

No. 31972

*Glen Falls Insurance Company v. Billie Joe Smith, Robin Smith and Johnny Combs and GMAC Insurance Company v. Johnny Combs*

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Davis, J., concurring:

I fully concur with the majority's Opinion in this case. Nevertheless, I feel the need to write separately to address the issues raised by my dissenting colleagues and to clarify the misconceptions that may arise therefrom.

Both of my dissenting brethren have suggested that coverage for Johnny Combs existed under Billie Joe Smith's Glen Falls policy of motor vehicle insurance because Johnny is Mr. Smith's "foster child" or "ward." With this position, I fervently disagree. In the first dissenting opinion, my colleague misapprehends the meaning of the term "foster child" as that phrase is intended by the subject policy language. *See generally* sep. op. of C.J. Albright. Explaining the longtime nurturing relationship that exists between Johnny and Mr. Combs, the dissent interprets the existing relationship between these two men as that of a foster child-foster parent arrangement. *See id.* Rather, the actual nature of the men's relationship is more in line with the status of a psychological parent relationship which we recently recognized in Syllabus point 3 of *Tina B. v. Paul S.*, \_\_\_ W. Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (No. 31855 June 17, 2005). The simple fact of the matter is, however, that the Glen Falls policy does not provide coverage for family members who enjoy merely a psychological

relationship. The only familial relationships that may beget coverage in the instant proceeding are those of “foster child” and “ward,” neither of which definitions Johnny can satisfy.

More importantly, in explaining the alleged foster parent-foster child relationship between Mr. Smith and Johnny, my dissenting colleague overlooks a critical fact: the definition of a “foster child” presupposes that that person is a “child.” Under the facts before the Court, it is clear that Johnny is not a child and thus is not Mr. Smith’s “foster child.” In defining the term “child,” Black’s Law Dictionary states that a “child” is, “[a]t common law, a person who has not reached the age of 14, though the age now varies from jurisdiction to jurisdiction.” Black’s Law Dictionary 232 (7th ed. 1999). Thus, under this definition, a child is anyone under the age of 14, if not provided for differently by statutory law. By statute and as a general matter, in West Virginia a “child” “means any person under eighteen years of age.” W. Va. Code § 49-1-2 (1997) (Repl. Vol. 2004).<sup>1</sup>

Incorporating this definition of the word “child” into the dissenter’s

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<sup>1</sup>A few exceptions to this general rule do exist. See, e.g., Syl. pt. 1, in part, *State ex rel. Dep’t of Health & Human Res., Bureau of Child Support Enforcement v. Farmer*, 206 W. Va. 249, 523 S.E.2d 840 (1999) (“A child [over or] under the age of sixteen who marries shall be emancipated by operation of law from his or her parents[.]”); *Facilities Review Panel v. Greiner*, 181 W. Va. 333, 336, 382 S.E.2d 527, 530 (1989) (“[Y]ouths between the ages of eighteen and twenty who are subject to continuing juvenile jurisdiction under *W. Va. Code*, 49-5-2 [1978] are defined as children for purposes of article 49, *W. Va. Code*[.]”).

construction of the term “foster child” to arrive at a complete interpretation thereof suggests that the plain, ordinary meaning of the phrase “foster child” contemplates any person under the age of eighteen who is “receiving . . . parental care and nurture *although not [from someone who is] related through legal or blood ties.*” Sep. op. of C.J. Albright, at 3 (emphasis in original) (internal quotations and citations omitted). Applying this definition to the facts before the Court, the record in this case is quite clear that Johnny was twenty-two years old when the accident occurred. Thus, even under the most liberal interpretation of the term “foster child” it is clear that Johnny is not and was not a “foster child” under Mr. Smith’s Glen Falls policy and, thus, was not entitled to coverage thereunder. Any other construction would yield the absurd result of denominating a twenty-two year old man, who has no mental impairments, a child for the limited purpose of insurance coverage when, for all other intents and purposes, this same twenty-two year old man is a full-fledged adult and functioning member of society. The majority was correct to reject such an interpretation. *See Legg v. Johnson, Simmerman & Broughton, L.C.*, 213 W. Va. 53, 59, 576 S.E.2d 532, 538 (2002) (per curiam) (“[T]he law itself indicates that [policy language] should not be construed to reach absurd results.” (citation omitted)).

The second dissenter suggests, instead, that the Court should have afforded “ward” or “foster child” status to Johnny because he is the *de facto* child of Mr. Smith, or, alternatively, because Mr. Smith is Johnny’s psychological parent. *See generally* sep. op. of J. Starcher. While my colleague can apparently conceive of the aforementioned

constructions of the subject policy of insurance so as to afford coverage where coverage does not, in fact, exist, such constructions are plainly wrong. When interpreting the language of an insurance policy, we are constrained to limit our consideration to the terms employed by the contract. *See Tackett v. American Motorists Ins. Co.*, 213 W. Va. 524, 528, 584 S.E.2d 158, 162 (2003) (“[T]he terms of the pertinent insurance contract govern the parties’ relationship and define the scope of coverage[.]”). Unfortunately, however, neither the term “*de facto* child” nor the phrase “psychological parent” refers to cognizable familial relationships for which coverage is provided under the Glen Falls policy.

First, my dissenting colleague suggests that because Johnny was Mr. Smith’s *de facto* child coverage should have been provided by the policy. On this point, I disagree and reaffirm my belief that the majority Opinion correctly decided this issue. The policy language in question simply does not provide coverage for a *de facto* child; such a relationship is not among the enumerated relationships under which coverage may be had. Whether Johnny may or may not have been Mr. Smith’s *de facto* child is not a matter presently before the Court; whether he is a foster child or a ward is. Because the policy language at issue does not afford coverage to an insured’s *de facto* child, this Court is not permitted to view the policy in this manner or to rewrite the policy to give it such effect. In short, rewriting insurance policies is not and has never been the role of this Court. *See Payne v. Weston*, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995) (“We will not rewrite the terms of the policy; instead, we enforce it as written.”). Stated otherwise, this Court’s authority to

construe language in an insurance policy is not a “license . . . to . . . rewrite [policy] language on the basis that, as written, it produces an undesirable . . . result.” *Taylor-Hurley v. Mingo County Bd. of Educ.*, 209 W. Va. 780, 788, 551 S.E.2d 702, 710 (2001). The majority resisted such temptation and with that course I wholeheartedly agree.

My dissenting colleague alternatively suggests that coverage exists under the Glen Falls policy because Mr. Smith is Johnny’s psychological parent and that to find, as the majority did in Syllabus point 5, that coverage is provided only for the “legally recognized relationship[s]” of “ward” and “foster child” strays from this Court’s recent decision in *Tina B. v. Paul S.*, \_\_\_ W. Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (No. 31855 June 17, 2005). This reasoning is misplaced and misinterprets the full import of *Tina B.* In that case, we very clearly and explicitly found that a psychological parent is *not* a legal parent within the contemplation of W. Va. Code § 48-1-232 (2001) (Repl. Vol. 2004).

Furthermore, the dissent suggests also that “Mr. Smith appears to have fit the bill as Johnny Combs’ ‘psychological parent,’ and as such had clear legal standing to act as his ‘parent.’” Sep. op. of J. Starcher, at 4. Again, however, the express meaning of the *Tina B.* opinion has been misunderstood. In *Tina B.*, this Court did *not* find that a psychological parent has standing to act as a child’s parent in the limited custodial proceeding context within which that case was decided. Rather, *Tina B.* qualifiedly found that, “[i]n exceptional cases and subject to the court’s discretion, a psychological parent may intervene in a custody

proceeding brought pursuant to W. Va. Code § 48-9-103 (2001) (Repl. Vol. 2004) when such intervention is likely to serve the best interests of the child(ren) whose custody is under adjudication.” Syl. pt. 4, *Tina B.*, \_\_\_ W. Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (emphasis added). Such limited right of potential intervention is vastly different from the unlimited standing which Tina B. sought in that case and which my dissenting colleague seems to suggest we recognized therein.

Finally, as I explained with regard to the dissent’s *de facto* parent argument, the policy language at issue in this case does not provide coverage for the psychological child of an insured. In the absence of the enumeration of such a familial relationship as a basis for coverage, the majority correctly abstained from conducting such an inquiry to determine whether, in fact, such a relationship exists and, if it does, extending coverage on this basis.

For the foregoing reasons, I respectfully concur with the Opinion of the Court.