No. 26658-- Douglas Bass v. Laura Coltelli-Rose

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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Davis, J., concurring in part and dissenting in part:

This Court was asked to determine whether the trial court committed error by concluding that a contingency fee contract between attorney Laura Coltelli-Rose and her clients, Mabel Bass and Douglas Bass, provided for no recovery of fees for medical payments obtained on behalf of the Basses. The majority opinion concluded that the trial court indeed committed error because such a recovery was provided for in the contract. I agree with the majority's decision that Rose was entitled to compensation under the contract for her work in recovering medical payments from Darren Weakley's insurer. I disagree, however, with the majority's decision that the contract permitted Rose to recover fees from the medical payments obtained from her clients' own insurer. Therefore, I concur in part and dissent in part to the majority's opinion.

A. THE CONTRACT PERMITTED RECOVERY OF FEES FROM MEDICAL PAYMENTS OBTAINED FROM DARREN WEAKLEY'S INSURER

Rose attempted to obtain one-third of the proceeds from the medical payments collected from Weakley's insurer. She recovered $25,000.00 from the insurer. Thus, Rose initially retained one-

third ($8,333.00) of the recovery based upon the language of her contract with the Basses.[1] Under the contract, Rose and the Basses agreed that she would receive one-third of the recovery from "whoever is liable for . . . injuries or damages resulting from [the] accident."

The circuit court restricted the above quoted-language to mean that Rose could recover only the fees from the person who struck the car in which Mr. Bass was riding when he was injured. The majority opinion correctly found that such an interpretation of the contract was wrong. In the context of the claim against Mr. Weakley's insurer, there is no ambiguity in the contract. It is a well settled principle of law that "[w]here the terms of a contract are clear and unambiguous, they must be applied and not construed." Syllabus point 2, *Bethlehem Mines Corp. v. Haden*, 153 W. Va. 721, 172 S.E.2d 126 (1969).

Weakley was the driver of the car in which Mr. Bass was a passenger when he sustained his injuries. Neither Mr. Bass nor his mother, Mrs. Bass, owned the vehicle driven by Weakley. While the record in this case does not disclose whether or not a separate action was initiated against Weakley, it is clear that a potential claim was present. In other words, Weakley was a potential adversary. In this posture, Rose's contract with the Bass family clearly entitled her to receive one-third of any recovery obtained from Weakley.

[1]Ultimately, Rose retained one-fourth of the recovery.

B. THE CONTRACT WAS AMBIGUOUS AS TO WHETHER ROSE COULD RECOVER FEES FROM MEDICAL PAYMENTS OBTAINED FROM THE BASSES' INSURER

Although I find the contract was not ambiguous as to Rose's recovery of fees involving Weakley, I believe ambiguity existed as to whether the contract permitted the recovery of legal fees from medical payments obtained from the Basses' own insurer.[2] The majority opinion has relied upon language from an opinion written in 1914 to conclude that the word "liable," as used in the contract, has broad enough meaning to include recovery of fees from medical payments obtained from the Basses' own insurer. The majority opinion is wrong.

The proper construction of the language in the contract is not limited to the term "liable." The controlling language is "liable for . . . injuries or damages resulting from [the] accident." Rose contends that this language clearly shows that she contemplated recovery of fees from monies obtained from the Basses' own insurer. No such clarity exists. The language of the contract is ambiguous. "It is also well settled that any ambiguity in a contract must be resolved against the party who prepared it." *Nisbet v. Watson*, 162 W. Va. 522, 530, 251 S.E.2d 774, 780 (1979). *See Hays & Co. v. Ancro Oil & Gas, Inc.*, 186 W. Va. 153, 155, 411 S.E.2d 478, 480 (1991).

I have little doubt that Rose may have contemplated recovering fees for monies obtained

[2]Rose recovered $21,666.00 in medical payments from Mrs. Bass's insurer. Rose then retained $7,221.00 as her contingency fee for retrieving these monies.

from the Basses' own insurer.[3] However, such a contemplation was not made evident in the contract. Under our case law, any ambiguity in the contract has to be interpreted against the maker of the contract. Here, this contract maker is Rose. Therefore, the circuit court was correct in ruling against Rose as to the portion of her fee that resulted from monies paid by the Basses' own insurer. The majority opinion was wrong in reversing the lower court's ruling in this regard.

For the reasons stated, I respectfully concur in part and dissent in part to the majority opinion.

[3]It is most unusual for lawyers to seek fees from medical payments. In fact, the majority of the plaintiffs' bar *does not* take a contingency fee on medical payment recoveries obtained from their client's own insurer.