2002). In this case there is no ambiguity as to the pertinent policy language and facts. The Court properly ruled as a matter of law there is no medical payment coverage available to Appellant under the State Farm policy and the undisputed facts of this case.

In interpreting an insurance policy, the policy language is to be given its plain, ordinary meaning, *Murray v. State Farm Fire and Casualty Company, supra*, quoting Syl. Pt.1, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W. Va. 430, 345 S.E.2d 33 (1986). Where the provisions of an insurance policy contract are clear and unambiguous, they are not subject to judicial construction or interpretation, but full effect will be given to their plain meaning. *Murray v. State Farm Fire and Casualty Company, supra*. 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. *See e.g., Castle v. Williamson*, 453 S.E.2d 624, 630. The policy language is clear. The Circuit Court gave the language its plain and ordinary meaning as intended by the parties. The Court correctly found there is no State Farm medical payment coverage for Appellant under the undisputed facts of this case.

Still, Appellant attempts to make the simple complex. Appellant attempts to create confusion and ambiguity where there is none by focusing on an inapplicable policy provision. *See* Brief of Appellant at pp.12-13. Appellant points to a provision of his policy excluding MPC for a vehicle otherwise qualifying as a non-owned car, if it is used in a business or job, unless the person seeking MPC is the named insured, a spouse, or relative and they are occupying a private passenger car. The MPC exclusion provides:

What Is Not Covered

THERE IS NO COVERAGE

1. WHILE A *NON-OWNED CAR* IS USED:
 - a. BY ANY *PERSON* EMPLOYED OR ENGAGED IN ANY WAY IN A CAR *BUSINESS*; OR
 - b. IN ANY OTHER BUSINESS OR JOB. This does not apply when the first *person* named in the declarations, his or her *spouse* or any *relative* is operating or *occupying a private passenger car*.

The trial court correctly concluded that, in determining whether there was MPC available to Appellant under his policy, it did not need to reach this exclusion because the South Charleston Sanitary Board vehicle which Appellant was occupying was not a “non-owned car” as defined in the policy. Moreover, even if the exclusion was applicable to the facts and circumstances of the case, MPC coverage would not be extended to the Appellant for this loss. This provision excludes MPC coverage for a vehicle that

otherwise qualifies as a non-owned vehicle if it is used in a business or job, unless a person seeking such coverage is a named insured or his or her spouse, occupying a private passenger car. The South Charleston Sanitary Board vehicle does not meet the definition of a “non-owned car.” Therefore, this exclusion is not applicable. Further, while it was occupied by a named insured, the Appellant, it was not a private passenger vehicle. Simply put, the Appellant is attempting to create an ambiguity where none exists.

2. The Circuit Court properly struck the expert affidavit.

The Circuit Court was correct to strike the affidavit of the “insurance expert.” This affidavit infringes on the Court’s role as arbiter of the law. The issue in this case, the interpretation of the insurance contract, is solely a question of law and an expert may not give an opinion on a question of law. This general rule relied upon by the Circuit Court is cited and upheld in *Jackson v. State Farm*, 215 W.Va. 634, 600 S.E.2d 346 (2004). The Court in *Jackson*, which involved unfair claim settlement practice allegations, held as follows:

We agree with State Farm that the circuit court abused its discretion in permitting Mr. Diaz to testify as an expert on the application of the *Unfair Claim Settlement Practices Act*, what constitutes a general business practice under the Act, and actual malice.

As a general rule, an expert witness may not give his [or her] opinion on a question of domestic law [as opposed to foreign law] or on matters which involve questions of law, and an expert witness cannot instruct the court with respect to the applicable law of the case, or infringe on the judge’s role to instruct the jury on the law. So an expert may not testify as to such questions of law as the interpretation of a statute ... or case law ... or the meaning of terms in a statute ... or the legality of conduct.

Id. at 643, 355. The Court in *Jackson* noted: “The trial judge is the “sole source of the law,” and witnesses should not be allowed to testify on the status of the law, just as counsel are forbidden to argue law to jurors.” *Id.* at 644, 356.

The issue before the Circuit Court, the interpretation of the insurance contract, was clearly a question of law. How the proffered expert interprets the contract language, or how he believes medical payments policies are typically written, interpreted or applied by the industry in general, is irrelevant. It does not matter here what the expert believes the original intent of medical payments coverage was or what he believes the effect or intention of an exception to an exclusion may be. The Circuit Court does not need an expert to tell it what the policy says. Whether the parties to the contract in question differ as to its interpretation or are uncertain or differ in some way as to its meaning is irrelevant to a determination of whether the contract or any of its provisions are ambiguous. Only where the court itself concludes the language of a provision of an insurance policy is reasonably susceptible to two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning is it ambiguous. *Murray v. State Farm Fire and Casualty Company, supra*, citing Syl. Pt. 1, *Prete v. Merchants Property Ins Co. of Indiana*, 159 W. Va. 508, 223 S.E.2d 441 (1976). The Circuit Court properly performed its duty to apply the contract as written without irrelevant commentary from an “expert witness” on a purely legal question.

VI. CONCLUSION

Based on the foregoing, State Farm respectfully submits the Order of the Circuit Court of Kanawha County was correct and should be affirmed.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

Appellant/Defendant-Below
By Counsel:



Charles S. Piccirillo (WVSB #2902)
Sabrena Olive Gillis (WVSB #6942)
SHAFFER & SHAFFER, PLLC
2116 Kanawha Boulevard, East
P.O. Box 3973
Charleston, WV 25333-3973
Telephone: (304) 344-8716

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35698

MICHAEL WITT

Appellant/Plaintiff-Below

vs.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, an Illinois corporation
and ST. PAUL FIRE AND MARINE
INSURANCE COMPANY, a Minnesota corporation

Appellees/ Defendants-Below

CERTIFICATE OF SERVICE

I, Sabrena Olive Gillis, Counsel for Appellee/Defendant-Below, State Farm Mutual Automobile Insurance Company, hereby certify that on this 4th day of February, 2011, I served a copy of the foregoing "Brief of Appellee, State Farm Mutual Automobile Insurance Company" upon counsel of record, by depositing true copies thereof in the United States mail, postage prepaid, to the following:

Marvin W. Masters, Esq.
Kelly Elswick-Hall, Esq.
THE MASTERS LAW FIRM, LC
181 Summers Street
Charleston, West Virginia 25301
Counsel for Plaintiff


Sabrena Olive Gillis (WVSB #6942)