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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OF WEST VIRGINIA

Albright, Chief Justice, dissenting, in part, and concurring, in part:

I strongly disagree with the majority's affirmance of the lower court's grant of summary judgment in favor of Glen Falls Insurance Company[1] on the basis that Appellant was not the foster child of Mr. Smith at the time of the accident, because this result was reached by ignoring time-honored principles governing the interpretation of ambiguous terms in insurance policies and in complete disregard of the realities surrounding the human relationship of foster child and foster parent. I have serious concern with the analysis used by the majority not only because of the specific result reached in this case, but also because it casts doubt on the vitality of two firmly rooted principles in our law – that an insurance contract will be construed in favor of the insured and that a term not defined within an insurance policy will be given its ordinary meaning.

The Glen Falls portion of this case involves the meaning of the term foster child as it appears within the four corners of an insurance policy, *not* as it appears in statutes setting forth the state's responsibility to protect abused and neglected children. I submit that the term "foster child" in the context of this case involves the human relationship of a foster

[1]Glen Falls Insurance Company is hereinafter referred to as "Glen Falls."

child and foster parent, not a legal relationship created by the state removing a child from its home. This conclusion is reached based on traditional methods this Court has employed in analyzing ambiguous terms in an insurance contract.

The term "foster child" which is included in the definition of "family member" is not defined in the insurance policy at issue. Given the uncertainty regarding its meaning, "[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." Syl. Pt. 4, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987), *overruled on other grounds, Potesta v. U.S. Fidelity & Guar. Co.,* 202 W. Va. 308, 504 S.E.2d 135 (1998). In applying this standard, we give "[l]anguage in an insurance policy . . . its plain and ordinary meaning," and the interpretation is made from the standpoint of "a reasonable person in the insured's position." Syl. Pts. 1 and 4, *Soliva v. Shand, Morahan & Co., Inc*., 176 W. Va. 430, 345 S.E.2d 33 (1986) (citation omitted), Syl. Pt. 1 *overruled on other grounds, National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E. 2d 488 (1987). *See also* Restatement (Second) of Contracts § 211 comment e ("[C]ourts in construing and applying a standardized contract seek to effectuate the reasonable expectations of the average member of the public who accepts it."). This standard was established in large part because insurance contracts are usually contracts of adhesion where the insured is not in the position to negotiate the terms of the policy with the insurer. *See*

Mitchell v. Broadnax, 208 W.Va. 36, 537 S.E.2d 882 (2000); *Auber v. Jellen*, 196 W.Va. 168, 469 S.E.2d 104 (1996).

The plain and ordinary meaning of a term such as foster child is generally found in a common dictionary. The phrase "foster child" is defined under the word "foster" in *The American Heritage Dictionary of the English Language* (1969) as "receiving, sharing, or affording parental care and nurture *although* ***not*** *related through legal or blood ties*." *Id*. at 519 (emphasis added). Such a common sense reading has been applied by a number of courts over the years. *See e.g. In re Norman's Estate*, 295 N.W. 63 (Minn. 1940); *Joseph v. Utah Home Fire Ins. Co.*, 835 P.2d 885, 888 (Or. 1992) ("In the common understanding, the defining relationship is one of nurturing, supporting, rearing – one of fostering – and not necessarily a 'legal relationship.'"); *see also* 66 A.L.R. 5th 269 §12, Annotation, *Who is "Member" or "Resident" of Same "Family" or "Household" within No-fault or Uninsured Motorist Provisions of Motor Vehicle Insurance Policy* (1999) (compilation of cases). This straightforward definition also reflects common experience.

Over the years many people with large hearts and wise ways have reached out to feed, clothe, shelter, nurture and love children not born of them, adopted by them or otherwise legally related to them. In turn, many of those children have in their adult years returned that love so freely given – hence establishing the actual lifetime relationship of

foster child and foster parent. Such relationships are not necessarily dependent on state intervention by our courts or our governmental agencies. The Glen Falls insurance policy – as it defined family member – may be easily read to include such non-legal relationships by reason of its use of the term "foster child." The undisputed facts in this case clearly demonstrate that Appellant and Mr. Smith shared a *human* relationship which comports with the ordinary or commonly held definition of foster child/foster father. At the time relevant to this case, Mr. Smith provided Appellant, at the least, shelter, some monetary support, companionship, shared meals and shared time.

Rather than looking to the plain meaning of the term "foster child," the majority announced in syllabus point five that "the terms 'ward' and 'foster child' as used in the definition of 'family member' in an automobile insurance policy . . . [are limited in meaning to] a legally recognized relationship."[2] It is hard to believe that a common person in the same position as Mr. Smith when he obtained the insurance policy would believe that some "legally recognized relationship" had to be in place in order to afford protection through the policy to those who were members of his household. The reasoning of the majority hardly favors the insured. I find it most difficult to understand why the majority, members of this Court who have given careful attention to honoring the best interests of families and family structures, could come to a conclusion which negates the human

[2]I assume the majority does not intend to interfere with the rights of parties to a contract to agree to a different definition of these terms.

relationship that exists between a foster parent and foster child in order to deprive an insured person the benefits of an insurance contract purchased to protect himself and the members of his real family. The relationship of foster child and foster parent *may be* created in the course of a statutory abuse and neglect proceeding by court order, *but* long before this State created such proceedings, the foster child/foster parent relationship has been and continues to be forged by the freely given and received acts of love and caring common to many such relationships without any governmental involvement at all.

The majority also found that even if Mr. Smith had established the legally recognized relationship of foster child/foster parent, Appellant's age precluded coverage under the insurance policy because he was beyond the age of eighteen at the time the accident occurred. The age restriction makes no sense in the context of the other relationships listed in the policy because had Appellant been the adult child of the insured through blood, marriage or adoption and resided with the insured, then he would have clearly fallen within the insurance policy's internal definition of family member regardless of age. The majority's reliance on the fact that Appellant was over the age of majority as further reason for denying insurance coverage simply makes no sense in the context of the policy or the expectations of the insured.

While the foregoing reflects my serious reservations with the outcome involving the Glen Falls policy, I concur with the majority's affirmance of the lower court's

grant of summary judgment for GMAC Insurance Company as the facts do not show that Appellant was a resident of his biological mother's household on the date of the accident for which he sought underinsured motorist coverage. Accordingly, I dissent, in part, and concur, in part, with the majority opinion.