

1953

Norma Lois Cooper v. Foresters Underwriters, Inc. : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Cooper v. Foresters Underwriters, Inc.*, No. 7941 (Utah Supreme Court, 1953).
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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

NORMA LOIS COOPER,
Plaintiff and Respondent,

VS

FORESTERS UNDER-
WRITERS, INC., a
corporation,
Defendant and Appellant.

APPELLANT'S
BRIEF

Case No. 7941

FILED
FEB 13 1953

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Received two copies this day of
..... 1953.

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STATEMENT OF FACTS

This is an action on an insurance policy issued by the Appellant to Respondent on March 31, 1951, which provides for certain medical, surgical and hospital benefits described in the policy (see Exhibit attached to Complaint, Tr. 2). The case was heard on a Motion for Summary Judgment, at which time the following statement of facts was agreed to:

“The Plaintiff made application, paid her first premium of six dollars, and was insured by defendant on March 31, 1951. Monthly pay-

ments of six dollars each were paid during each of the months of May, June, July and August, 1951. Payment of six dollars was made on October 1, 1951. The accident occurred in the afternoon of October 31, 1951, and in the evening of October 31, 1951, after the accident occurred and after Defendant's office was closed, the payment of twelve dollars was made to an agent of the Defendant at the home of the agent." (Tr. 10 and 11.)

Based upon the foregoing the trial court granted the motion of Respondent for summary judgment, apparently upon the theory that the grace period provided for in the policy did not expire until midnight of the day of the accident and the policy was therefore in full force and effect at the time of the accident.

STATEMENT OF POINTS

I

THE POLICY HAD LAPSED, ACCORDING TO ITS TERMS, AT THE TIME OF THE ACCIDENT.

II

THE GRACE PERIOD EXPIRED AT NOON ON OCTOBER 31, 1951.

III

FINDING OF FACT NO. 3 IS NOT SUPPORTED BY THE EVIDENCE.

ARGUMENT

Point No. III will not be argued separately, but is included in the discussion under Points No. I and II.

I

THE POLICY HAD LAPSED ACCORDING TO ITS TERMS AT THE TIME OF THE ACCIDENT.

The policy contains the following provisions (See Exhibit attached to Complaint, Tr. 2):

“This Certificate is dated and takes effect March 31, 1951, in consideration of the statements and agreements made by the insured in the application and the payment in advance of \$6.00 as the first premium, which maintains this Certificate in force for one month from its effective date. The payment in advance and acceptance by the Company of premiums monthly of \$6.00 thereafter is required to keep this Certificate in continuous effect. The Company's acceptance of the premiums will constitute its consent for renewal. All periods of insurance hereunder shall begin and end at twelve o'clock noon, standard time, at the residence of the insured.

“SECTION V. GRACE PERIOD. A grace period of thirty-one (31) days will be allowed for payment of any renewal premium during which grace period the Certificate will remain in full force.”

“SECTION VII. (3) No statement made by the applicant for insurance not included herein shall void the certificate or be used in any legal proceeding hereunder. No agent has authority to change this Certificate or to waive any of its provisions. No change in this Certificate shall be valid unless approved by an executive officer of the organization and such approval be endorsed hereon.”

“(4) If default be made in the payment of the agreed premium for this Certificate, the subsequent acceptance of a premium by the Organization or by any of its duly authorized agents shall reinstate the Certificate, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.”

The policy provides for monthly “periods of insurance” which begin and end at noon on the last day of each month, commencing March 31, 1951, and required the payment of a monthly premium of \$6.00 to keep the “certificate in continuous effect.” The first premium paid the policy to April 30, 1951, at noon, and the premiums paid during the months of May, June, July and August paid the policy to noon of the last day of each of those months. The payment made on October 1st was made on the last day of the grace period and paid the policy to noon of September 30, 1951. The last “period of insurance” was from noon September 30 to noon October 31. October having 31 days, the grace period corresponded with the “period of insurance” and expired on October 31, 1951. The premium for this “period of insurance”

was not paid during the grace period, therefore the policy had lapsed at the time the accident occurred in the afternoon of October 31, 1951. The payment made in the evening of October 31st does not alter the result for the reason that Section VII (4) of the policy provides for reinstatement "only to cover accidental injury thereafter sustained."

II

THE GRACE PERIOD EXPIRED AT NOON ON OCTOBER 31, 1951.

The trial court apparently took the position that the law does not recognize fractions of days and that the grace period ran until midnight October 31, 1951. That the law does not take cognizance of fractions of days as a general rule is recognized. We are also aware of Section 68-3-7 of the Utah Code Annotated, 1953, which provides as follows:

"68-3-7. TIME, HOW COMPUTED.—The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last is a holiday, and then it also is excluded."

But the rule adopted by the trial court is a mere legal fiction and subject to limitations as stated in 52 American Jurisprudence, Pages 340 and 341, as follows:

"The general rule that the law knows no fractions of a day is a mere legal fiction, and,

like all other legal fictions, is allowed to operate only in cases where it will promote right and justice.

“And although the ends of justice never require that the law depart from the ordinary rule and recognize a fraction of a day to defeat the manifest intention of the parties, where the parties to a contract stipulate for the performance of the contract by an agreed hour on a certain day, the law in such case will take cognizance of the fractions of the day.”

Perhaps the most common exception to the above general rule in the field of insurance is found in cases where the policy expires at a certain time of day, such as in *Mutual Benefit Health and Accident, vs. Kennedy*, 140 Fed. 2d 24, where the policy expired at noon on a certain day and it was held that where the insured drowned two hours thereafter there was no coverage. The same proposition is found in *Shankle, vs. Home Insurance Company of New York*, 133 S. W. 2d 289 (Tenn.) where the policy provided for coverage from December 5, 1936, to December 5, 1937, at Noon Standard Time, place of issue, and it was held that an accident which occurred at 7:30 p.m. on December 5, 1937, was not covered. The Court in the *Shankle* case observed that the principle that the law knows no part of a day has no application to a contract having a definite hour for its expiration.

In the case at bar not only the hour of beginning, but also the hour of ending each “period of

insurance” is specifically set forth. There is no ambiguity in the wording of the provisions. Likewise, the case at bar should be distinguished from one where the policy provides for a definite hour of commencement on a certain day, but fails to specify a definite hour of termination. The question for decision is whether the time specified in the policy as to the beginning and ending of the “period of insurance” applies to the grace period, the grace period not having such a specification. The wording of the grace period provision is:

“A grace period of thirty-one (31) days will be allowed . . . ”

The trial court held that the grace period expired at midnight on October 31, 1951. This does violence to the policy in that it allows 31½ days of grace instead of 31 as provided for therein. The interpretation of Appellant is the only one consistent with the terms of the policy.

There are a number of cases which have specifically held that the grace period, renewal period, etc., although not specifically limited as to hour, are limited by the other provisions of the policy. In the case of *Richardson, vs. American National Insurance Company*, 137 S. 370 (La.) the following are the pertinent provisions of the policy:

“In consideration of the . . . payment in advance of a policy fee of Two Dollars and a premium of \$1.95 does hereby insure Thomas Rich-

ardson, subject to all the conditions herein contained and endorsed hereon, from 12:00 o'clock noon, standard time, of the day this contract is dated, until 12:00 o'clock noon, standard time, of the 15th day of February, 1925, and for such further periods, stated in the renewal receipts, as the payment of the premium specified in said application will maintain this policy and insurance in force, against death or disability . . . ”

“(2) A period of five (5) days of grace is allowed for the payment of any renewal premium, during which the policy shall be maintained in full force and effect in accordance with its terms, but if the payment of any renewal premium is made after the grace period of the policy has expired neither the Insured nor the Beneficiary shall be entitled to recover for any accidental injury sustained between the date of such expiration and 12:00 o'clock noon, standard time, of the day following the date of such renewal payment; or for any illness originating or death occurring before the expiration of ten (10) days after the date of such renewal payment.

“(3) If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the Company or by any of its duly authorized agents shall reinstate the Policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.”

The premium due at noon on February 15, 1929, was not paid until February 22, 1929. The insured

was fatally shot on February 20, 1929, at 4:45 p.m. It was contended that inasmuch as the grace period provision was not limited to noon that the insured had until six p.m., or sunset of the last day to pay the premium in accordance with a provision of the Louisiana law. The Court held that the grace period expired at noon of the last day. The language of the Court is as follows:

“We conclude that, under both the common law and the codal article, contracting parties have the right to stipulate for the performance of the contract by an agreed hour on a certain day and the law in such case will take cognizance of the fractions of the day.

“The argument of plaintiff’s attorney is predicated upon only a few words of the clauses in question, which he attempts to isolate from the language of the balance of the clause and the other clauses in the policy. To accept this interpretation would be to give the plaintiff not only five days’ grace, but five days, four hours, and forty-five minutes. We do not believe that this was contemplated by the parties and that the language in question must be interpreted in connection with the remainder of the clause and also the other provisions of the policy, which, as a whole, show that the policy commenced and ended at 12 o’clock noon, whether it was terminated upon the expiration of the term or upon the termination of a renewal period, or upon the termination of the grace period. All of the periods of time in the policy are based upon 12 o’clock noon. We find no uncertainty or ambiguity or conjecture in the language of the policy on this point.”

Orlando, vs. Rosen, 290 N. Y. S. 270. This case involved a workmen's compensation policy which was written to expire on November 11, 1934, at 12:01 a.m. By a rider attached, the policy was extended for a period of one month to expire on December 11, 1934. The rider contains the following provision: "Subject otherwise to all terms, limitations and conditions of the policy to which this endorsement is attached." The claimant was injured at two p.m. on December 11, 1934. It was held that the policy had expired some hours earlier that day.

Purvis, vs. Commercial Casualty Co., 159 S. E. 369 (S. C.) (1931). The defendant insured Jack W. Purvis "for the term of twelve months from the 3rd day of September, 1928, from Noon Standard Time" against loss or disability or death from accidental means. On September 3, 1929, about five o'clock in the afternoon Purvis was fatally injured. The Court held that the policy had lapsed at the time of the injury and stated as follows:

"In the case at bar, the parties stipulated in the contract, as was their right, that the insurance should be for a term of twelve months, beginning at noon of September 3, 1928; in view of the fact that the insured was fatally injured a few hours after noon of September 3, 1929, it would be an injustice to the insurer for the court to hold, nothing else appearing, that the insurance was in force during the whole of that day."

The Plaintiff contended that a receipt book issued by the company contained a notation that the

premium must be paid on or before September 3, 1929, and that by reason of there being no limitations as to time of day when the premium should be paid that the insured had the entire day to make payment thereof. In discussing this point, however, the Court said:

“The receipt book contains notice that such premium must be paid on or before September 3, 1929. The policy indicates that it was the clear intent of the parties that the insurance should expire at 12 o'clock noon September 3, 1929. There is nothing in the receipt book to indicate a contrary intention; the notice that the renewal premium must be paid on or before September 3, 1929, merely meaning, in connection with the provisions of the policy, that, if payment should be deferred until that date, it must be made by 12 o'clock noon. It being conceded that the renewal premium was not paid by or before 12 o'clock noon of September 3, and that the insured received his injuries some hours thereafter, it is clear that the policy was not in force at the time of the fatal accident.”

In the case of Troy Automobile Exchange, vs. Home Insurance Company, 103 Misc. Rep. 331, 169 N. Y. S. 796, 798, the policy ran from one date certain at noon to another date certain at noon. The period covered by a renewal certificate which ran from the 30th of one month to the 30th of another was involved. In the Troy case the insurance company tried to avoid liability for loss of a car that was stolen on August 30, 1913, on the theory that August 30th

was excluded by the renewal certificate. The Court, however, held that the period of renewal ran from noon on August 30th to noon on September 30th:

“The defendant, however, insists that the insurance kept in force by certificate No. 10 runs from August 30, to September 30, 1931, and therefore, admitting the date of the theft to be August 30th, it is not included within the term of the contract, because the word ‘from’ would not include August 30th, or any part thereof, but would begin the next day; but the certificate must be construed in the light of the policy under which it was issued, and, reading both together as we must, it is clear that the insurance was from noon of the 30th of August to noon of the 30th of September.”

Our search has not revealed a Utah case exactly in point on the facts. However, *Fawcett, vs. Security Benefit Association*, 99 Utah 193, 104 Pac. 2d 214, 218, is a case involving the construction of an insurance contract and the principle of construction therein adopted is determinative of the question involved in the case at bar. The language of the Court is:

“Since such provision of the certificate is not so clear as to be susceptible of but one construction, we must determine which of the permissible interpretations thereof is consistent with the other provisions of the entire agreement. Even though a particular provision of a contract of insurance be susceptible of more than one meaning, the construction of such provision more favorable to the assured will not

be adopted if other provisions of the entire contract clearly resolve the ambiguity in favor of the contrary construction.”

There is no ambiguity in the contract in the case at bar. The trial court went beyond and outside the contract and adopted a legal fiction contrary to its terms. The contract can not be rendered ambiguous by a strained misapplication of a legal fiction. In the Fawcett case, where the contract itself was susceptible of more than one meaning, this Court adopted the interpretation consistent with the other provisions of the entire contract. In the case at bar, where an alternative interpretation is made possible only by a legal fiction, this Court is bound to follow the holding in the Fawcett case and adopt the interpretation which is consistent with the entire provisions of the contract.

The judgment of the trial court should be reversed and the Complaint dismissed.

Respectfully submitted,

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