No. 30469 – *Farmers Mutual Insurance Company, a West Virginia corporation v. Hubert Junior Tucker; and Hubert Junior Tucker v. Darrell Lee Taylor; Leonard Locie Taylor; and Other Individuals Presently Unknown*

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Albright, Justice, concurring:

While I concur in the decision of the majority, I write separately to clarify the factual record supporting the majority opinion, and to suggest how the legal points discussed in the majority opinion might be applied by the circuit court on remand.

I agree with the majority opinion's conclusion that questions of fact exist regarding whether Darrell Lee Taylor was a member of his father Locie Taylor's household, and thereby whether plaintiff Hubert Junior Tucker is entitled to recover against Locie Taylor's homeowner's liability policy issued by Farmers Mutual Insurance Company.

The record from the trial court and the briefs of the parties suggest that the tortfeasor in this case, Darrell Lee Taylor, is a 38-year-old man who – except for a short, unsuccessful marriage – has lived continuously on the farm owned by his father, Locie Taylor. Darrell Lee Taylor lives in a mobile home that is owned by his father, and he pays no rent. The record suggests that Darrell Lee Taylor has no job other than tasks he performs around the farm, and has no source of income except for what his father gives him. Locie Taylor admitted

that he gives his son money without receiving anything from Darrell Lee Taylor in exchange. Darrell Lee Taylor, in response to interrogatories, stated that he owned "nothing."

Locie Taylor testified below that his arrangement with Darrell Lee Taylor was not unique. Several of his children have lived on his farm at various times, in trailers that he owned, and he has never charged them rent. He would also give them money when they needed it. The children would occasionally perform work around the farm; they appear to have been able to freely eat food raised or grown on the farm.

Before the circuit court Darrell Lee Taylor contended that he was not a member of his father's "household" for purposes of the insurance policy purchased by his father. Darrell Lee Taylor also signed an agreement with the insurance company stating that in return for the insurance company paying for his legal defense, Darrell Lee Taylor would waive any right to coverage under the insurance policy.

My dissenting colleagues argue that both Locie Taylor's and Darrell Lee Taylor's assertion that Darrell Lee Taylor was not a member of Locie Taylor's household is a "fundamental and dispositive hurdle." However, the majority opinion correctly indicates that the Taylors' characterization of their living arrangements is only one factor to consider. Moreover, the facts of the instant case demonstrate why the Taylors' characterization is not controlling. A jury could reasonably infer from the record that Darrell Lee Taylor has no

income, no assets, and is otherwise judgment-proof, and that he has therefore accepted sole responsibility for Mr. Tucker's injuries because Mr. Tucker would never be able to collect any judgment for damages from Darrell Lee Taylor. A jury could reasonably infer that Darrell Lee Taylor, by denying the existence of a household and accepting full responsibility, is attempting to protect his father – who owns a farm and several mobile homes – from any measure of liability. And because Mr. Tucker's injuries were extensive, and because there is only $25,000.00 in liability coverage available under the disputed insurance policy, Locie Taylor appears to have a significant motive for distancing himself and his assets from the careless actions of his son.

The characterization offered by Darrell Lee Taylor and Locie Taylor is that Darrell Lee Taylor is independent, living "on his own." The record, however, can be read to indicate that Darrell Lee Taylor in fact relies entirely upon his father for his day-to-day living. Locie Taylor provides a roof over his son's head on Locie Taylor's property, provides him with income, and provides him with food on the table. Thus, a jury could infer from Locie Taylor's and Darrell Lee Taylor's actions before Mr. Tucker was injured that Darrell Lee Taylor intended to be and was a resident of Locie Taylor's household, even if the two now say otherwise. Of course, the jury -- in possession of all of the facts -- may conclude otherwise. The principal point of the majority opinion is that the issue is one of fact, not one of law.

The majority opinion correctly indicates that a court should consider the "formality of the relationship between the person in question and the other members of the named insured's household." The record reveals no aspects of a stilted, formal relationship between Darrell Lee Taylor and Locie Taylor. Instead, Darrell Lee Taylor appears to have been free to come and go as he pleased, was allowed to go anywhere on the family property that he liked, and received money from his father when he expressed a need for money. Nothing in the record indicates that any place or activity on the farm was off-limits to Darrell Lee Taylor. Instead of a formal, landlord-tenant type relationship, the record suggests that Darrell Lee Taylor acted like a son, living in and on the family household and homestead.

Another factor that the majority opinion indicates a court should consider is "the permanence or transient nature of that person's residence therein." In other words, a court should consider whether Darrell Lee Taylor was "transient" and stayed at his family's farm for only short periods, or whether he seemed to maintain a permanent presence, so that he would call it a "residence." The record is clear that, except for a brief marriage, Darrell Lee Taylor lived permanently on his family's property.

A third factor to consider is the "absence or existence of another place of lodging for that person." Darrell Lee Taylor had only the mobile home and farm as his place of lodging. He did not own a residence elsewhere, nor did he have another place that he called "home."

Another factor is the "age and self-sufficiency of that person." It may be conceded that Darrell Lee Taylor was a 38-year-old man at the time of Mr. Tucker's injuries. However, the record indicates that Darrell Lee Taylor is an alcoholic and relies entirely upon his father's grace to sustain him. There appears to be little evidence in the record to establish that Darrell Lee Taylor is "self-sufficient," but much evidence from which we could draw the conclusion that Locie Taylor's household is Darrell Lee Taylor's sole source of support.

The circuit court below began its analysis in this case by presuming that the term "household" means "only individuals living together under the same roof," and in doing so relied upon language contained in *Spangler v. Armstrong*, 201 W.Va. 643, 499 S.E.2d 865 (1997) (*per curiam*). Yet the clear majority of jurisdictions hold that individuals do not have to live under the same roof in order to be members of the same household. *See* Annotation, "Who is 'Resident' or 'Member' of Same 'Household' or 'Family' as Named Insured, Within Liability Insurance Provision Defining Additional Insureds," 93 A.L.R.3d 420 (1979).[1] The

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[1]The ALR article summarizes the law in this area in this fashion:

> A review of the cases construing or applying the particular policy terms that are the subject of the present annotation reveals a wide variety of factual considerations upon which the courts have focused in their determinations of whether a particular person was a "resident" or "member" of the same "household" or "family" as the named insured at a particular time. Those factual considerations not only relate to the respective individual's physical presence in, or absence from, the named insured's home during the period that included the date of a particular occurrence,

(continued...)

majority opinion examined the use of the word "household" by Farmers' Mutual in its policy, a term which was not defined, and concluded as many other jurisdictions have concluded that whether a particular person is a "resident" or "member" of a particular "household" is ordinarily a question of fact. In the instant case, inferences can be drawn from facts in the record that are favorable to Mr. Tucker, so it was therefore improper for the circuit court to grant summary judgment against him.

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[1](...continued)

> but also relate to such matters as the relationship (if any) of the individual to the named insured, the circumstances of such person's presence in or absence from the named insured's home, the individual's living arrangements during earlier time periods, and the individual's intention at various times with regard to his place of residence. Such factual considerations have become particularly significant in view of the express recognition by courts, in numerous cases appearing throughout the annotation, that some or all of the respective policy terms are ambiguous or devoid of any fixed meaning.
>
> A significant portion of the cases focusing upon one or more of the policy terms under consideration have involved a child of the named insured. Where such child was staying with the named insured during a period that included the date of the accident or other occurrence giving rise to the controversy concerning the child's status, courts have held, on the basis of a variety of circumstances, that the child qualified as a "resident" or "member" of the named insured's "household." Such results have been reached despite circumstances that included the child's separate living arrangements during a prior period, and the child's status as an individual over the age of majority.

93 A.L.R.3d at 424-25, § 2.

One other point in the circuit court's summary judgment order should be raised. The circuit court concluded that the term "household" was clear and unambiguous in the Farmers Mutual policy, and then went on to apply our law which specifies that "[w]here the provisions of an insurance policy are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." Syllabus, *Keffer v. Prudential Ins. Co. of America*, 153 W.Va. 813, 172 S.E.2d 714 (1970).

However, many jurisdictions have concluded that the term "household" is a "chameleon like word" that takes its color of meaning from the context in which it is found. *See*, *Amco Ins. Co. v. Norton*, 243 Neb. 444, 447, 500 N.W.2d 542, 545 (1993); *Cobb v. State Security Ins. Co.*, 576 S.W.2d 726, 738 (Mo. 1979). The meaning of the word "may vary according to the circumstances." *Cal-Farm Ins. Co. v. Boisseranc*, 151 Cal.App.2d 775, 781, 312 P.2d 401, 404 (1957). In other words, many other courts looking at the same insurance policy language found in the Farmers Mutual policy have concluded that the term "household" is ambiguous.

One rule of insurance policy construction that is well settled law in West Virginia states that an insurance policy is ambiguous if it can reasonably be understood in two different ways or if it is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning. Syllabus Point 1, *Prete v. Merchants Property Ins. Co. of Indiana*, 159 W.Va. 508, 223 S.E.2d 441 (1976). Another rule of construction is that "[i]t is well

settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured." Syllabus Point 4, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987).

The majority opinion, looking to the courts of Connecticut, found the above two rules of construction combined into one in *Raffel v. Travelers Indemnity Co.*, 141 Conn. 389, 392, 106 A.2d 716, 718 (1954), where the court stated that, "When the words of an insurance contract are, without violence, susceptible of two interpretations, that which will sustain the claim and cover the loss must, in preference, be adopted." My dissenting colleagues suggest that the majority opinion's adoption of this "unforgivable principle of law" will "make every unambiguous insurance policy in West Virginia subject to challenge by policyholders," and will be used "to attack unambiguous language in all contracts." However, this rule has operated in Connecticut for nearly 50 years, and it does not appear to have had such a wide-ranging, deleterious effect.[2] The majority opinion merely holds that if a term in an insurance policy can *reasonably* be understood in two different ways – without violence or undue contortion – then the term will be construed against the insurance company and in favor of the person seeking coverage.

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[2]*See, e.g., Costabile v. Metropolitan Property and Cas. Ins. Co.*, 193 F.Supp.2d 465, 476 (D.Conn. 2002); *Hertz Corp. v. Federal Ins. Co.*, 245 Conn. 374, 382, 713 A.2d 820, 824 (1998); *Heyman Associates No. 1 v. Insurance Co. of State of Pa.*, 231 Conn. 756, 770, 653 A.2d 122, 130 (1995).

Our use of the Connecticut articulation of two long-established principles of West Virginia law does not raise the specter of widespread attack on unambiguous language forecast by the dissenters. Such a reading of the majority opinion does a profound disservice to the long-established law of this State.

The majority opinion rightfully acknowledges that, as previously mentioned, a determination of whether someone is a "resident" of a "household" depends on the intent and actions of the parties and is typically a question of fact for the jury, usually not susceptible to determination through a motion for summary judgment. In sum, the circuit court erred, and the majority opinion correctly concluded that the term "household," as used in the Farmers Mutual policy, is ambiguous, and its meaning is dependant upon the facts to which the term is being applied.

I therefore respectfully concur with the decision to reverse the circuit court's summary judgment.