

STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)
-----)

IN THE COURT OF
COMMON PLEAS
2009-CP-04-00907

RECEIVED

Nov 24 2020

S.C. SUPREME COURT

NATIONWIDE MUTUAL FIRE)
INSURANCE COMPANY,)
)
VS.)
SHARMIN CHRISTINE WALL,)
RANDI HARPER, WENDY TIMMS,)
in her capacity as P.R.)
of the Estate of)
CHRISTOPHER ADAM TIMMS,)
DEBORAH TIMMS and KOREY)
MAYFIELD,)
DEFENDANTS)
-----)

TRANSCRIPT OF RECORD

MARCH 6, 2015
ANDERSON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE J. CORDELL MADDOX, JR.

A P P E A R A N C E S:

JOHN ROBERT MURPHY, ESQUIRE
ATTORNEY FOR PLAINTIFF

MICHAEL F. MULLINAX, ESQUIRE
ATTORNEY FOR DEFENDANT/WALL

JOHN K. MOORHEAD, ESQUIRE
ATTORNEY FOR DEFENDANT/HARPER

VIVIAN CROSS,
CIRCUIT COURT REPORTER

I N D E X

Motions 3

1 to protect the record --

2 THE COURT: I got you.

3 MR. MURPHY: I think the appellate courts require
4 us to do so, and I would gladly encourage you to -- to
5 revisit some of these issues, but not to belabor the
6 point --

7 THE COURT: Sure.

8 MR. MURPHY: -- because I know you certainly gave
9 it due deliberation and you had -- had knowledge.

10 But the -- the -- the four things really are --
11 number one is, there was really no factual finding as
12 to whether or not the court felt that Korey Mayfield
13 was fleeing law enforcement at the time of the
14 accident.

15 Secondly, the argument that was made and kind of
16 adopted in the order, that he was a nonpermissive user,
17 and therefore it was an uninsured motorist case. I
18 have some issues with that that I would ask that -- the
19 order to at least address, if not reverse itself.

20 There was a couple of factual statements that I
21 just wanted to bring out so I could challenge them
22 later. They're -- they're certainly nothing
23 significant, but I did want to bring them up.

24 THE COURT: Sure.

25 MR. MURPHY: If I can address those just in turn

1 briefly, I will do so.

2 THE COURT: Yeah. Yeah.

3 MR. MURPHY: I don't know if you have our
4 memorandum in front --

5 THE COURT: I do. I do.

6 MR. MURPHY: It follows it pretty well. But the
7 first thing is that the order did not actually indicate
8 what the factual finding that the court believed that
9 Korey Mayfield was fleeing law enforcement such to
10 bring the exclusion into play factually, then whether
11 or not legally -- because there were some legal
12 grounds.

13 On page 35 of the trial transcript, Your Honor,
14 you know, I remember this distinctly -- and we were in
15 the smaller courtroom -- but you indicated that -- in
16 response to Mr. Mullinax at trial, that there was no
17 doubt in your mind that he was still in the process of
18 fleeing, but the order did not indicate that factual
19 finding.

20 And I know you're free to express yourself in
21 the courtroom and change your mind, but I think the
22 order does need to indicate factually whether he was
23 fleeing or not fleeing.

24 THE COURT: Do y'all agree with that? I think
25 that he's right. I mean, --

1 MR. MOORHEAD: Your Honor, the only --

2 THE COURT: And I'm sorry, I didn't mean to
3 interrupt you. I was just trying to do it one-by-one.

4 MR. MURPHY: Sure. Sure.

5 THE COURT: So we --

6 MR. MOORHEAD: I feel -- I feel it's certainly
7 something you can take consideration of -- in this
8 case. Law enforcement had broken off any pursuit. So
9 when -- when they used the term "fleeing law
10 enforcement" in the -- in the policy, we have some --
11 some issue about the ambiguity of those terms, whether
12 or not -- if there's no pursuit, whether you can in
13 fact keep fleeing. I think that the -- and I think
14 that really is sort of the crux of the issue in that
15 case.

16 By -- by all accounts the -- the accident that
17 occurred was some measure of time, perhaps a minute, a
18 minute and a half subsequent to -- to law enforcement
19 breaking off any pursuit. So we -- we think that there
20 -- there is -- certainly we're going to argue -- we'd
21 argue there is ambiguity in the policy about what
22 exactly "fleeing law enforcement" means when you don't
23 have law enforcement in pursuit. And it asks for a
24 factual finding of whether or not they were fleeing.

25 It -- I think it sort of hinges on whether or

1 not we know what fleeing is.

2 THE COURT: All right. Why don't we do this, and
3 I understand you need to protect yourself for the
4 record -- why don't we re-do the order and just
5 basically state what happened, which was that he was at
6 one point fleeing; that law enforcement -- and I would
7 put in there for internal procedure -- because that's
8 why they stopped -- a minute and a half prior to the
9 accident had broken off the active pursuit to their --
10 their internal procedure.

11 And then as it moves up, I think that's probably
12 the clearest way to do it so that the Court of Appeals
13 knows exactly what happened. I mean look, in my mind,
14 they were fleeing. It can be argued that law
15 enforcement had stopped, but they only stopped because
16 they had a procedure that it created a -- more
17 significant danger. So I think that covers everybody
18 if we just put those facts in there and -- and -- and
19 make those my findings of fact.

20 MR. MURPHY: Okay. We accept that. I mean,
21 again, I think the court has to -- this court has to
22 interpret the -- that policy to say he was or was not
23 fleeing. As I understood the court's order and the
24 comments, he was fleeing. But we think the language is
25 ambiguous or it's -- actually it was quoted as being

1 arbitrary and unconscionable, not ambiguous or
2 incapable of being determined.

3 So we just wanted to raise that. I think Your
4 Honor has -- has -- as I understood your ruling, but it
5 was unclear in the order that you found that he -- his
6 conduct fell within the exclusion, but the exclusion
7 was not enforceable for other reasons. That's a
8 different -- that's a different argument I would be
9 taking up as opposed to we're not really sure whether
10 -- whether his conduct fell within the language of the
11 exclusion at all, so that --

12 THE COURT: Well, I think he was fleeing quite
13 frankly. If you want to -- I mean look, you know, the
14 fact that they pulled back doesn't mean that he
15 suddenly stopped fleeing. And so if you're comfortable
16 with me saying that he was fleeing, and that more
17 clearly defines the issue, I'm okay with that.

18 MR. MURPHY: That's all -- I think I'm entitled to
19 that based on --

20 THE COURT: I do, too.

21 MR. MURPHY: -- in the case, and then we can
22 argue. And then, Your Honor, the -- the -- when we
23 talked about -- one case that has come up since then
24 that has been argued in support of an invalidation of
25 the exclusion in total, is the Williams v. Geico case.

1 Of course, that applied just to family members. It was
2 very narrow.

3 If we interpret it differently from that, what
4 we're saying is the Supreme Court has now changed the
5 mandatory coverage to apply to any coverage you have to
6 write in any number as opposed -- because that's -- if
7 it applies to every single exclusion in the policy cart
8 blanche, then it would -- it would ineffectively
9 service the Legislature -- of course a three-two
10 decision is very narrow just to the family member
11 because of the nature of the person injured, as opposed
12 to the nature of the conduct of the driver.

13 Of course we see many, many cases saying that
14 felony and fleeing law enforcement exclusions are
15 valid. They're not against public policy. So since
16 we've already stepped it down to the minimum and
17 realized it would not apply to that, we would like some
18 issue that -- whether Williams v. Geico applies or
19 doesn't apply to -- to this. We don't think it does.

20 And, lastly, the finding that it was arbitrary
21 and unconscionable would not -- there was no analysis
22 of why it was arbitrary and unconscionable, and that
23 went in hand-in-hand with one of the factual issues
24 that -- that, you know, wasn't explained or brought out
25 very well. There was no evidence whether it was or

1 wasn't, so I don't know we can say it wasn't explained.

2 It certainly would not be required -- South
3 Carolina does not require any specific part of the
4 policy to be in any different font or format or
5 location than any other part of the policy. That's why
6 the policy is read as a whole. So I think it may --
7 it's not arbitrary and unconscionable if the court
8 found that it's either against public policy, based on
9 Williams, or some other ground. We understand that
10 ruling. Or, if the court found it was ambiguous for
11 some reason, we -- I understand that. But we don't
12 believe -- a finding that it was arbitrary and
13 unconscionable is applicable in this field based on the
14 jurisprudence that's developed there. So that just has
15 to do with the exclusion itself.

16 The second point, Your Honor, had to do with the
17 argument that was raised at trial -- brought to my
18 attention a few days before trial regarding their
19 argument that Mr. Mayfield was a nonpermissive user,
20 and therefore they should be entitled to UM coverage.

21 And I think there are three problems with that
22 argument that at least, at a minimum, have to be
23 addressed or overcome at the trial level. The first
24 one is procedural. The second is substantive. And the
25 third is equitable.

1 Procedurally, it was never pled. There was
2 never any request to find that Korey Mayfield did not
3 have permission or that uninsured motorist coverage
4 applied for this accident. In fact, prior to the case
5 going to trial, the liability coverage from Nationwide
6 and the liability coverage from Safe Auto, that were
7 applicable to the vehicle at the time of the accident,
8 were paid in their full -- Nationwide's mandatory
9 limits, Safe Auto in their full stated limit. And so
10 there was simply nothing before the court to allow an
11 investigation or a consideration of the fact that it
12 was an uninsured motorist claim.

13 And any of the counterclaims that were initially
14 brought in the case, first of all, they were only
15 brought as basically to ask for the same relief that
16 Nationwide had asked, and they were all dismissed. A
17 couple of the parties, through some tort cross claims
18 against each other -- even against Ms. Wall for
19 negligent entrustment, all of those were racked up. We
20 paid the stipulated amounts up front. Once it was --
21 summary judgment was granted that Korey Mayfield was,
22 in fact, the driver because he had disputed that. Once
23 that was done, Safe Auto paid their limits. They
24 issued him a policy as the named insured of his own
25 auto.

1 So, procedurally, we would ask that -- that that
2 should not have been allowed. And it should at least
3 be addressed as to why it was allowed because it
4 doesn't appear to be.

5 Substantively, we don't believe there was any
6 evidence to support it. The only evidence was that
7 perhaps they thought he was driving unsafely and they
8 wanted him to pull over, but there's nothing -- it
9 falls far short of revoking permission --

10 MR. MULLINAX: Your Honor, to -- to not create an
11 extended hearing on that basis, we feel the Williams
12 case -- and the comments that I would make concerning
13 it, we don't think the uninsured -- we don't have a
14 problem with deleting that.

15 MR. MURPHY: Okay.

16 THE COURT: Okay, good. Okay. So by agreement,
17 y'all are deleting that from the --

18 MR. MULLINAX: We'll -- yeah, we'll stipulate --

19 THE COURT: Okay.

20 MR. MULLINAX: -- that. We'll delete the
21 uninsured provisions on that.

22 MR. MURPHY: Well, that will simplify things a lot
23 then, Your Honor. That's pretty much all I have.

24 THE COURT: Good deal.

25 MR. MURPHY: And, you know, I would suggest -- my

1 feeling would be that -- if there's an order that says
2 his conduct fell within the language of the exclusion,
3 but it's either ambiguous or it's against public
4 policy, I can live with that because that's a legal
5 matter we can disagree about, and we can let someone
6 else settle that for us, and I would feel protected
7 there.

8 And if they withdraw the request that the court
9 could find that it was an uninsured motorist claim,
10 we'll go up and see how broad Williams v. Geico is and
11 some other issues.

12 THE COURT: Okay. All right. Sounds good.

13 MR. MULLINAX: May it please the court, briefly.
14 Williams vs. Geico is very broad --

15 THE COURT: Yeah. I read it. It's kind of
16 interesting.

17 MR. MULLINAX: Defendant's Exhibit 1 is the
18 coverage that was in place, a hundred and three hundred
19 in this case. Based upon some arguments that had been
20 made in the brief, I've included a settlement agreement
21 which shows that we did not release any right to
22 proceed against the \$100,000.

23 On behalf of Sharmin Wall, I think all the
24 releases are basically the same, Your Honor, but -- and
25 I'm going to hand up an additional copy of the Williams

1 v. Geico case. They came out in August, Your Honor.

2 Instead of it being a limited provision,
3 although it did talk about a step-down provision as it
4 applied to family members in that case, the actual
5 holding of the case is basically set forth just before
6 head note 23 on page 10, where the court said "As a
7 result, the General Assembly specifically included
8 language in section 38-77-142(c), prohibited provisions
9 in the policy that limit or reduce coverage".

10 I mean, that's a pretty broad statement. It
11 goes back to the statute. It quotes the statute and
12 says "any endorsement, provision, or rider attached to
13 or included in any policy of insurance, which purports
14 or seeks to limit or reduce the coverage afforded by
15 the provisions required by this section is void".

16 In that case, it prohibited in the context of a
17 family purpose holding, but it's very broad. The
18 statute is clear you can't have these step-down
19 provisions. You can't market your policy and charge
20 premiums based on a hundred or three hundred, and
21 somehow sneak in some kind of a step-down provision and
22 cut it down when somebody gets hurt.

23 The Supreme Court recognizes that. They said
24 they recognize that. And they basically said to make
25 it clear that this was not a limited holding on page

1 608, which is the last page right before the end of the
2 provision -- it said "A provision that is against
3 public policy is void, and because it is deemed legally
4 never to have come into existence, is incapable of
5 being enforced by the court".

6 So, therefore, the holding in the statute of the
7 Legislature is that they can't do it. It applies to
8 the case that Your Honor ruled on and would afford the
9 full coverage benefits of a \$100,000. We've got three
10 people that were injured, to each of these. So
11 basically that -- we feel that should be added as the
12 court's basic holding in the case.

13 THE COURT: Okay. Let me do this: Since y'all
14 have agreed on the -- on the real sticky issue, why
15 don't you re-do an order. I'm -- I'm going to find
16 that he was fleeing. I mean, I think that there is no
17 doubt in my mind that even though -- I'm kind of taking
18 back what I said. There's no point in muddying the
19 water by me having an ambiguous order that says he was,
20 but they had some police procedure. I happen to know
21 that to be true, but that wasn't presented at court --

22 MR. MURPHY: I'm not sure he was aware of their
23 procedure at this --

24 THE COURT: Yeah -- yeah. I mean, you know, he
25 wasn't trying -- he was trying to not get caught. So

1 why don't you re-do the order, just saying that I find
2 that he was fleeing. And then that simplifies what
3 y'all go up on, it seems to me.

4 MR. MURPHY: Yes, sir.

5 MR. MULLINAX: But I would want the holding of
6 Williams put in your order.

7 THE COURT: Well, I can't do that because I heard
8 it before Williams. Williams is the law now.

9 MR. MULLINAX: Williams is the law.

10 THE COURT: Yeah.

11 MR. MULLINAX: And it applies to this case because
12 it's retroactive.

13 THE COURT: Is it retroactive?

14 MR. MULLINAX: Yes, sir.

15 MR. MURPHY: Well, it would be a change in the law
16 which would be a reason to change an order. That's
17 something that could be --

18 THE COURT: Okay. Y'all can include that then --

19 MR. MURPHY: -- so it's no -- it'll be -- either
20 way --

21 THE COURT: Yeah.

22 MR. MURPHY: If that forms the basis of it, that's
23 fine --

24 THE COURT: Y'all know what you want to do. Y'all
25 want to define the issues --

1 MR. MULLINAX: This court specifically said it was
2 retroactive.

3 THE COURT: Okay. I know you want to define the
4 issue so that they are as narrow as possible when you
5 go up. So just re-do an order, pass it along to them.

6 MR. MURPHY: I will. Yes, Your Honor.

7 THE COURT: Since they stipulated to all that
8 business about uninsured, that takes out the -- the
9 real crux of any problem.

10 MR. MURPHY: And what I may do is I may address
11 that it was raised, but the court declines --

12 THE COURT: Yeah --

13 MR. MURPHY: I don't want to get up there and then
14 have an additional -- say as well as additional to a
15 sustained ground, you can find UM -- they're
16 withdrawing it and I'll change that --

17 THE COURT: And just say that -- yeah, just say --

18 MR. MULLINAX: I don't want to waive nothing --

19 MR. MURPHY: No. No. No.

20 THE COURT: No. No. We're talking about y'all
21 stipulating. Just put in there that that they
22 stipulated that that was not an issue, and I found that
23 it -- and I did not consider it.

24 MR. MURPHY: Okay.

25 THE COURT: And then that will narrow the order so

1 that when you go up, they're not going to send me a
2 letter asking me what I meant, because that's what they
3 do.

4 MR. MURPHY: Good. Thank you, Your Honor.

5 MR. MULLINAX: Well, if he'll do the order and
6 send it to us, then --

7 THE COURT: Yeah.

8 MR. MULLINAX: -- we can get it in a position that
9 it needs to be --

10 THE COURT: Yep.

11 MR. MURPHY: Yes, sir.

12 THE COURT: And then send it to me. And I'm sorry
13 y'all had to come early. It's -- I -- I won't go into
14 why I've got to leave, but I've got to go. I got
15 family health problems.

16 MR. MULLINAX: And just for the record, Chip
17 Howard couldn't be here, and we're all operating
18 together and joins in or argument --

19 THE COURT: Okay.

20 MR. MULLINAX: -- on behalf of his client.

21 THE COURT: Thanks.

22 (Whereupon, the hearing adjourned)

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