Supreme Court of Ohio Clerk of Court - Filed May 19, 2016 - Case No. 2014-1161

CASE NO. 14 – 1161

In the SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO
CASE NO. 13AP-290

WORLD HARVEST CHURCH,
Plaintiff-Appellee,

v.

GRANGE MUTUAL CASUALTY COMPANY,
Defendant-Appellant,

APPELLEE WORLD HARVEST CHURCH'S MOTION FOR RECONSIDERATION

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APPELLEE WORLD HARVEST CHURCH'S MOTION FOR RECONSIDERATION

1. Summary of Argument

Pursuant to S.Ct.Prac. R. 18.02, World Harvest Church asks the Court to reconsider coverage under the SUPPLEMENTARY PAYMENTS section of the policy because the Court's sole justification for denying coverage was based on an incorrect fact. The Court avoided coverage under this section: "Because the Faietas' suit is not one that alleges bodily injury to which the insurance applies." ¶42

This is incorrect. The Faieta lawsuit *did* allege a claim to which the insurance applied—simple negligence—and even Grange admitted that there was a limited scenario whereby there could be a covered loss based on the facts alleged in the complaint.

Coverage under the SUPPLEMENTARY PAYMENTS section does not depend on an actual duty to indemnify, but instead is triggered merely by the duty to defend. Grange, quite properly, defended the Faieta lawsuit, so WHC has coverage for attorney fees and post-judgment interest amounting to about $1.5 million, regardless of whether there is coverage under the main portion of the CGL form for the underlying torts.

Grange's Proposition of Law Number 2:

When attorney's fees are awarded solely in conjunction with non-covered conduct, "compensatory" attorney's fees are not covered damages under liability insurance policies. (*Neal-Pettit v. Lanham*, 125 Ohio St.3d 327 (2010), construed.).

2.1 The Faieta complaint qualified as a "suit" because it contained a count of simple negligence that alleged "damages because of bodily injury * * * to which this insurance applies." This resulted in Grange defending the "suit" and this is all that is required to trigger coverage under the SUPPLEMENTARY PAYMENTS section.

The Court's decision concludes at ¶39 that since "no claims are covered by the insurance policies" then "there is no basis to conclude that Grange must indemnify WHC for attorney fees awarded on noncovered claims."

However, coverage under the SUPPLEMENTARY PAYMENTS section does not depend on coverage existing under the main coverage form, and the exclusions contained in the main coverage form (such as the Abuse and Molestation Exclusion) do not apply to negate coverage afforded under the SUPPLEMENTARY PAYMENTS section.

Rather, as the clear language of this section states, coverage is available if Grange **defends** a "suit." In other words, coverage turns on whether there is a duty to defend, not on whether there proves to be a duty to indemnify.

Grange's policy contains a SUPPLEMENTARY PAYMENTS section (Grange Supplement, p. 20-21) that provides:

> We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:
>
> * * *
>
> e. all costs taxed against the insured in the "suit".

Payment under the SUPPLEMENTARY PAYMENTS provision is not dependent on the presence of "bodily injury" or an "occurrence." Rather, by its plain terms, payment is triggered by the investigation or defense of a "suit." Grange defended the underlying *Faieta* lawsuit, so payment under this provision is triggered.

In its opinion, the Court avoided coverage under this section and the corresponding interest provision by stating that the definition of "suit" was not satisfied because "the Faietas' suit is not one that alleges bodily injury to which the insurance applies." ¶42.

This is incorrect; even Grange admitted that there was a limited scenario whereby there could be covered loss based on the facts alleged in the complaint:

> Q. What is the jury award that could have come back that would have been covered by the policy?
>
> A. There's a possibility based on the testimony of a dermatology condition by some of the medical personnel * * * that would be the basis of a minimal award for bodily injury, that he definitely had bruises and marks and it might have been a rash, based on the medical testimony.
>
> Q. So the cause of action would be negligently causing a rash?
>
> A. It could be, yes, yes. That was—the medical testimony initially said yes, he has got bruises, but it looks like a rash, and the Church volunteered that yes, some others had said their children had developed a rash. So we are looking at it from the insured's standpoint that possibly a rash had developed based on some harsh cleaning chemicals used in the daycare.

See Histed deposition, p. 60-61.

The Faieta complaint contained a basic allegation of negligence. Count One—Negligence simply alleged "Defendants breached their duty to exercise care by allowing plaintiff Infant Doe to become physically injured while in their care." See Grange Supplement—70. Count Two alleged assault and battery, but Count One alleged simple negligence.

Simple negligence is covered by Grange's policy, as Histed admitted. So there was an allegation made in the complaint of "damages because of bodily injury * * * to which this insurance applies." The definition of "suit" was satisfied. Grange acknowledged that there was a covered allegation made in the complaint by agreeing to defend under a reservation of rights.

The jury did not find against WHC based on the negligence count, but covered negligence was alleged in the complaint, and that is all that is required to trigger the duty to defend and coverage under the SUPPLEMENTARY PAYMENTS section.

2.2 Cases construing the term "costs" from a layperson's viewpoint have consistently held that it can reasonably be construed to include attorney fees.

The SUPPLEMENTARY PAYMENTS section covers "all costs taxed against an insured in the "suit."" From the point of view of a layperson, it is reasonable to construe costs as including attorney fees awarded to the prevailing party. Although this Court has not addressed this specific issue, a myriad of other states has weighed in on the interpretation of this provision and agreed.

Only three years ago, the Supreme Court of Idaho, in *Employers Mutual. Casualty Co. v. Donnelly*, 154 Idaho 499, 300 P.3d 31 (2013), was faced with a situation where the insured, in the underlying suit, was found liable for faulty workmanship. The insurer defended the insured under a reservation of rights and the court later determined that the insurer had no duty to indemnify as there was no coverage under the CGL policy for the underlying claim. However, the policy had a SUPPLEMENTARY PAYMENTS section that was identical to the provision in Grange's policy. The court held that the insured had coverage for the attorney fees awarded the plaintiff in the underlying suit since the fees "emanate[d] from the duty to defend as provided in the supplementary payments section of the policy." *Id.* at 503. The court concluded that although "awarded damages [were] excluded from coverage under the applicable insurance policy," the insurance company was "required to pay costs and attorney fees taxed against [the insured] in the underlying action." *Id.* at 507.

In its analysis, the Idaho Supreme Court used the same rationale that this Court has used on many occasions. First, the drafter "never set forth any specific language in its policy that ties its promise to pay costs on a finding that there is coverage." Likewise, this Court has recognized that an insurance company, as the drafter of the document, can easily exclude coverage through specific policy language. "In the insurance context, we have assumed that the insurer, as the drafter of the policy, is always in a stronger bargaining position than is the insured." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 224, 2003-Ohio-5849, 797 N.E.2d 1256, 1265, ¶ 34 (2003).

Second, the Idaho Supreme Court recognized "any ambiguity in this provision of the policy contract should be construed strongly against [the insurer] and in favor of the [the insured]." Likewise, it is a longstanding tenet in Ohio that "[w]here provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured." *King v. Nationwide Ins. Co*., 35 Ohio St.3d 208, 519 N.E.2d 1380, 1380-81 (1988).

Finally, the Idaho Supreme Court articulated in a separate case that:

> The [dictionary] definition represents the common understanding of the term 'costs.' The plain, ordinary and popular meaning of 'costs' is the expense of litigation which includes attorney fees.

Mutual of Enumclaw v. Harvey, 115 Idaho 1009, 1013, 772 P.2d 216, 220 (1989).

In *Prichard v. Liberty Mut. Ins. Co*., 84 Cal.App.4th 890, 101 Cal.Rptr.2d 298 (Cal.App.2000), as modified on denial of reh'g (Dec. 6, 2000), the court was faced with a nearly identical SUPPLEMENTARY PAYMENTS provision that promised to "pay, with respect to any claim or suit we defend . . . [a]ll costs taxed against the insured in the suit." *Id* at 312. The court separated the issue of coverage and attorney costs and held "[t]he cost claim is not . . . a

substantive replay of the indemnity issue. The policy . . . obligates the insurer to pay the costs in any lawsuit it defends." *Id*. Moreover, the court held that "there is no reason that there should be any per se immunity from the supplementary payments obligation, particularly given that such payments (unlike the classic indemnification obligation but like defense costs), **are independent of actual coverage**." *Id* at 313.

Likewise, in our case coverage for the assault/IIED/negligent supervision claims is irrelevant in deciding coverage under the SUPPLEMENTARY PAYMENTS section. Did Grange defend the underlying suit? Yes. Were attorney fee costs taxed against WHC in the underlying suit? Yes. Did Grange promise to pay these costs? Yes.

Most other jurisdictions agree with this approach. *See e.g.:*

- *Groom v. Home-Owners Ins. Co*., 2007 WL 1166050 (Mich. App. 2007) (court held that there was no coverage for any other damages to insured in an underlying suit but held that the insurance company was still "obligated to pay an award of attorney fees" based upon the supplementary payments clause.);

- *Littlefield v. McGuffey,* 979 F.2d 101 (7th Cir.1992) (court held that the insurer had "defended" insured, and therefore it had to fulfill its obligations under the policy's supplementary payments provision to pay costs, including an award of attorney fees.);

- *St. Paul Fire & Marine Ins. Co. v. Hebert Const., Inc*., 450 F.Supp.2d 1214 (W.D.Wash.2006) (court held that coverage of underlying damages was a factual question to be sent to the jury, but that supplementary payments clause in the "policies includes attorneys' fees" from the underlying suit against the insured.);

- *GEICO General Ins. Co. v. Hollingsworth*, 2015 WL 376406 (Fla. App.), (finding coverage since "GEICO could have provided a definition of "court costs" that explicitly excluded attorney's fees"); and

- *GEICO General Ins. CO. v. Rodriguez*, 2014 WL 4435956 (Fla. App.), (finding coverage even for attorney fees in the form of a sanctions judgment against the insured arising from discovery dispute).

2.3 There is little Ohio law on the issue, but the little that exists supports WHC's position.

Ohio law on this issue is sparse, but what little exists supports WHC's position. In *Pasco v. State Auto. Mut. Ins. Co.*, 1999 WL 1221633, the underlying plaintiff was awarded attorney fees of $10,000 in a CSPA case. The defendant/insured requested that State Auto pay this award pursuant to the supplementary payments provision of the policy, which covered "all costs taxed against the insured in any suit defended by the company." State Auto argued—and the trial court agreed—that since the CSPA violations were not covered by the policy, the attorney fee award was similarly not covered.

The court of appeals disagreed:

> [T]he provision's use of the language "*all* costs taxed in any *suit* defended by the company" (as opposed to "those costs taxed against the insured and associated with a covered claim") indicates that no such requirement exists.
>
> * * *
>
> Given the requirement that we construe ambiguous language strictly against the insurer and liberally in favor of the insured, we find that the primary policy's "supplementary payments" provision does cover the costs (including attorney fees) under the specific facts of this case assessed against [State Auto's] insured in the Ottawa County litigation.

2.4 The insurance industry reacts—and predictably restricts coverage.

Significantly, the insurance industry has reacted to this wave of cases and ISO has now redrafted the supplementary payments provision at issue. Effective with the 2007 CGL form the provision now states that the insurer will pay (new language in bold):

> All **court** costs taxed against the insured in the "suit". **However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.**

See *Commercial General Liability Coverage Guide, 11th Edition* and National Underwriter Company, FC&S Online, Commercial General Liability Insurance, 2007 CGL Form Revisions.

This is a significant change, and it was done for a reason. Since ISO has changed its wording to now specifically exclude coverage for attorney fees, it stands to reason that one reasonable interpretation of the older language—which is the language in WHC's policy—is that attorney fees *were* intended to be covered as 'costs.'

2.5 Conclusion.

Affirming the Tenth District's ruling that WHC is entitled to indemnity of the underlying suit's attorney fees follows not only this Court's previous rulings, but also the trend in other jurisdictions to provide coverage to policyholders in the face of ambiguous language that has now been clarified.

As Grange pointed out in its Merit Brief, some jurisdictions may have bucked the trend, but in such a situation Ohio law is clear:

> Where the language of a clause used in an insurance contract is such that courts of numerous jurisdictions have found it necessary to construe it and in such construction have arrived at conflicting conclusions as to the correct meaning, intent, and effect thereof, the question whether such clause is ambiguous ceases to be an open one.

George H. Olmsted & Co. v. Metropolitan Life Insurance Company (1928), 118 Ohio St. 421, 161 N.E. 276.

Grange's Proposition of Law Number 3:

A liability insurance policy's supplementary payments clause cannot be reasonably construed as an agreement to pay post-judgment interest on non-covered claims.

The Tenth District was correct in holding "that the supplementary payments section of the CGL policy plainly obligates Grange to pay WHC for the post-judgment interest assessed on the full amount of the judgment." (Recon. App. Op., ¶ 23, Grange Appendix 13). As with

attorney fees, the trigger of coverage is Grange defending a "suit," not a covered or partially covered judgment.

The SUPPLEMENTARY PAYMENTS section of Grange's policy clearly states that Grange will pay "all interest earned on the full amount of any judgment" that accrues prior to Grange proffering the part of the judgment covered by the policy. Part of the judgment was for attorney fees, and this portion of the judgement was covered for the reasons stated above. Grange did not proffer this amount, so Grange is liable for post-judgment interest on the entire award.

This SUPPLEMENTARY PAYMENTS provision is standard, and the vast majority of cases that have construed it—at least for the last 50 years—have held that it means exactly what it says:

> Most liability policies provide that the carrier, in addition to the policy limits, is obligated to pay all interest on any judgment that accrues before the company pays or deposits into the court that part of the judgment covered by the policy. Under such policies, therefore, the insurer will be liable for post-judgment interest on the entire judgment, including any portion of it which is outside or in excess of the policy coverage.

Windt, *Insurance Claims and Disputes*, §6:17.

Windt cites 15-20 cases for this statement and there are many others, including *River Valley Cartage Co. v. Hawkeye-Security Ins. Co.*, 17 Ill.2d 242, 161 N.E.2d 101 (1959), the lead case for the primary treatise on the subject, which appears at 76 *ALR2d* 976. Interestingly, *River Valley* reviews the history of the supplementary payments form and notes that The National Bureau of Casualty Underwriters adapted the present language in the 1950s to clarify that carriers were intended to be liable for interest on the full amount of a judgment and not just the covered portion:

> The National Bureau of Casualty Underwriters formerly included the clause now before us in its form of standard policy. It has now changed its form to read 'all interest on the entire amount of any judgment therein which accrues after entry of the judgment.' In announcing the change, it said: "Several court cases have held that an insurer's obligation to pay interest extends only to that part of the judgment for which the insurer is liable. **The respective rating committees have agreed that this is contrary to the intent.** As a result, the wording with respect to payment of interest in the new Family Automobile Policy has been restated, in order that it be entirely clear that all interest on the entire amount of any judgment, which accrues after entry of the judgment, is payable by the insurer until the insurer has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the insurer's liability thereon."

Ramsey, *Interest on Judgments Under Liability Insurance Policies*, Insurance Law Journal No. 414 (July, 1957), p. 407, at p. 411.

Ohio cases are in accord. In *Coventry v. Steve Koren, Inc.*, 1 Ohio App.2d 385, 205 N.E.2d 18 (1965), a judgment was returned against the insured for $60,000; the insured's policy limit was only $10,000. The issue was whether the insurer was liable only for post-judgment interest on the covered amount of $10,000 or the whole amount of the judgment. The policy language required the insurer to pay "all interest accruing after entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon."

Notice that this is the old language and that this provision is not as broad as Grange's provision, which specifically says "all interest **on the full amount** of any judgment." Nevertheless, the court in *Coventry* found that the insurer was obligated to pay *all* post-judgment interest. The case was certified to the Ohio Supreme Court based on a conflict with another district, and the supreme court held that the "judgment of the Court of Appeals is affirmed for the reasons stated in its opinion." *Coventry v. Steve Koren, Inc.*, 4 Ohio St.2d 24 (1965). See also *Rader v. Carroll*, 1992 WL 379315 (12th District).

The court of appeals adopted the majority position that has been entrenched in the case law and treatises for over 50 years, as evidenced by the language used by the Kansas Supreme Court in *Stamps v. Consolidated Underwriters*, 208 Kan. 630, 493 P.2d 246 (1972):

> That which now appears to be the majority view is the clause creates liability for interest on the entire judgment awarded so as to render the insurer liable for such interest until the amount of the policy limit, plus interest on the whole judgment, has been tendered, offered or paid.
>
> The minority view is that liability is limited to interest on the amount of the policy limit.
>
> * * *
>
> We are persuaded the language in the interest clause means what it says and means what a substantial segment of the insurance industry says it means, that is, irrespective of principal policy limits, the term judgment refers to the entire or whole judgment and not something less.

Grange espouses a position that was the minority view even 50 years ago before the SUPPLEMENTARY PAYMENTS language was broadened to include the words "full amount of the judgment." The only case cited by Grange—*Bohrer v. Church Mutual Ins. Co.*, 12 P.3d 854 (Colo. App. 2000)—arrived at its decision by refusing to enforce the clear language of the policies based on public policy considerations, not based, as Grange suggests, on policy construction.

Finally, Grange, the drafter of the contract, knew how to limit the SUPPLEMENTARY PAYMENTS section of the CGL policy. The Tenth District said it best:

> If Grange wanted to limit its liability for postjudgment interest, it could have done so. For example, in the CU [commercial umbrella] policy, Grange stated it agreed to pay its insured for: "All interest earned *on that part of any judgment within the Limit of Insurance* after entry of the judgment and before we have paid the insured, offered to pay, or deposited in *court that part of any judgment that is within the applicable Limit of Insurance*." (Emphasis added.) (R. 28, exhibit A, CU Policy, at 7.) As evidenced by this provision, Grange knew how to limit its liability for postjudgment interest. Grange chose not to do so in the CGL policy.

(Recon. App. Op., ¶ 22; see policy provision at Grange Supplement p. 48)

The Tenth District ruled correctly that "the supplementary payments section of the CGL policy plainly obligates Grange to pay WHC for the post-judgment interest assessed on the full amount of the judgment." (Grange Appendix 13, ¶23) This Court should affirm the portion of the Tenth District's holding that Grange is required to indemnify WHC for all post-judgment interest.

Respectfully Submitted,

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