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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 11-265

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

STATE FARM FIRE & CASUALTY COMPANY,

Petitioner,

v.

ROBIN SKINNER PRINZ, the Personal Representative of the ESTATE OF KYLE HOFFMAN, JR.,

Respondent.

REPLY BRIEF

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COMES NOW the Petitioner, State Farm Fire & Casualty Company (hereinafter "State Farm"), by and through its counsel E. Kay Fuller and Martin and Seibert, L.C., and in reply to the Respondent's brief and in further support of its brief, does state as follows:

First, Respondent attempts to apply the incorrect standard of review arguing for an abuse of discretion standard. Case law in West Virginia is clear that as to evidence potentially impacted by the Dead Man's Statute, there is a bifurcated review process. Any finding of fact by the trial court is reviewed under this standard. However, when evidence is excluded due to the Circuit Court's interpretation of the statute, that review is *de novo. Meadows v. Meadows,* 196 W.Va. 56, 468 S.E.2d 309 (1996). Here, the Circuit Court of Jefferson County improperly interpreted the statute, thus depriving the jury of all admissible evidence. That must be reviewed *de novo.*

Respondent next incorrectly alleges that observations about the key fact in this case – where William Piper lived on the date of his death – are a personal transaction. Case law which considered this line of testimony in analogous situations has shown such observations are not personal transactions, but are simply factual observations, thus admissible. *Meadows, supra.* While the Dead Man's Statute, W.Va. Code §57-3-1, prohibits parties and those interested in the event from testifying about transactions with the decedent, it does not prohibit testimony about first hand personal observations. This Court held in *Meadows* the term "personal transaction" is characterized akin to a "business deal where the legal relationship of the parties is altered." *Meadows* specifically permitted

testimony about physical observations of a witness about a decedent. Moreover, the testimony permitted in *Meadows* concerned observations of a testator which went to the central issue of capacity. Here the testimony is just as central concerning William Piper's place of residency. Just as in *Meadows*, family members were proffered to provide observations, not transactions. They were also proffered to explain certain of the hearsay documentary evidence Respondent utilized in an attempt to establish William Piper's residency. If the jury was permitted to see those documents and hear supposition about them, they were likewise entitled to hear explanation as to the documents, yet they were deprived of this information when the Circuit Court excluded this factual information in favor of presumptions.

This speculation continues in Respondent's attack on the excluded family members. Respondent argues the Piper Estate and hence the beneficiaries face risk if the State Farm policy is not triggered yet also argues the excluded family members were somehow colluding to avoid triggering the policy. On the one hand, Respondent argues the excluded family members, are "advantaged" if insurance coverage is precluded, yet on the other hand argues the family members "stood to benefit from the outcome of the declaratory judgment action." (Respondent's Brief, p. 9). The family members would nether benefit, nor be harmed, by the outcome of the declaratory judgment action since they were not parties; the parties are the Hoffman Estate and State Farm. Thus, as witnesses who would only provide factual testimony, they are not interested parties which might preclude their testimony under the Dead Man's Statute. Moreover, the excluded family members

could not "benefit" from any finding in the declaratory judgment action. The only outcome of the declaratory judgment action was resolution of the residency question which might then provide additional insurance coverage to the Hoffman Estate. There is no outcome of the declaratory judgment action whereby the Piper Estate or the excluded family members would obtain insurance proceeds for their own use. Therefore, their exclusion on the grounds they were interested witnesses were incorrect and prejudicial.

The speculation and attacks continue with arguments that the excluded family members attempted to avoid triggering the State Farm policy to avoid a premium increase. (Respondent's Brief, pp. 10-12). While this may be cross-examination material, it is not the basis to exclude pertinent witnesses. Nonetheless, the Circuit Court permitted this one-sided presentation of evidence and unsupported speculation. These rulings prohibited a balanced presentation of evidence which in turn dictated the outcome of the declaratory judgment trial. Those rulings were incorrect and prejudicial and must be reversed.

In the same vein, the Circuit Court excluded documents that again would have given the jury a balanced view of the evidence. The exclusion of relevant documentary evidence was also incorrect and prejudicial, warranting reversal.

Finally, the Circuit Court's refusal to instruct the jury on the central issue, the definition of the policy term "household" was prejudicial and constitutes reversible error. Not only was its exclusion harmful because it deprived the jury of full instruction, it was also particularly harmful because the plaintiff failed to establish the degree of permanency that the definition of household demands under Virginia

law.[1] Therefore, had the jury heard the definition and followed the instruction, it would have been bound to find the Plaintiff did not meet her burden of proof. Again, this exclusion dictated the outcome of the trial against the interests of the Petitioner which warrants reversal.

It is clear a full presentment of evidence with complete instruction of law did not occur in the declaratory judgment action trial. Testimonial and documentary evidence was improperly excluded and the jury was not fully instructed on applicable law. These errors require a reversal of the verdict with a new trial granted so that all testimony can be presented and so that a jury, fully instructed on the law, can determine the residency question.

WHEREFORE, the Petitioner, State Farm Fire & Casualty Company, respectfully requests this Court reverse the pre-trial rulings of the Circuit Court of Jefferson County, vacate the verdict, grant a new trial and remand with instructions to permit introduction of all pertinent evidence and with proper instruction.

Respectfully submitted,

STATE FARM FIRE & CASUALTY COMPANY
By Counsel

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[1] Virginia law defines the term "household" as: ..."a collection of persons as a single group; with one head, living together, a unit of permanent and domestic character under one roof." A temporary sojourn or visit by a relative does not make the relative a resident of the insured's household, because there is no melding of the family unit."*Allstate Ins. Co. v. Patterson*, 231 W.Va. 358, 344 S.E.2d 890 (1986); *USAA Cas. Ins. Co. v. Hensley*, 251 Va. 177, 465 S.E.2d 791 (1996); *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co., 1*997 WL 1070431, 7 (Va. Cir. Ct. 1997). See also, *State Farm Mut. Auto Ins. Co. v. Smith,* 142 S.E.2d 562, 566 (1965).

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CERTIFICATE OF SERVICE

I, E. Kay Fuller, Counsel for the Petitioner, State Farm Fire & Casualty Company, hereby certify that I served a true copy of the foregoing ***Reply Brief*** upon the following individual by United States Mail, postage prepaid, first class, on this the 7th day of Feb., 2012:

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