THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2014-000671

Mike Russell, ... Respondent,

v.

Randolph Gill and Pennsylvania Life Insurance Company, ... Defendants,

Of Which Pennsylvania Life Insurance Company is the. ..... Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

I. THE TRIAL COURT CORRECTLY APPLIED SOUTH CAROLINA CODE SECTION 38-71-30 TO THE FACTS OF THIS CASE TO FIND AND HOLD THAT THE APPELLANT WAS NOT ENTITLED TO ENFORCE THE "INTOXICATION EXCLUSION" CONTAINED IN ITS POLICY AS A MATTER OF LAW.

II. DEFENDANT'S EXHIBIT 12 DOES NOT EXCUSE APPELLANT'S FAILURE TO DELIVER A COPY OF THE DISABILITY POLICY TO RESPONDENT.

III. THE CAUSE OF RESPONDENT'S MOTORCYCLE ACCIDENT HAS NO RELEVANCE TO THE ISSUES BEFORE THE COURT.

IV. PUBLIC POLICY DOES NOT REQUIRE REVERSAL OF THE TRIAL COURT'S ORDER

STATEMENT OF THE CASE

This is an appeal from the Order of the Honorable Eugene Griffith entered on or about June 7, 2013, after a four day bench trial in the Lexington County Court of Common Pleas. (R. pp. 1-10, 88, 178, 399). After consideration of the testimony presented before him and after reviewing the exhibits introduced at trial, Judge Griffith correctly found and ruled that Appellant Pennsylvania Life Insurance Company ("Penn Life") offered no proof that it provided Respondent Mike Russell with a copy of the disability policy sold to him and was therefore not entitled to enforce the intoxication exclusion contained in the policy in order to defeat coverage. (R. p. 10) Judge Griffith's Order is correct and should be affirmed by this Court.

Respondent initiated this action against Appellant Penn Life and Randolph Gill on or about February 10, 2010, in the Charleston County Court of Common Pleas. (R. p. 29) (Mr. Gill was dismissed from this lawsuit prior to Trial). Respondent's Complaint alleged causes of action against Appellant including bad faith refusal to pay benefits; breach of contract to procure insurance; and breach of insurance contract. (R. pp. 29-34). Appellant removed this case to Federal Court and subsequently answered Respondent's Complaint. (R. pp. 36, 63). Appellant also asserted a counterclaim against Respondent for declaratory judgment, seeking to enforce an intoxication exclusion allegedly contained in the insurance policy. (R. pp. 10, 63-70, 77-87). On or about October 1, 2010, the case was remanded to State Court on the grounds that the then Defendant Gill was a South Carolina native. (R. pp. 15-25).

Venue in the case was ultimately transferred to Lexington County (R. pp. 1-2). The matter was tried before Judge Griffith on December 13-14 and 20-21, 2012. On June

7, 2013, Judge Griffith issued his Order. (R. pp. 1-10). Appellant timely filed a motion for reconsideration which was argued before Judge Griffith on October 15, 2013. (R. pp. 2414-2436). On or about March 5, 2014, Judge Griffith issued his Order denying the Appellant's motion for reconsideration. (R. p. 13). This appeal followed.

STATEMENT OF THE FACTS

The question before the Court in this case is very simple. Can an insurance company deny coverage based on an exclusion in a policy which the carrier has never bothered to deliver or give to its insured? The Trial Court heard the evidence presented before him and considered the documentary evidence as well as the applicable South Carolina law and held that as a matter of law it could not. (R. pp. 1-10). Appellant takes issue with this ruling and has appealed. However, Judge Griffith's ruling is correct and should be affirmed by this Court.

Respondent purchased an accident disability insurance policy from Penn Life in November of 1999. (R. pp. 2, 677). Several years later, on or about June 27, 2002, Respondent met with Randolph Gill, another insurance agent and completed an application requesting an additional monthly benefit of $500.00 for his accident disability policy. (R. pp. 2, 688). This increased his monthly benefit to $2,500.00 a month. (R. p. 2; p. 100, lines 2-6; p. 419, lines 6-8).

Although both South Carolina law and company policy specifically required that the Respondent be furnished with a copy of the policy and his application, the evidence presented in this case by both Appellant and Respondent conclusively establishes that the Respondent was never provided a copy of his policy in 1999 or 2002. No evidence was presented that Appellant or its agents ever provided Respondent with a copy of his

policy. (R. pp. 2-3; p. 99, lines 14-23; p. 103, lines 21-23; p. 112, lines 20-25; p. 113, line 1; p. 137, lines 11-16; p. 140, lines 7-11, 18-20; p. 141, lines 14-17; p. 149, line 3; p. 152, lines 10-17; p. 417, lines 8-9; p. 418, lines 5-8).

Appellant provided testimony that it was their company "policy" to deliver a copy of the policy to the agent who then delivered it to their insureds. However, Appellant was unable to produce a single shred of evidence that this "policy" was followed in this case. (R. p. 137, line 10 - p. 138, line 17; p. 143, line 23 – p. 144, line 1). The only policy that Appellant was able to produce during discovery and at trial was a computer generated specimen of the policy generated after the commencement of this litigation and not the actual policy itself. (R. p. 136, line 2; p. 274, line 20 – p. 275, line 19).

On June 18, 2008, the Respondent was seriously injured in a motorcycle accident. (R. p. 7). Respondent admitted to consuming several alcoholic drinks prior to the accident. (R. p. 6). The Appellant asserted as a defense to the Respondent's claim the argument that the Respondent's action was barred by the intoxication exclusion contained in the policy that he never received and spent the bulk of its case at trial (as well as the bulk of its brief before this Court) litigating and presenting argument as to the cause of the accident and whether or not the Respondent was intoxicated at the time his accident occurred. (Respondent has vehemently denied being intoxicated at the time of the accident and has vehemently denied that the accident was caused or contributed to by any intoxication on his part.) (R. p. 428, lines 21-23). Judge Griffith made no finding or ruling in his Order as to the issue of whether or not the Respondent was intoxicated at the time of the accident and whether or not such alleged impairment contributed to the motorcycle accident and his injuries. (R. p. 10).

Respondent submitted to Appellants a claim form dated August 27, 2008, requesting disability benefits under the policy. (R. p. 279, line 21 - p. 280, line 5; p. 624). Respondent executed all forms and provided all information required by Appellant. (R. p. 280, lines 1-25; p. 281, lines 1-6). He executed a release for medical records. (R. p. 284, lines 15-19). The Appellant conceded at trial that Respondent did not lie to the company or provide them with false or misleading information. (R. p. 279, lines 17-20; p. 283, lines 20-23; p. 337, line 20 – p. 338, line 2).

By check dated September 22, 2008, Appellant paid to Respondent $8,125.00. This payment included two months of disability benefits, a surgical benefit, an ambulance benefit, and benefits related to emergency first aid and x-rays. (R. pp. 7, 711). Respondent submitted to Appellant a second claim form dated October 2, 2008, and in response the Appellant issued a check to Respondent on October 9, 2008, for $2,500.00 of total disability benefits. (R. p. 717). Appellant presented evidence at trial that they made monthly disability payments to Respondent from 2008 up to trial. (R. pp. 7, 979-981).

The Respondent is now 42 years old. (R. p. 424, lines 23-24). Prior to the motorcycle accident he owned his own construction company, making approximately $40,000.00 - $60,000.00 a year. (R. p. 416, lines 16-19). It is undisputed that the Respondent is presently disabled under the Appellant's policy. (R. p. 277, lines 1-12; p. 278, lines 15-22; p. 279, lines 4-7, 21-25). His injuries in the accident included a broken pelvis, broken hip, fractured fibula and open fracture to his tibia. He suffered damage to one of his knees. (R. p. 202, line 17 – p. 203, line 14). He suffers from chronic, nearly constant migraines, and ringing in his ears. He has difficulty concentrating. (R. p. 348,

line 14 – p. 349, line 6). In addition, he can only walk short distances with the assistance of a cane. He cannot bend or stoop. He has pain and numbness in his legs as the result of nerve damage. (R. p. 347, line 12 - p. 348, line 4; p. 420, lines 12-25; pp. 421-424). He is under continuous care of a physician for chronic and constant pain. He has not been cleared to return to work. (R. p. 360, line 11 - p. 361, line 11). Respondent presented testimony at trial that the present dollar value of the policy is approximately $540,000.00 if the Respondent is disabled until age 65. (R. p. 405, lines 3-4).

ARGUMENT

I. THE TRIAL COURT CORRECTLY APPLIED SOUTH CAROLINA CODE SECTION 38-71-30 TO THIS CASE AND HELD THAT THE APPELLANT IS NOT ENTITLED TO ENFORCE THE "INTOXICATION EXCLUSION."

The Appellant argues that Respondent's claim is barred by the "intoxication exclusion" allegedly contained in the insurance policy that he was never provided with or that he never received from Appellant. Judge Griffith correctly applied South Carolina Code Section 38-71-30 to this case in order to hold that the Appellant was precluded as a matter of law from relying on or enforcing any intoxication exclusion contained in the policy of insurance it never delivered to Respondent. His Order should be affirmed by this Court.

It is undisputed in this case that the Respondent never received a copy of the policy of insurance. Respondent and his wife both testified at trial that they never received a copy of the policy. (R. p. 353, lines 15-18; p. 417; lines 8-9; p. 418, lines 5-8). He testified that he was provided with a packet of information that he believed to be the policy (but which he learned after commencing this action was not). (R. p. 354, lines 6-25; Plaintiff's Trial Exhibit 21). This packet contained no information regarding any

alleged "intoxication exclusion." (R. p. 354, lines 15-18). Respondent testified that he was not aware of any exclusions that the policy might or might not contain at the time he bought it and that he would not have purchased the policy had he known it contained such an exclusion. (R. p. 418, lines 9-11, 20-25).

Appellant presented no testimony or evidence that the policy was ever delivered to Respondent. Randolph Gill, the agent who sold Respondent the additional increased coverage, presented no evidence of delivery of the application or policy. (R. p. 99, lines 14-23; p. 103, lines 21-23; p. 107, line 18 – p. 108, line 1; p. 112, line 20 - p. 113, line 1). John Mackin, an authorized representative of Appellant Penn Life with authority to speak for them, also testified at trial. (R. p. 126, lines 3-6; p. 128, line 24 – p. 129, line 2). Mr. Mackin acknowledged that an insurance company is required to send a copy of the policy to its insured. (R. p. 144, lines 19-23; p. 148, lines 1-5). He further testified that, while it was his company's policy to deliver the policy to the agent who sold it for delivery to the insured, there was no evidence the company policy was followed or that there was any delivery to the Respondent in this case. (R. p. 137, lines 11-16; p. 138, lines 9-21; p. 139, lines 6-10; p. 140, lines 7-11; p. 141, lines 14-17; p. 146, lines 2-21; p. 149, line 3; p. 152, lines 10-17). Finally, Appellant presented no letters of transmittal or receipts indicating that the policy of insurance was ever given to Respondent. (R. p. 137, lines 13-16; p. 149, line 3; p. 152, lines 10-17; p. 154, lines 18-21).

The parties both agree that South Carolina Code Section 38-71-30 is applicable to the insurance policy at issue in this case. It reads in pertinent part: "Every insurer doing accident or health insurance business in the State shall deliver with each policy of insurance issued by it a copy of the application made by the insured so that the whole

contract appears in the application and policy of insurance. If the insurer violates this requirement, no defense is allowed to the policy on account of anything contained in or omitted from the application." Appellant's own witnesses acknowledged that an insurance company has an obligation to provide the policy of insurance to the customer or insured. (R. p. 144, lines 19-23). As set forth above, the Trial Court correctly held and ruled that while Appellant issued a policy in response to the Respondent's application, Appellant offered no proof that a copy of the policy was ever delivered to the Respondent. The Trial Court correctly found and ruled that as a result of Appellant's clear (and admitted) violation of South Carolina Code Section 38-71-30, it was not entitled to enforce any intoxication exclusion contained in the policy. (R. pp. 1-10).

Statutory application and interpretation is a question of law for the Court. *Vaughn v. McLeod Regional Medical Center,* 372 S.C. 505, 642 S.E.2d 744 (2007); *Grier v. AMISUB of South Carolina, Inc.,* 397 S.C. 532, 725 S.E.2d 693 (2012); *Colleton County Taxpayers Ass'n v. School District of Colleton County,* 371 S.C. 224, 638 S.E.2d 685 (2006); *State v. Jacobs,* 393 S.C. 584, 713 S.E.2d 621 (2011). Under South Carolina law, the Court's function is to enforce an ambiguous statute according to its terms. "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey,* 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The Court has held that it is its duty to apply the statute according to its own terms. *Shelly Construction Company v. Sea Garden Homes, Inc.,* 287 S.C. 24, 336 S.E.2d 488 (S.C. App. 1985).

Judge Griffith correctly applied the plain and clear meaning of South Carolina Code Section 38-71-30 to the facts of this case. South Carolina law clearly and unequivocally requires that the insurer deliver a copy of both the application and policy to the insured in order that the "whole contract appears in the application and policy of insurance." Clearly, under this statute, an insurer is required to deliver both the application and the actual policy of insurance to its insured. Appellant presented no evidence at trial that it ever delivered a copy of the policy to Respondent. Therefore, under South Carolina law, it cannot rely on any intoxication exclusion allegedly contained in its policy (which it never delivered to Respondent) to defeat coverage in this case.

Even if the language contained in this statute is ambiguous, which the Respondent asserts it is not, Judge Griffith interpreted this statute correctly. The primary purpose in construing a statute is to determine the legislative intent. The language contained in the statute is the best evidence of what the legislature intended. *See*, *Hodges v. Rainy,* 341 S.C. 79, 533 S.E.2d 578 (2001); *McClanahan v. Richland Cnty. Council,* 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.* (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03, at 94 (5th ed.1992)). "The Court is not at liberty, under the guise of construction, to alter the plain language of [a] statute by adding words which the Legislature saw fit not to include." *Shelly Construction Company v. Sea Garden Homes, Inc.,* 287 S.C. 24, 336 S.E.2d 488 (S.C. App. 1985); *see, Enos v. Doe,* 380 S.C. 295, 669 S.E.2d 619 (2008).

In the case before the Court, the statute in question clearly evidences a legislative intent for the insured to be provided with all relevant documents which form the contract of insurance. Failure to provide an insured with all the necessary documents precludes an insurer from enforcing a policy provision contained in the undelivered policy against its insured. It would be a ridiculous construction to interpret this statute in such a way that an insurer has to provide a copy of the application, but may withhold from its insured a copy of the actual policy. The Appellant's argument for a contrary construction of this statute lacks merit and should be rejected by this Court.

II. THE RECEIPT DOES NOT EXCUSE APPELLANT'S FAILURE TO DELIVER A COPY OF THE POLICY TO RESPONDENT.

The Appellant argues that the receipt it introduced into evidence at Exhibit 12 somehow excuses their failure to deliver a copy of the policy to Respondent. However, Respondent cannot rely on Exhibit 12 to excuse it's failure to deliver a copy of the application and policy to the Respondent.

As the Appellant acknowledges in its brief, Exhibit 12 consists of a document entitled "Definitions, Exceptions and Limitations." (R. p. 113, lines 2-5). Appellant's agent, Mr. Gill identified this document as a receipt which he "assumes" that he gave to Respondent in July 2002 (three years after purchase of the original policy) when Respondent increased his monthly benefit. (R. p. 113, lines 6-21). Because this document contains language it construes as providing that the policy does not cover loss from "intoxication," the Appellant argues to this Court that it is excused from its admitted failure to deliver a copy of the policy to Respondent. (R. p. 112, line 22 – p. 114, line 15).

This argument lacks merit. The Appellant's own witnesses and representatives acknowledged that they had a duty to deliver a copy of the actual policy itself to their insured. They acknowledged that the document marked and introduced as Exhibit 12 was not a copy of the policy. (R. p. 121, line 19 - p. 122, line 21). The document on its face clearly states that it is not a copy of the contract of insurance. (R. p. 122, lines 13-21). Mr. Mackin, the Respondent's representative, brought to trial to testify on its behalf, described it as a brochure and not a contract of insurance. (R. p. 135, lines 18-23). Mr. Gill, who sold the monthly benefit increase to Respondent in 2002, described this document as a summary or "brief description" of the policy. (R. p. 122, lines 13-15). However, he acknowledged at trial that to determine the actual language of the contract one would have to look at the actual contract itself (which was never provided to Respondent). (R. p. 122, lines 13-21). The delivery of the receipt does not excuse the Appellant for its failure to deliver a copy of its policy to Respondent or to exempt the Appellant from the operation of South Carolina Code Section 38-71-30.

Further, the document which was identified and introduced as Exhibit 12 did not exist at the time Respondent purchased the original policy in 1999. It was not created and/or delivered to the Respondent until 2002, at the time the monthly benefit was increased. Therefore Exhibit 12 does not relieve or excuse the Appellant from its failure to comply with South Carolina Code Section 38-71-30.

III. THE CAUSE OF RESPONDENT'S ACCIDENT IS IRRELEVANT TO THE ISSUES BEFORE THE COURT.

The Appellant argues that this Court should hold that Respondent was intoxicated at the time of the accident and that this intoxication was a contributing cause of his wreck

"based on the fully developed record presented to the trial court by the parties," and asks this Court to enter judgment in its favor. (Initial Brief of Appellant, p. 22).

As set forth above, the Appellant's failure to deliver a copy of the disability policy to Respondent precludes them from relying on any intoxication exclusion contained in its policy as a matter of law. Therefore, the issue of whether or not the Respondent was "intoxicated" at the time of the accident, and whether this alleged intoxication caused or contributed to the accident and his subsequent injuries, is irrelevant to the issues before the Court as the Trial Court correctly ruled in his Order. (R. p. 10).

Even if this Court were to conclude that the Appellant has a right to rely on the intoxication exclusion, the evidence does not establish that the Respondent was impaired at the time of the accident and that any intoxication or impairment was the proximate cause of the accident which forms the basis of the Respondent's disability. Judge Griffith made no finding as to whether or not Respondent was impaired at the time the accident occurred and whether or not any alleged impairment contributed to the motorcycle accident. (R. p. 10). He correctly ruled that the other issues in the case were dispositive and made any decision on the causation of the accident unnecessary and moot. (R. p. 10). The evidence presented before Judge Griffith as to whether or not the Respondent was impaired or intoxicated at the time of the accident and whether this caused or contributed to the accident which caused his injuries was in dispute. In addition to the evidence cited by Appellant in its brief, the Respondent presented ample evidence that he was not impaired at the time of the accident and that the accident was not caused by any alleged impairment on his part, but was caused by the negligence of the other driver involved in the accident. (R. p. 212, line 10 - p. 213, line 2; p. 215, line 22 - p. 216, line 13; p. 307,

lines 12-14; p. 371, lines 17-23; p. 425, lines 9-18, 19-20; p. 427, lines 2-25; p. 440, lines 7-9; p. 486, line 19 - p. 487, line 3; p. 519, line 21 - p. 521, line 5; p. 525, lines 3-19; pp. 526-527). There is certainly sufficient conflicting testimony in the record as to the question of any alleged intoxication on the part of Respondent and whether or not this caused or contributed to the accident to warrant a remand back to the trial court in the event that this court determines that the Appellant can rely on the alleged intoxication exclusion to defeat coverage in this case.

IV. PUBLIC POLICY DOES NOT REQUIRE REVERSAL OF THE TRIAL COURT'S ORDER AND IT SHOULD BE AFFIRMED.

The Appellant argues that this Court should reverse the Order of the Trial Court because, "allowing Russell (Respondent) to recover disability insurance benefits for injuries received while driving drunk violates public policy." This argument lacks merit and should be ignored by this Court.

As set forth above, the Appellant's failure to deliver a copy of the disability policy to Respondent precludes them from relying on the intoxication exclusion as a matter of law. Therefore, the issue of whether or not the Respondent was "intoxicated" at the time of the accident, and whether this alleged intoxication caused or contributed to the accident and his subsequent injuries, is irrelevant to the issues before the Court.

Further, there has been no finding by any Court that the Respondent was "driving drunk" at the time he was involved in the motorcycle accident resulting in his injuries and disability. The Trial Court expressly made no ruling on this issue at trial. Judge Griffith's Order expressly provides that, "[t]he Court has not reached the issue as to whether the Plaintiff's (Respondent's) level of impairment due to the consumption of alcohol and if such impairment contributed to the collision with Ms. Collins' vehicle."

(R. p. 10). The Court correctly ruled that "[t]he other issues presented in the case proved dispositive and made a decision on the causation of the wreck unnecessary and moot." (R. p. 10).

Therefore whether or not "public policy" precludes recovery in this case is not at issue in the appeal before the Court. Appellant's argument to the contrary is not controlling.

CONCLUSION

South Carolina law clearly and unequivocally provides that an insurance company must deliver to its insured both a copy of the application and a copy of the actual policy. The Appellant violated this provision by failing to provide Respondent with a copy of his policy. The trial judge correctly ruled that the Appellant was therefore not entitled to rely on any intoxication exclusion contained in the policy. The Order and Judgment of the Trial Court should be affirmed.

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CERTIFICATE OF COUNSEL

I certify that this Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Brief of Respondent on Counsel for the Appellant by depositing a copy of same in the United States Mail, postage prepaid, on January 30, 2015, addressed to the attorney of record as follows:

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