

1998

Marilyn Murdock v. Monumental Life Insurance Company, a foreign corporation doing business in Utah : Reply Brief

Utah Court of Appeals

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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REPLY BRIEF

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ARGUMENT

I. Mr. Murdock's Death Was Accidental

Utah courts follow the rule that an "accident" is an event that is not "naturally and probably expected" by the insured. See Hoffman v. Life Ins. Co. of North Am., 669 P.2d 410, 415-16 (Utah 1983); Hardy v. Beneficial Life Ins. Co., 787 P.2d 1, 2 (Utah App. 1990). As recently as this year, the Utah Supreme Court has reaffirmed that an "accident" includes effects "which are not the natural and probable consequences" of an act or course of action. Nova Cas. Co. v. Able Constr., Inc., 1999 WL 507167 at 3-4 (Utah 1999). For a result to not be an accident, it must "ordinarily" follow a particular course of action, and it must be "more likely to follow" the course of action than not to follow it. Id. at 4; Hoffman, 669 P.2d at 416.

Monumental Life Insurance Company (hereinafter "Monumental") also relies on Hoffman to stand for the basic proposition that one who participates in an armed attack must naturally and probably expect a victim to respond with deadly force. Nevertheless, the rules stated in Hoffman are not so broad and absolute as to encompass the situation in our case.

The Hoffman case does indicate that "if the insured threatens to kill, or inflict serious bodily injury on, another person or assaults another person under circumstances making it likely the other person will respond with deadly force, and does so and kills the insured, the insured's death is not accidental." Hoffman, 669 P.2d at 417 (emphasis added). Even so, this rule is merely a natural corollary of the general

rule that events that should be naturally and probably expected by the insured to occur are not accidents.

Nevertheless, the facts and circumstances of this case are easily distinguished from those described in Hoffman or the other five cases cited by Monumental. This is especially true when the facts and inferences are viewed in Mrs. Murdock's favor, as they should be. The Hoffman court also indicated that "the simple fact that an insured is armed during a confrontation does not, by itself, make the insured's death nonaccidental." Id. Indeed, that court refused to conclude that insured's death was nonaccidental in part because there was conflicting evidence as to whether the insured specifically threatened the lives of the police officers who shot him even though he was clearly holding a gun at the time. Id. at 418.

Only where the insured's conduct "threatens death or serious bodily injury to another, . . . should [the insured] expect or anticipate that the threatened individual will very likely respond with deadly force." Id. (emphasis added). In other words, the threat must be present and ongoing, giving rise to the likelihood that the "threatened" party will respond in a manner intended to harm or kill the insured in an effort to repel or terminate the threat.

Indeed, these are the very same conditions described in most of the other cases relied upon by Monumental. See, e.g., Isoard v. Mutual Life Ins. Co. 22 F.2d 956 (8th Cir. 1927) (armed insured is shot by the person he was threatening to shoot); Valley Dental Assoc. v. Great West Life, 842 P.2d 1340 (Ariz. App. 1992) (armed insured is

stabbed to death by the person he is raping); Carlyle v. Equity Benefit Life Ins. Co., 551 P.2d 663 (Okla. 1976) (armed insured killed while attempting to complete the crime).

Unlike the situation described in Hoffman or these other cases, the threat of death or serious bodily injury to Mr. Moser had ended. Mr. Moser was no longer "threatened" once Mr. Murdock and his accomplice were fleeing the scene. Moreover, no evidence suggests that Mr. Moser was attempting to repel or terminate a threat of death or serious bodily injury when he drove the vehicle over Mr. Murdock. Finally, and most significantly, Mr. Moser asserted that he did not intend to drive the vehicle into or over Mr. Murdock and did not realize he had done so until well after the fact. This is not even a case of an angry victim attempting to retaliate with deadly force.

Moreover, the fact that Mr. Moser pursued the robbers in a vehicle in an effort to retrieve the stolen funds likely had nothing to do with whether the perpetrators had just committed an armed attack. In fact, it would seem just as likely, if not more so, that a victim might attempt to pursue a thief in a vehicle in a situation where the thief simply grabbed the money and ran away.

Accordingly, Monumental's analysis of the Hoffman case and its attempt to stretch the language of that case to the present one must fail. Mr. Moser admittedly did not intend death or serious bodily injury to Mr. Murdock as he made his pursuit. Certainly based on the circumstances, and all reasonable inferences, Mr. Murdock could not have naturally and probably expected that he would be killed by being

unintentionally run over by a vehicle driven through a field full of debris. Mr. Murdock's death was an accident.

II. The Exclusion in Question Does Not Preclude Coverage

Monumental bears the burden of establishing the applicability of the "assault or felony" exclusion contained in the policy in question. See LDS Hosp. v. Capitol Life Ins. Co., 765 P.2d 857, 859 (Utah 1988). This is not necessarily an easy burden to meet, and Monumental failed to meet this burden in its motion for summary judgment.

"It must not be forgotten that the purpose of insurance is to insure" Id. Accordingly, "insurance policies should be construed liberally in favor of the insured and their beneficiaries so as to promote and not defeat the purposes of insurance." U.S. Fidelity & Guar. Co. v. Sandt, 854 P.2d 519, 521 (Utah 1993). Indeed, "the insured is entitled to the broadest coverage he could reasonably understand from the policy." Id. at 522.

Insurers such as Monumental may exclude certain losses from coverage only "by using language which clearly and unmistakably communicates to the insured the specific circumstances under which the expected coverage will not be provided." Utah Farm Bureau Ins. Co. v. Crook, 980 P.2d 685, 686 (Utah 1999). Accordingly, "provisions that limit or exclude coverage should be strictly construed against the insurer," and any "ambiguous or uncertain language in an insurance contract that is fairly susceptible to different interpretations should be construed in favor of coverage." Sandt, 854 P.2d at 522-23.

These fundamental rules are applied regularly to an insurance contract because it is "a classic example of an adhesion contract." Id. at 522.

Insurance contracts are typically drafted by insurance company attorneys who are duty-bound to protect their clients. The terms of a typical insurance policy are not negotiated by the insurer and the insured. A policy is usually offered on a take-it-or-leave-it basis. . . . "Normally, the details and provisions of the policy are not discussed, . . . [and] many of its terms and all of its defenses and super-refinements [the insured] has never heard of and would not understand them if he read them."

Id. (quoting Browning v. Equitable Life Assur. Soc., 72 P.2d 1060, 1073 (Utah 1937)).

Nor should it be forgotten that money has been paid for the insurance policy--money that will be forfeited if the contract is nullified--and that no wrongdoing has even been alleged on the part of the policy's intended beneficiary.

A. Mr. Murdock's death did not result from "committing an assault or felony".

The fact that Mr. Murdock may have committed an assault or a felony in the events preceding his death does not, as a matter of law, bring his death within Monumental's "assault or felony" exclusion as Monumental seems to believe. Nor has Monumental established, as a matter of law, the required causal relationship between Mr. Murdock's death and his prior conduct. See LDS Hosp., 765 P.2d at 860.

The exclusion in question in this case employs language excluding "a loss which is caused by, resulting from, or contributed to by" some defined conduct or occurrence. Monumental suggests that this Court should adopt the reasoning of National Farmers Union Prop. & Cas. Co. v. Western Cas. Ins. Co., 577 P.2d 961 (Utah 1978), which held that the phrase "arising out of" is a phrase of broader significance than "caused

by”, and that the language requires only that there be some causal relationship between the injury and the risk for which coverage is provided. Id. at 962-63.

Nevertheless, the holding in National Farmers Union involved an exclusion in a homeowners insurance policy, making the holding dicta with respect to an accidental death policy. Moreover, the courts recently relying on the holding have been construing the term “arising out of” to uphold coverage under an insurance contract, not to terminate coverage. See, e.g., Gibbs M. Smith, Inc. v. U.S. Fidelity & Guar. Co., 949 P.2d 337, 343 (Utah 1997); Viking Ins. Co. of Wisc. v. Coleman, 927 P.2d 661, 663-64 (Utah App. 1996) (indicating that the “term ‘arising out of’ should be broadly interpreted in favor of coverage”). Such an approach seems consistent with the principle of construing an insurance contract to provide the broadest coverage reasonable. See Sandt, 854 P.2d at 522.

More importantly, the exclusion involved in this case does not even employ the term “arising out of”, so the discussion seems largely irrelevant. In any event, the Utah Supreme Court still requires a necessary causal relationship between the injury and the excluded conduct or occurrence even when broad language is used. See LDS Hosp., 765 P.2d at 860. Indeed, the exclusion in LDS Hospital included an exclusion from coverage for a loss “arising out of an attempt at assault or felony.” Id. at 859 (emphasis added). Even so, the Supreme Court still required that “the insured must have been actually engaged in a felony at the time and place of the injury” in order for the exclusion to apply. Id. at 860 (emphasis added).

The same principles of causation are required here. Viewing the facts and all reasonable inferences in favor of Mrs. Murdock, and construing the exclusion in favor of the broadest reasonable coverage, this Court must conclude that Mr. Murdock was not engaged in a felony or assault “at the time and place” of his death. The fact that there may be some causal link is insufficient to nullify the provisions of an insurance contract as LDS Hospital illustrates.

Again, it must be emphasized that a victim who has had a hundred-dollar bill stolen might attempt to chase the thief in a vehicle even though no assault or felony was ever committed. Mr. Moser was not intending to use deadly force in an effort to cause serious injury or death to Mr. Murdock; he was simply trying to retrieve the money. This result may have followed any theft. It is not so closely and logically connected to “an assault or felony” to satisfy the necessary causal relationship.

Moreover, the exclusion itself uses the term “committing” (rather than “committed” or “commission”), a term which plainly refers to current and ongoing conduct, not conduct past or already completed. Accordingly, the reasoning of LDS Hospital should be adopted and the Court should conclude that, as a matter of law (or at least for purposes of Monumental’s motion for summary judgment), Mr. Murdock was not “committing an assault or felony” at the “time and place” the vehicle driven by Mr. Moser accidentally collided with him.

Such a conclusion is necessary if the exclusion is to be “strictly construed against the insurer” as is required under Utah law. Sandt, 854 P.2d at 523.

Monumental complains that Mrs. Murdock should not be allowed to nullify “the exclusion.” (Appellee’s Brief at 12). However, the more important policy is that the “insurance contract” should not be nullified, especially in light of a poorly drafted exclusion contained in a contract of adhesion. Indeed, Utah courts favor “a liberal construction in favor of the insured to accomplish the purpose for which the insurance was taken out and for which the premium was paid.” *Id.* at 522 (quoting *Browning*, 72 P.2d at 1073).

Accordingly, the trial court erred by concluding that Monumental’s “assault or felony” exclusion precludes coverage as a matter of undisputed fact and law in this case.¹

B. Monumental’s exclusion is ambiguous and must be construed in favor of coverage.

The insured party is entitled to “the broadest protection he could reasonably believe the commonly understood meaning of its terms afforded him.” *Sandt*, 854 P.2d at 522. Accordingly, “an insurer wishing to limit coverage through an exclusion must employ language clearly identifying the scope of the limitation.” *Draughon v. CUNA Mut. Ins. Soc.*, 771 P.2d 1105, 1108 (Utah App. 1989) (emphasis added). An insurer that fails to do this will not be able to exclude coverage. “[A]mbiguous or uncertain

¹ Monumental inexplicably attempts to distinguish some cases not even cited by Mrs. Murdock in her initial brief. (Appellee’s Brief at 13). Discussion of those cases is not relevant to this appeal. It should be noted, however, that Monumental distinguishes the facts, but not the logic, reasoning and legal principles established in *Denies v. First National Life Ins. Co.*, 144 So.2d 570 (La. App. 1962). As analyzed in Mrs. Murdock’s initial brief, that case has great significance to the rationale to be applied in this case.

language in an insurance contract that is fairly susceptible to different interpretations should be construed in favor of coverage.” Sandt, 854 P.2d at 522.

Such is the case with Monumental’s exclusion. It is not clear whether “committing an assault or felony” refers to conduct of the insured or of a third party.

“Whether an insurance policy is ambiguous is a question of law. A policy may be ambiguous if it is unclear, omits terms, or is capable of two or more plausible meanings.” S.W. Energy Corp. v. Continental Ins. Co., 974 P.2d 1239. If a contract is ambiguous, contrary to Monumental’s assertion, “it is appropriate to simply construe ambiguities against insurers, without pausing to consider extrinsic evidence of intent, since the parties to routine kinds of insurance contracts typically do not discuss or negotiate terms and provisions.” Metropolitan Prop. & Liab. Ins. Co. v. Finlayson, 751 P.2d 254, 257 n.3 (Utah App. 1988).

Monumental’s exclusion does not explicitly state whether it refers to conduct (1) of the insured, (2) of some third party, or (3) of any party, including the insured. Monumental argues that the policy exception for committing an assault or felony “applies to the insured and not to third parties.” (Appellee’s Brief at 11). On the other hand, the trial court concluded that the exclusion’s “plain meaning” was that Monumental “will not pay benefits for a loss which is caused by, that results from, or contributed by persons committing an assault or felony. That means anybody can commit an assault or felony and they won’t pay on the insured’s case.” (R. 160, T. 9 (emphasis added)).

The difference in the interpretations applied to the exclusion's "plain language" by the insurance company and the trial court emphasize the confusion and ambiguity. If the insurance company's attorney and the trial judge cannot agree on the interpretation, the average policy purchaser will not be able to understand the exclusion.

Inasmuch as the listed exclusions do refer to some acts by third parties, such as the act of "undeclared war", Mr. Murdock could reasonably have understood the policy to refer to the assaults and felonies of third persons as well. While this interpretation is not the most plausible, it is one plausible interpretation, and in light of the policy's lack of clarity, the exclusion must be construed in favor of coverage. That is the principle gleaned from LDS Hospital, that an unclear exclusion will be construed in favor of coverage, even if the result may not seem logical or what the insurance company intended. 765 P.2d at 860-61.

Similarly, Mr. Murdock could reasonably have understood the exclusion to apply only when his death occurred while "committing" an assault or felony. Inasmuch as Mr. Murdock was no longer "committing" any assault or felony at the time of his accidental death, he likely would have believed that his death was covered under the policy.

Monumental argues that LDS Hospital did not consider a lack of reference to whose conduct is excluded to give rise to an ambiguity. Nevertheless, the holding in LDS Hospital certainly cannot be contorted to include such a proposition. The Supreme Court never considered the issue, likely because it was never raised by the parties.

Moreover, we do not have the complete policy in our possession to compare to Monumental's. LDS Hospital does not support Monumental's case.

Finally, Monumental claims it must prevail because Mrs. Murdock has not cited one case directly supporting the ambiguity argument. Mrs. Murdock would simply note that Monumental has not cited one case that directly refutes the ambiguity argument. The policy exclusion is capable of more than one plausible interpretation, and must be construed in favor of coverage.

CONCLUSION AND RELIEF SOUGHT


On the basis of all arguments and analysis set forth in the briefs, the Court of Appeals should reverse the trial court and set aside the summary judgment entered in favor of Monumental. Clearly Mr. Murdock's death was not intended, not likely and not the natural result of fleeing a crime scene. Indeed, the event could be considered extraordinary. Accordingly, Mr. Murdock's death was accidental and outside the boundaries of time and place of any assault or felony.

The Court of Appeals should further conclude as a matter of law that Mr. Murdock's accidental death was not sufficiently connected to "committing an assault or felony" and that Monumental's exclusion is ambiguous in any event.

In the alternative, the Court of Appeals should view the facts and inferences in favor of Mrs. Murdock, conclude that genuine issues of material fact remain to be

resolved as set forth in Mrs. Murdock's briefs, and remand the case for trial on those issues. Mrs. Murdock is entitled to at least be able to fully present her case in court.

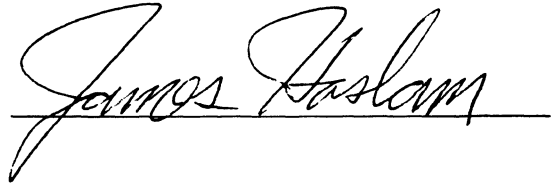
DATED this 15th day of November, 1999.


G. ERIC NIELSON
JAMES K. HASLAM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused to be mailed by first class U.S. mail,
postage prepaid, a true and correct copy of the foregoing **REPLY BRIEF** this
15th day of November, 1999, to the following:

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Salt Lake City, Utah 84145

A handwritten signature in cursive script, reading "James Haslam", is written over a horizontal line.