STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Robert Q. Sayre Jr., Administrator
cum testamento Annexo, de bonis non,
of the Estate of Linda Harmon Culp, deceased,
Plaintiff Below, Petitioner

FILED
May 25, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) No. 11-0962 (Jackson County 03-C-84)

State Farm Fire & Casualty Company,
Suggestee Below, Respondent

MEMORANDUM DECISION

Petitioner Robert Q. Sayre Jr., the Administrator *cta dbn* for the Estate of Linda H. Culp, plaintiff below, appeals the Circuit Court of Jackson County's May 12, 2011, order granting summary judgment in favor of Respondent State Farm Fire & Casualty Company, a non-party suggestee below. Petitioner/Administrator Sayre is an attorney, and he represents the Estate of Linda Culp in this appeal. Respondent is represented by attorney Todd A. Mount.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On or about July 19, 2003, Gary Culp killed his wife Linda Culp at their marital residence in Jackson County. Gary Culp then fled the state and, on July 28, 2003, committed suicide. The Estate of Linda Culp filed a wrongful death lawsuit against the Estate of Gary Culp. In addition, various heirs or beneficiaries of both decedents filed separate lawsuits. On February 22, 2005, the circuit court approved a global settlement agreement that resolved all of these lawsuits and approved the distribution of the probate and non-probate assets of both decedents. With regard to the wrongful death claim, the Estate of Gary Culp agreed to the entry of a default judgment and agreed to pay the Estate of Linda Culp $295,000. The Estate of Linda Culp agreed not to execute against the Estate of Gary Culp for more than this amount. The settlement agreement left open the option for the Estate of Linda Culp to pursue a claim for the liability coverage in the Culps' homeowner's insurance policy issued by State Farm Fire & Casualty Company.

State Farm had previously denied this claim by letter of August 4, 2003. The basis for State Farm's denial was the "family exclusion" in the homeowner's policy. This provision excluded liability coverage for bodily injury to "you [the named insured] or any insured[.]" Both Linda Culp and Gary Culp were named insureds under the policy.

In an effort to recover under the insurance policy, on January 16, 2007, the Estate of Linda Culp issued a "Notice of Inquiry into Damages." The circuit court conducted the inquiry on February 16, 2007. By order entered May 27, 2010, nunc pro tunc to February 16, 2007, the circuit court determined that for the wrongful death claim, the Gary Culp Estate was liable to the Linda Culp Estate for $4,002,581, plus interest (although the Linda Culp Estate could not collect this amount from the Gary Culp Estate because of the earlier settlement agreement).

On May 28, 2010, the Linda Culp Estate filed a "Suggestion on Judgment" and a summons to State Farm pursuant to West Virginia Code § 38-5-10. State Farm filed an Answer denying that it was indebted and asserting that there was no liability insurance coverage. The circuit court agreed with State Farm that, because of the family exclusion, there was no liability insurance coverage for Gary Culp's killing of Linda Culp. Accordingly, the circuit court granted summary judgment for State Farm.[1]

This Court reviews a circuit court's entry of summary judgment under a de novo standard of review. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). After a careful consideration of the parties' briefs and the record on appeal, we conclude that summary judgment for State Farm was proper under the facts of this case and we affirm the circuit court. Linda Culp was a named insured and there was no liability coverage in the homeowner's policy for bodily injury of an insured.

The Estate of Linda Culp argued to the circuit court, and argues in this appeal, that a separate provision in the insurance policy, the severability clause, creates an ambiguity which defeats the family exclusion. The severability clause is in the "Conditions" section of the policy and provides, "[t]his insurance applies separately to each insured. This condition shall not increase our limit of liability for any one occurrence." In the summary judgment order, the circuit court rejected this argument by finding as follows:

> [The severability] clause appears to exist to potentially confer liability coverage to one insured even when another insured may not be entitled to liability coverage, where multiple insureds are alleged to be ***liable*** for one occurrence. In this case, there are no liability claims against the Estate of Linda Culp, and further, the Estate of Linda Culp could not be liable to itself; accordingly, the severability clause has no application.

We agree with the circuit court's analysis and find no error.

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[1] The circuit court did not need to address additional policy exclusions that might apply.

The Estate of Linda Culp also asserts that State Farm waited too long to assert the coverage issue and should be estopped from raising it as a defense to the suggestion proceeding. However, State Farm denied coverage as early as August 4, 2003. Moreover, State Farm was not a party to any of the lawsuits and the circuit court has found that State Farm was not properly served with, and did not receive, the "Notice of Inquiry into Damages." The circuit court concluded, as do we, that State Farm timely asserted its coverage defense when it was served with the suggestion and summons.

Finally, the Estate of Linda Culp argues that an insurance company, in challenging a garnishment claim, cannot raise for the first time defenses that its insured did not raise in the underlying litigation. It argues that the Estate of Gary Culp never raised an insurance coverage defense to the wrongful death suit. State Farm responds that the coverage issue is *its own defense*, not a defense that the Estate of Gary Culp could or would assert. State Farm argues that a garnishee may always assert its own defenses to a creditor's claim that the garnishee is indebted to the judgment debtor. We have held that "[a]n indemnitor against loss ordinarily may not, in a garnishment-in-aid-of-execution proceeding, assert defenses against the judgment creditor which the indemnitee/judgment debtor failed to assert, such as the comparative negligence of the judgment creditor." Syl. Pt. 5, *Commercial Bank v. St. Paul Fire and Marine Ins. Co.*, 175 W.Va. 588, 336 S.E.2d 552 (1985). However, we also recognized in *Commercial Bank* that "[t]he garnishee may, of course, defend on the ground that no moneys are due by it to the judgment debtor[.]" *Id.*, 175 W.Va. at 597, 336 S.E.2d at 560, *quoting Gorn v. Kolker*, 213 Md. 551, 553, 133 A.2d 65, 67 (1957). Accordingly, we conclude that State Farm was entitled to assert in the suggestion action that it owes no money because there was no coverage.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 25, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Justice Robin Jean Davis