No. 30469 - Farmers Mutual Insurance Company, a West Virginia corporation v. Herbert Junior Tucker, et al.

FILED
December 6, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
December 9, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
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Davis, C.J., dissenting:

In this proceeding the trial court granted summary judgment against Hubert Tucker. The trial court found no material issue of fact in dispute as to whether a homeowner's policy issued by Farmers Mutual Insurance Company covered Darrell Taylor, the adult son of its insured, Locie Taylor. The majority has determined that material issues of fact exist in this case. Therefore, the majority reversed the trial court's ruling. For the reasons set out below, I dissent.

A. Locie Taylor Never Claimed That His Son Was a Member of His Household

The initial problem I have with the majority opinion is that the opinion blindly launches into the meaning of "household," when a more fundamental and dispositive hurdle had to be addressed and overcome by Mr. Tucker. That issue involved the evidence presented to show that Locie or Darrell believed that Darrell was a member of Locie's household. In every case, cited in the majority, except one, a party to the litigation claimed to be a member of a household in order to obtain coverage under a policy. *See Johnson v. State Farm Mut. Auto. Ins. Co.*, 252 F.2d 158 (8th Cir. 1958) (insured's daughter sought coverage); *Atlanta Cas. Co.*

v. *Powell*, 83 F. Supp. 2d 749 (N.D. Miss. 1999) (son sought coverage under father's policy); *Aetna Cas. & Sur. Co. v*. *Shambaugh*, 747 F. Supp. 1203 (N.D. W. Va. 1990) (insured sought coverage for son); *Aetna Cas. & Sur. Co. v*. *Miller*, 276 F. Supp. 341 (D. Kan. 1967) (estranged wife sought coverage under husband's policy); *Crossett v. St. Louis Fire & Marine Ins. Co.*, 269 So. 2d 869 (Ala. 1972) (son sought coverage under father's policy); *Simmons v*. *Insurance Co. of N. Am.*, 17 P.3d 56 (Alaska 2001) (daughter sought coverage of father's alleged policy); *Mid-Century Ins. Co. v*. *Duzykowski*, 641 P.2d 1272 (Ariz. 1982) (daughter of insured sought coverage); *State Farm Mut. Auto. Ins. Co. v. Johnson*, 729 P.2d 945 (Ariz. Ct. App. 1986) (spouse of deceased sought coverage under decedent's policy); *Reserve Ins. Co. v*. *Apps*, 149 Cal. Rptr. 223, 85 Cal. App. 3d 228 (Ct. App. 1978) (estranged wife sought coverage under husband's policy); *State Farm Mut. Auto. Ins. Co. v*. *Elkins*, 125 Cal. Rptr. 139, 52 Cal. App. 3d 534 (Dist. Ct. App. 1975) (daughter sought coverage under parents' policy); *Cal-Farm Ins. Co. v*. *Boisseranc*, 151 Cal. App. 2d 775, 312 P.2d 401 (Dist. Ct. App. 1957) (insured sought coverage for son); *Iowa Nat. Mut. Ins. Co. v*. *Boatright*, 516 P.2d 439 (Colo. Ct. App. 1973) (estate of deceased sought coverage under daughter's policy); *Rathbun v*. *Aetna Cas. & Sur. Co.*, 128 A.2d 327 (Conn. 1956) (sister of deceased was member of deceased household); *Alava By and Through Alava v*. *Allstate Ins. Co.*, 497 So. 2d 1286 (Fla. Dist. Ct. App. 1986) (son sought coverage under father's policy); *Row v*. *United Servs. Auto. Ass'n*, 474 So. 2d 348 (Fla. Dist. Ct. App. 1985) (father sought coverage for deceased son); *Farmers Auto. Ins. Ass'n v*. *Williams*, 746 N.E.2d 1279 (Ill. App. Ct. 2001) (insured's son sought coverage); *Wood v*. *Mutual Serv. Cas. Ins. Co.*, 415 N.W.2d 748 (Minn. Ct. App.

1988); *Mutual Serv. Cas. Ins. Co. v. Olson*, 402 N.W.2d 621 (Minn. Ct. App. 1987) (son sought coverage under mother's policy); *Cobb v. State Sec. Ins. Co.*, 576 S.W.2d 726 (Mo. 1979) (insured sought coverage for deceased daughter); *Amco Ins. Co. v. Norton*, 500 N.W.2d 542 (Neb. 1993) (insureds sought coverage for niece); *Gibson v. Callaghan*, 730 A.2d 1278 (N.J. 1999) (in-law of insured sought coverage); *Mazzilli v. Accident & Cas. Ins. Co.*, 170 A.2d 800 (N.J. 1961) (estranged wife sought coverage under husband's policy); *Nationwide Mut. Ins. Co. v. Allison*, 277 S.E.2d 473 (N.C. Ct. App. 1981) (estranged wife sought coverage under husband's policy); *State Farm Mut. Auto. Ins. Co. v. McCormick*, 17 P.3d 1083 (Ore. Ct. App. 2000) (mother sought to show daughter was not member of household); *General Motors Acceptance Corp. v. Grange Ins. Ass'n*, 684 P.2d 744 (Wash. Ct. App. 1984) (son sought coverage under father's policy); *Pierce v. Aetna Cas. & Sur. Co.*, 627 P.2d 152 (Wash. App. 1981) (son sought coverage under father's policy); *A.G. by Waite v. Travelers Ins. Co.*, 331 N.W.2d 643 (Wis. Ct. App. 1983) (foster care child sought coverage under foster care mother's policy); *Londre by Long v. Continental W. Ins. Co.*, 343 N.W.2d 128 (Wis. Ct. App. 1983) (son sought coverage under father's policy).[1]

Here, there was no evidence presented by Mr. Tucker that Locie believed or considered Darrell to be a member of his household. Additionally, there was no evidence that

[1]The only case cited by the majority where a third party sought to show a tortfeasor was a resident in another's home was the case of *Pamperin v. Milwaukee Mut. Ins. Co.*, 197 N.W.2d 783 (Wis. 1972). In *Pamperin*, the court reversed a jury's finding that the tortfeasor resided in the home of her uncle.

Darrell believed or considered himself a member of Locie's household. In fact, the evidence indicated that neither Locie nor Darrell considered Darrell as a member of Locie's household. Thus, there was no need to examine the wording of the insurance policy. Under the majority's decision, Mr. Tucker merely had to assert that Darrell was a resident in Locie's household to trigger an analysis of the policy language. This is wrong. A third party cannot be allowed to invade a homeowner's contract with an insurance company solely upon a bare assertion that someone resides in the homeowner's home. Bare assertions are the fruit of summary judgment and should be dismissed as a matter of law.

B. Mr. Tucker Did Not Satisfy the Test Created by the Majority Opinion

Assuming arguendo that Mr. Tucker submitted sufficient evidence to require the trial court to examine the language of the policy, Mr. Tucker nevertheless failed to satisfy the test created by the majority in order to withstand summary judgment.

Under the majority opinion, for Mr. Tucker to establish that Darrell was a resident of Locie's household, Mr. Tucker had to present evidence on the following: (1) the intent of the parties, (2) the formality of the relationship between the person in question and the other members of the named insured's household, (3) the permanence or transient nature of that person's residence therein, (4) the absence or existence of another place of lodging for that person, and (5) the age and self-sufficiency of that person. Mr. Tucker's evidence fails under all five criteria.

1. The intent of the parties. This factor in the majority's test is particularly confusing, primarily due to the lack of any indication of what is meant by the term "formality." Assuming, for the sake of argument, that this factor directs that consideration be given to the relationship between the "person in question" and the insured, then Mr. Tucker's case still fails to survive summary judgment as he did not present any evidence describing the nature of the relationship between Darrell and Locie.

2. The formality of the relationship between the person in question and the other members of the named insured's household. This next requirement simply has no application in the context of the instant case. Only two people have been described as relevant in the so-called household in this case: Darrell and Locie. There is no evidence of anyone else purporting to be a member of the alleged household.

3. The permanence or transient nature of that person's residence therein. Under this element of the majority's test, there must have been a showing that a person was actually residing in the home of the insured for some period of time. Here, all evidence established that Darrell did not reside in Locie's trailer. Darrell lived in one trailer. Locie lived in a separate trailer.

4. The absence or existence of another place of lodging for that person. As

previously indicated, all evidence proved that Darrell lived alone in his own trailer.

5. The age and self-sufficiency of that person. **Darrell was thirty-eight years old.** He lived alone and independently.

Based upon the evidence outlined above, it is clear that summary judgment was appropriate in this case.

C. Every Insurance Contract Entered into in the State of West Virginia Is Subject to Ambiguity under Syllabus Point 2 of the Majority Opinion

Prior to the decision in the instant case, the law in West Virginia has traditionally held that "[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Syl. pt. 1, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962). *See also* Syl. pt. 2, *Orteza v. Monongalia County Gen. Hosp.*, 173 W. Va. 461, 318 S.E.2d 40 (1984) ("Where the terms of a contract are clear and unambiguous, they must be applied and not construed."); Syl. pt. 4, *Williams v. South Penn Oil Co.*, 52 W. Va. 181, 43 S.E. 214 (1903) ("It is the safest and best mode of construction to give words free from ambiguity their plain and ordinary meaning."). In syllabus point two of the majority opinion, our law of contract interpretation has been totally emasculated and replaced with a new and dangerous rule.

Syllabus point two of the majority opinion states that "[w]hen the words of an insurance policy are, without violence, susceptible of two or more interpretations, that which will sustain the claim and cover the loss must be adopted." This proposition is revolutionary in the area of contract interpretation. In every treatise, law review publication, and every decision ever rendered by an American court, the rule of law has been that an unambiguous contract cannot be "contorted" to make it ambiguous. The majority in this case has deviated from all Anglo-American jurisprudence to permit unambiguous language in an "insurance policy" to become ambiguous, so long as the contortion of the unambiguous words is "without violence."

I am simply at a loss in expressing my dismay over the majority's decision to make every unambiguous insurance policy in West Virginia subject to challenge by policyholders.[2] Under the majority opinion no insurance company will ever prevail, even when the clear and unambiguous terms of a policy support their position. This is true because syllabus point two of the majority opinion permits a plaintiff's attorney to contort unambiguous words "without violence" in order to make them ambiguous. When this is done, the majority has made crystal clear that the interpretation "which will sustain the claim and

[2]Obviously, this new principle of law will not be confined to insurance policies. Lawyers will use this unforgivable principle of law to attack unambiguous language in all contracts.

cover the loss *must* be adopted." (Emphasis added).

In view of the foregoing, I dissent. I am authorized to state that Justice Maynard joins me in this dissenting opinion.