STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

JAMES AND MARLAINE ADKINS,
Plaintiffs below, Appellants

v.) No. 35676 (Cabell County No. 06-C-0905)

ERIE INSURANCE COMPANY,
Defendant below, Appellee

FILED
May 16, 2011
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This case is before the Court upon the appeal of James and Marlaine Adkins from the December 30, 2009, order of the Cabell County Circuit Court granting summary judgment to Erie Insurance Company. Pursuant to Rule 1(d) of the West Virginia Revised Rules of Appellate Procedure, the Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having carefully reviewed the record, the briefs of the parties, the arguments of counsel, the applicable precedent and the relevant standard of review, the Court concludes that the trial court erred in granting Rule 60(b) relief to the appellee and reversing a previous judgment in favor of the appellants. The Court further finds that this case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate pursuant to Rule 21 of the West Virginia Revised Rules of Appellate Procedure.

This case arises from a declaratory judgment action filed by James and Marlaine Adkins (hereinafter "appellants") on November 30, 2006, against Erie Insurance Company (hereinafter "appellees"), seeking a ruling on whether the appellants were entitled to coverage for damages incurred as a result of an April 9, 2005, automobile accident in which their daughter, Kayla, who was under the age of 18, was severely injured. Appellants asserted that the accident was caused by Nancy Johnstone, who was insured under an automobile liability policy issued by the appellee, Erie Insurance Company. Ms. Johnstone's insurance policy provided for a per-person policy limit of One Hundred Thousand Dollars ($100,000.00) and a per-accident policy limit of Three Hundred Thousand Dollars ($300,000.00).

The appellants were not involved in the accident. Rather, the appellants sought to recover incidental costs associated with caring for their daughter and for their daughter's medical bills, for which they contend they are responsible as Kayla's parents. The appellants' daughter was seriously injured in the automobile accident, and spent nine days in the hospital. Kayla suffered a concussion, right eye trauma requiring cosmetic surgery,

a broken right scapula, rib fractures, collapsed lung, liver lacerations, pelvic fracture and other injuries.

The appellee ultimately settled Kayla's claim against Ms. Johnstone with the payment of the per-person policy limits of $100,000.00. The appellants waived any claims that they might have had to the settlement proceeds, and waived any right or claim to recovery against Johnstone, other than that which would have been available as a separate per-person policy limit under the insurance policy. The appellants specifically reserved the right to file a declaratory judgment action against the appellee to determine whether they had a right to recovery under the policy, and whether the insurance company had an obligation to pay under a separate per-person policy limitation.

The circuit court held a hearing on February 28, 2008, on the declaratory judgment action. At the time of the circuit court's ruling, representations were made to the circuit court that the insurance policy's definition of "bodily injury" was as follows:

> LIABILITY PROTECTION
>
> OUR PROMISE
>
> Bodily Injury Liability
>
> Property Damage Liability
>
> We will pay all sums you legally must pay as damages caused by an accident covered by this policy. The accident must arise out of the ownership, maintenance, use, loading or unloading of an auto we insure.
>
> Damages must involve:
>
> 1. Bodily injury, meaning physical harm, sickness or disease, including care, loss of services, or resultant death;...

The appellee did not contest at this time that the policy language was not as represented to the circuit court. In reliance upon these representations about the policy language, on May 10, 2008, the circuit court found that the appellants' claims were separate and distinct from the claims of the child, and that the appellee would have to treat the appellants' claims under a separate per-person policy limit. This order included a finding

that an injury to a minor child gives rise to two causes of action, pursuant to *Glover v. Narrick*, 184 W. Va. 381, 400 S.E.2d 816 (1990). The first is an action on behalf of the child for pain and suffering, permanent injury and impairment of earning capacity. The second is an action by the parents for consequential damages, including the loss of services and earnings during the minority of the child and expenses incurred for necessary medical treatment for the child's injuries. The court concluded that because the accident gave rise to two separate and distinct causes of action, the claims were capable of being resolved independently of one another, and thus were not derivative claims. Therefore, the claims could not be subject to a limitation of liability provision in the Erie insurance policy that limits payment of derivative claims to a single per-person limit.

Four months later, on September 3, 2008, Erie moved pursuant to Rule 60(b) of the W. Va. Rules of Civil Procedure for relief of the May 10, 2008, order of the circuit court. In this motion, the appellee contended that the policy language relied upon by the circuit court in its May 10, 2008, order, and which Appellee did not then challenge, was not the policy language which should have been considered. Specifically, Erie contended that Ms. Johnstone's insurance coverage was amended by a Policy Change Endorsement FWA02 (Ed. 6/04) in 2004. The amendment, according to Erie, altered the definition of bodily injury, by taking out any claim for care and loss of services. The amendment, in pertinent part, reads as follows:

> LIABILITY PROTECTION
>
> OUR PROMISE
>
> Bodily Injury Liability
>
> Property Damage Liability
>
> We will pay all sums you legally must pay as damages caused by an accident covered by this policy. The accident must arise out of the ownership, maintenance, use, loading or unloading of an auto we insure.
>
> Damages must involve:
>
> 1. Bodily injury, meaning physical harm, sickness or disease, or resultant death to a person...

The appellees argued before the circuit court that the previous order was predicated upon a mistake in fact because the wrong definition of "bodily injury" was used.

At a hearing on September 18, 2008, the circuit court heard the arguments of the parties, and requested additional briefing on the issues of waiver and estoppel. No order was entered from this hearing. However, on October 1, 2008, the circuit court issued a letter advising the parties that the court was going to grant the appellee's motion for relief from the May 10, 2008, order in favor of the appellants, based upon the mistaken definition of "bodily injury" used at the time of the initial ruling. Although counsel for the appellee was directed to prepare an order, no order resulted from this hearing. On December 31, 2008, the presiding judge retired and a new judge was appointed in 2009.

On July 24, 2009, a hearing was held by the circuit court on the appellee's renewed motion for summary judgment. By order entered December 30, 2009, the circuit court entered an order setting aside the previous grant of summary judgment in favor of the appellants, citing the amended policy definition of "bodily injury" in the Policy Change Endorsement. The circuit court further held that the appellants' claims were derivative of their daughter's claim, and not a separate and distinct claim, so the payment of the policy limits to the daughter exhausted all coverage available under the policy.

The standard of review in this case which turns upon whether the circuit court properly granted relief under W. Va.R.C.P. Rule 60(b) was stated in Syl. Pt. 5 of *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974) as follows:

> "A motion to vacate a judgment made pursuant to Rule 60(b), W. Va. R.C.P., is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion."

Furthermore, we are reminded that the purpose of Rule 60(b) relief is remedial:

> "A court, in the exercise of discretion given it by the remedial provisions of Rule 60(b), W. Va. R.C.P., should recognize that the rule is to be liberally construed for the purpose of accomplishing justice and that it was designed to facilitate the desirable legal objection that cases are to be decided on the merits."

Id., at Syl. Pt. 6.

The appellants posit that the circuit court abused its discretion in reversing its previous ruling on their claim, asserting that Erie was arguing that the discovery of the amended policy language amounted to a claim of newly discovered evidence. The appellants

direct this Court's attention to the case of *Powderidge Unit Owners Ass'n v. Highland Properties*, 196 W. Va. 692, 474 S.E.2d 872 (1996). In *Powderidge*, we noted that "[i]n establishing the bounds of such motion, the weight of authority supports the view that Rule 60(b) motions which seek merely to relitigate legal issues heard at the underlying proceeding are without merit." *Id.*, at 705, 474 S.E.2d at 885. We further noted that "a Rule 60(b) motion does not present a forum for the consideration of evidence which was available but not offered at the original summary judgment motion." *See Anthony v. Runyon*, 76 F.3d 210, 215 (8th Cir. 1996) ("a motion for reconsideration should not be used 'as a vehicle' to introduce new evidence that could have been adduced during pendency of the [previous] motion"). *Id.* at 886, 474. S.E.2d at 706. We also noted in *Powderidge* that "the great weight of authority is that failure to file documents in an original motion does not convert the late filed documents into newly discovered evidence. (Citations omitted). *Id.* at 706, 474 S.E.2d at 886.

We agree with the appellee that the correct version of the insurance policy, along with its amended definition of bodily injury, could be the basis for a denial of the appellants' separate claim. However, under these particular facts and circumstances, the failure of the appellee to present the correct version of its own policy in rebuttal of the appellants' assertions cannot be used as a basis to relitigate the appellants' claims in a Rule 60(b) motion. The circuit court abused its discretion in granting the appellee's relief from the initial summary judgment in favor of the appellants based upon the later presented amended policy language, which was most certainly in the possession of the appellee.

Having resolved this appeal on the first assignment of error, we find no reason to elaborate on the remaining four assignments of error.

For the foregoing reasons, the order of the Circuit Court of Cabell County entered December 30, 2009, is reversed, and this matter remanded to the Circuit Court of Cabell County with directions to reinstate the order entered May 10, 2008, granting summary judgment in favor of the appellants.

Reversed and remanded.

ISSUED: May 16, 2011

CONCURRED IN BY:
Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh