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Government Employees Insurance Company v. William Charles Dennis v. James C. Holder, Et Al. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GOVERNMENT EMPLOYEES
INSURANCE COMPANY,

Plaintiff and
Appellant,

vs.

WILLIAM CHARLES
DENNIS,

Defendant and
Respondent,

No. 17267

vs.

JAMES C. HOLDER, et al.,

Defendants-in-
Intervention and
Respondents.

BRIEF OF APPELLANT

From a Judgment of the Third District Court
In and For Salt Lake County
The Honorable Jay E. Banks, Presiding

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vs.

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Defendants-in-
Intervention and
Respondents.

BRIEF OF APPELLANT

NATURE OF THE CASE

This is a declaratory action filed by plaintiff insurance company seeking a determination as to whether William Charles Dennis is an additional insured under the terms of a policy issued to his father.

DISPOSITION IN LOWER COURT

A jury trial was held in this matter on May 27 and May 28, 1980, the Honorable Jay E. Banks presiding. The jury found that defendant William Charles Dennis was not a resident of his father's household. The lower court

entered a judgment in favor of plaintiff and against defendant, finding that plaintiff had no obligation to indemnify or defend William Charles Dennis in any action or judgment arising from an automobile accident on February 25, 1978.

On June 16, 1980, a hearing was held at which time Defendants-in-Intervention moved for a judgment n.o.v. or, in the alternative, for a new trial. On July 14, 1980, the court granted the motion for a judgment n.o.v., set aside the findings of the jury from the previous judgment, and held that plaintiff did owe an obligation to defend William Charles Dennis and to provide insurance coverage for any judgment obtained as a result of the accident on February 25, 1978.

RELIEF SOUGHT ON APPEAL

Appellant Government Employees Insurance Company seeks a reversal of the judgment notwithstanding the verdict and a reinstatement of the judgment based upon the jury's finding.

STATEMENT OF FACTS

This action was commenced by plaintiff Government Employees Insurance Company to determine whether William Charles Dennis was insured under a policy issued to his father, Donald R. Dennis. Because this appeal is concerned solely with the issue as to whether there was a factual question for the jury and as to whether there was substantial evidence to support the jury's finding, it is unnecessary and repetitious at this time to restate the evidence which will be argued infra to support appellant's

contentions. Rather, it is more germane for this Court to understand the procedural events which occurred in this litigation and the effect such events now have upon this appeal.

On November 21, 1979, Plaintiff filed a complaint for declaratory relief against defendant William Charles Dennis. (R. 2-4). The complaint alleged that Plaintiff had issued an insurance policy to Donald R. Dennis which provided coverage for bodily injury liability to Donald R. Dennis and to other additional insureds who qualified under the terms of the policy. The complaint further alleged that on February 25, 1978, William Charles Dennis, son of the insured, was involved in an accident with an automobile driven by James Holder and that a lawsuit had been subsequently filed in Salt Lake County against William Charles Dennis. Plaintiff sought a declaration that the plaintiff did not owe any obligation of defense or payment to defendant William Charles Dennis with respect to any claim arising from the February 25 accident.

On November 28, 1979, an answer was filed on behalf of defendant William Charles Dennis by his attorney Joseph Fratto. (R. 19-20). On December 10, 1979, James C. Holder, his wife and children, moved to intervene in the action through their attorney, Stephen Morgan. (R. 52). At that time they tendered an answer on behalf of Defendants-in-Intervention claiming that defendant William Charles Dennis was covered under the terms of the plaintiff's policy. (R. 21-25). On December 28, 1979, the Holders' motion

to intervene was granted by the Honorable Homer F. Wilkinson. (R. 60-62).

On February 25, 1980, Defendants-in-Intervention filed a motion for summary judgment. (R. 63). On February 28, 1980, Plaintiff filed a motion for summary judgment. (R. 129). On March 4, 1980, both motions were heard by the Honorable Bryant H. Croft and both motions for summary judgment were denied. (R. 147).

On March 21, 1980, Defendants-in-Intervention filed their demand for a jury trial. (R. 170). On May 27, 1980, a jury trial was commenced with the Honorable Jay E. Banks presiding. The trial continued through May 28, 1980. (R. 196-197). Plaintiff called four witnesses and rested. Defendant and Defendants-in-Intervention called no witnesses and rested. Defendant and Defendants-in-Intervention moved for a directed verdict at the termination of the testimony. The court took the motions under advisement. (R. 197).

On May 28, 1980, the jury was read the court's instructions and was given a special verdict form which required it to answer the question of whether defendant William Charles Dennis was a "resident of his father's household" on February 25, 1978. (R. 198). The jury returned the form with the answer "No." (R. 198). On May 30, 1980, a judgment on the verdict was signed by Judge Jay E. Banks ordering that Plaintiff had no obligation under its policy with Donald R. Dennis to pay,

indemnify, or defend his son William Charles Dennis from any action or judgment arising from the February 25, 1978 accident. (R. 309-310).

On June 6, 1980, Defendant and Defendants-in-Intervention moved for a judgment notwithstanding the verdict or, in the alternative, for a new trial. (R. 311-320). The motions were argued extensively on June 16, 1980, and the Court, at that time, took the motions under advisement. (Tr. 523-572). On July 14, 1980, the lower court granted the motions for a judgment notwithstanding the verdict. (R. 378).

After Plaintiff objected to the form of the judgment notwithstanding the verdict originally signed by the court (R. 379-380), an amended judgment was executed by the lower court (R. 383-384). This form was also objected to and a third order was signed by the lower court entitled "Second Amended Judgment Notwithstanding the Verdict." (R. 385-386). It is from this order and judgment that the present appeal is taken. (R. 387).

ARGUMENT

THE LOWER COURT ERRED IN SETTING ASIDE THE JUDGMENT BASED UPON THE JURY'S FINDINGS AND IN ENTERING A JUDGMENT NOTWITHSTANDING THE VERDICT.

It is the contention of Plaintiff-Appellant that the question of whether a person is an additional insured under a policy insuring "relatives" who are "residents of the insured's household" is, in almost all cases, a question of fact. In the instant case a review of the

record shows that there was a clear dispute as to the inferences to be drawn from the facts produced by both sides of this dispute as to whether defendant William Charles Dennis was in fact "a resident of his father's household." Since there was substantial evidence to support the jury's finding that he was not such a resident it was prejudicial error for the lower court to disregard the jury's findings and to enter a judgment contrary to the jury's determination. Plaintiff's contentions will now be examined in detail.

A. The Determination of Whether a "Relative" is a Resident of an Insured's Household is a Factual Question.

Plaintiff-Appellant issued a general automobile liability policy to Donald R. Dennis for a term commencing November 20, 1977, and continuing through November 20, 1978. The policy specifically insured a 1972 Caprice and a 1972 Chevrolet camper. (Exhibit 2P). Donald R. Dennis in his application for the insurance listed himself and his wife, Francis H. Dennis, as the sole operators of these two vehicles. (Exhibit 2P).

It is undisputed that defendant William Charles Dennis is neither a listed insured under the policy nor a listed operator of the vehicles insured under the policy. Thus, the only way in which coverage can be afforded to Defendant is if he qualifies as an additional insured under the general terms of the policy.

On February 25, 1978, defendant William Charles Dennis was driving an automobile belonging to a Sandra

Freestone. This suit, therefore, evolved around an accident in which William Charles Dennis was driving a vehicle not owned or listed by his father. The pertinent portion of the policy is limited as follows:

Persons Insured: The following are insureds under Part I:

* * *

b. With respect to a nonowned automobile,

- (1) the named insured,
- (2) any relative, but only with respect to a private passenger automobile or trailer

The term "relative" is defined by the policy as follows:

"Relative" means a relative of the named insured who is a resident of the same household.

Thus, the sole issue in this lawsuit was whether the definition of "relative" applied to defendant. In other words, was defendant William Charles Dennis a resident of his father's household?

The two words in controversy during this lawsuit were "resident" and "household." Plaintiff contended that Defendant, while admittedly a relative of the insured, was not residing in Donald Dennis' household as was required by the policy and therefore was not insured. Defendant and Defendants-in-Intervention, on the other hand, contended that William Charles Dennis was indeed a resident of his father's household and was therefore covered.

It is elementary that terms contained in insurance contracts are to be taken and understood in their plain,

ordinary, and common sense usage. The test used to determine the meaning of such terms is simply what a reasonable person would expect such terms to normally mean.

It has been stated that the purpose of including coverage for unnamed insureds is to provide protection for those whom, because of a close relationship, a person obtaining a liability insurance policy would ordinarily want to protect. National Farmers Union Property and Casualty Company v. Maca, 132 N.W.2d 517 (Wis. 1965). Expressions such as "residents of household" are used to describe a "common type of close relationship varying greatly in detail, where people live together as a family in a closely knit group, usually because of close relationship by blood, marriage or adoption and deal with each other intimately, informally, and not at arms length." Id. at 601.

In determining whether a person is an additional insured under the terms of a policy, it is useful to examine a dictionary-type definition of the terms in question. For example, the term "resident" is defined by Webster's International Dictionary as "one who resides in a place" or "one who dwells in a place for more or less duration. Resident usually implies more or less permanence of abode, but is often distinguished from inhabitant as not implying great fixity or permanency of abode." Residency also implies "dwelling, or having an abode, for a continued length of time." Great American Insurance Company v.

Marshall, 356 F.Supp. 208 (D.C.G. 1967)

Likewise, the term "household" has been stated as follows:

There is not much disagreement in the definition of "household," whether they emanate from judges or lexicographers. The word is synonymous with "family" but broader, in that it includes servants or attendants, "all who are under one domestic head; persons who dwell together as a family." Engebretson v. Austdold, 271 N.W. 809, 810 (Minn. 1930).

While these general definitions of "residence" and "household" are helpful, they do not provide the type of criteria necessary to determine if a person becomes an insured under the particular facts of that case. For this reason, courts have developed a number of factors to examine the circumstances surrounding the claim, in order to determine if the policy is applicable.

An extensive annotation dealing with the exact question of what determines a "resident" or member of a "household" states the general rule as follows:

A review of the cases construing or applying the particular policy terms that are the subject of the present annotation reveals a wide variety of factual considerations upon which the courts have focused in their determination of whether a particular person was a "resident" or "member" of the same "household" or "family" as the named insured at a particular time.

Those factual considerations not only relate to the respective individual's physical presence, or absence from, the named insured's home during the period that included the date of a particular occurrence, but also relate to such matters as the relationship (if any) of the individual to the named insured, the circumstances of such person's presence in or absence from

the named insured's home, the individual's living arrangements during earlier time periods and the individual's intention at various times with regard to his place of residence. 93 ALR 3d 420, 424.

More specifically, the courts have examined the subjective or declared intent of the individual, Hardware Mutual Casualty Company v. Home Indemnity Company, 60 Cal. Rptr., 508 (Cal. App. 1966); the formality or informality of the relationship between the individual and the members of the household, Pamparin v. Milwaukee Mutual Insurance Company, 197 N.W.2d 783 (Wis. 1972); the existence of another place of lodging by the alleged resident, State Farm Mutual Automobile Insurance Company v. Holloway, 423 F.2d 1281 (10th Cir. 1970); and the relative permanence or transient nature of the individual's residence in the household, Great American Insurance Company v. Marshall, 266 F.Supp. 208 (D.S.C. 1967).

Of all of these factors, the intention of the parties is one of the most important evidentiary questions to be considered. As noted by the Wisconsin Supreme Court, "While it is true that 'actions sometimes speak louder than words,' intention is a subjective state of mind to be determined upon all of the facts including the declaration of the person inquired about." Lecus v. American Mutual Insurance Company of Boston, 260 N.W.2d 241 (Wis. 1977).

Likewise, the intended duration of a stay is also an important factor to be examined since if a person comes under the family roof for a definite short period or for an indefinite period under such circumstances

that an early termination is highly probable, then it is unlikely the person has become a member of the household as intended by the insurance coverage. Nation-wide Mutual Insurance Company v. Granillo, 573 P.2d 80 (Ariz. App. 1977).

In summary, therefore, whether a person is a resident of the insured's household depends upon the particular facts in each case. Bartholet v. Berkness, 189 N.W.2d 410 (Minn. 1971). These facts involve a variety of considerations in which the factfinder can utilize in determining if the criteria necessary to qualify for insurance coverage has been established.

This Court, in American States Insurance Company v. Walker, 486 P.2d 1042 (Utah 1971), reviewed a number of such factors in deciding whether a college student could be considered a resident of her father's household. The lower court looked into the girl's intent and her statement that she considered herself to be a resident of her father's household while she was in school in Idaho. The court looked at the opening of a joint banking account with her father and a telephone listing in her own name. The court examined her income and the fact that her father gave her additional money to assist her in living expenses and in returning home. The court examined the type of furniture and possessions she had with her in her apartment as opposed to her father's house. The court examined her voting residency in Idaho, her driver's license in Idaho, and her

income tax statements.

This Court stated that the question of whether or not a child ceases to be a member of the family household after going away to school "must be determined from all of the facts and circumstances as revealed by the evidence." Id. at 1044. This Court further stated, "It is our duty to affirm him (the lower court) if there is any substantial evidence to sustain that ruling." Id. at 1044.

Thus, the rule is clear that except in extraordinary cases in which a person clearly does not qualify as an insured by any definition of the term, Bartholet v. Berkness, 189 N.W.2d 410 (Minn. 1971), it is for the trier of fact to determine, based upon the circumstances and evidence adduced at trial, whether the person can be said to be a resident of the insured's household.

As stated by the leading authority Couch, "whether a relative driving an insured vehicle is a resident of the insured's household is a question of fact." Couch, Couch on Insurance 2d, §45:276, p. 176 (Supp.) In addition there are a legion of cases holding that the ultimate determination of whether a person is a resident of an insured's household is solely a question of fact for the trier of fact. For example, the Tenth Circuit Court of Appeals in Hardesty v. State Farm Mutual Automobile Insurance Company, 382 F.2d 564 (10th Cir. 1967), has amply demonstrated this principle. In that case the question was whether a son was a resident of his father's household at the time of an accident. In a previous

appeal, 361 F.2d 176, the Tenth Circuit reversed a declaration by the trial court that, as a matter of law, the son was not covered under the policy.

Upon the remand the trial court did not submit the case to a jury but held, again, as a matter of law that under the evidence reasonable men could only conclude that the son was not a resident of the father's household. The Tenth Circuit Court in the second opinion reversed the lower court again and noted that the words "resident of the same household" do not constitute a term of art which would dictate a particularized legal inference to be drawn from family relationships. The court stated, "The function of the court remains, then, to submit to the jury consideration of evidentiary facts from which different permissible inferences may be drawn." Id. at 565.

The Tenth Circuit Court then stated the following:

We reiterate that there is strong and cogent evidence in the record which would lead the factfinder to the conclusion that Ennis Jr. was residing in the household of his aunt who had reared and educated him since he was eight years old with a minimum of assistance of any kind from his father. Weighty as this evidence may be, and thus proper for the trial court's consideration in the discretionary function of ruling upon motions for new trial, we cannot say such evidence dictates a "one way" verdict as a matter of law. Id. at 565.

There is no doubt that there are numerous cases throughout the country in which it has been held that an emancipated child who has left the family residence but who has returned for one reason or another can be deemed as a resident of the family household. See cases

listed 93 ALR 3rd, 420, 449-451. Likewise, there are numerous other cases in which such a child has been held not to be a resident of the family household. Id. at 451-453. However, it is patently clear that the question as to coverage is one of fact and not law. Each case, regardless of the outcome, turns upon the circumstances existing at the time the liability was claimed. It is the factfinder who must decide whether coverage exists. As long as there are conflicting versions of the evidence or conflicting inferences to be drawn from the evidence, the matter must be submitted to the factfinder. The instant case clearly involved a dispute which required submission and determination by the jury.

B. There Existed Substantial Disputes
as to the Inferences to be Drawn from the
Evidence Which Required Submission to the
Jury of Whether William Charles Dennis
Was a Resident of His Father's Household.

It is interesting to note that in this case Defendant in-Intervention first moved for summary judgment based upon the argument that the evidence was uncontroverted that William Charles Dennis was a resident of his father's household. (R. 63-73). Similarly, Plaintiff also moved for summary judgment based upon the assumption that the evidence was clear and undisputed that William Charles Dennis was not a resident of his father's household. (R. 133-145).

After extensive argument before the Honorable Bryant Croft, both motions were denied. (R. 147). Judge

Croft held that there was clearly a question of fact based upon the conflicting inferences to be drawn from the basically undisputed facts in the record.

After the denial of the two motions, it was the Defendants-in-Intervention who made a demand for a jury trial. (R. 170). After submission of the case to the jury Defendants-in-Intervention moved for a directed verdict in their favor. The court took the motion under advisement but submitted the issue of residency to the jury on a special verdict form. (R. 198).

Thus, it was not until some 45 days after the verdict had been rendered that the lower court decided that there was no proper question for the jury to determine and that the issue should have been ruled upon as a matter of law. Up until this time, both Judge Croft, in reviewing the motion for summary judgment and Judge Banks, in submitting the issue to the jury, had concluded there was sufficient evidence to merit jury consideration.

Appellant submits that this initial determination by the two judges was correct based upon the substantial difference in the contentions of the parties relating to the facts and the inferences to be drawn from them. A review of the record shows substantial questions of fact which should have been submitted to the jury for its determination.

The instant case is analogous to the case of Aetna Casualty and Surety Company of Hartford, Connecticut v.

Means, 382 F.2d 26 (10th Cir. 1967). In that case a declaratory action was brought to determine whether a son was a member of the insured father's household. The case was tried to a jury and the identical question, as in the instant case, was submitted to it. The jury determined that the son was a member of the household. The insurance company moved for a judgment notwithstanding the verdict or for a new trial. Both motions were denied. The Tenth Circuit Court of Appeals, in affirming the lower court judgment and denial of the motion, stated the following pertinent observation:

There is no substantial conflict in the testimony as to the pertinent evidentiary facts. There is a big difference between the contentions of the parties as to the inference of ultimate facts to be drawn from the established evidentiary facts. Id. at 27. (Emphasis added).

The court in Aetna reviewed the evidence favoring the position of both the plaintiff and the defendant to illustrate the substantial differences existing in the contentions of the parties. A similar listing in the instant case reveals the substantial dispute between Defendants and Plaintiff.

The evidence favoring the position of the Plaintiff was to the effect that:

(1) For more than six years preceding the accident William Charles Dennis had been financially independent and self-supporting, and that because he did not get along with his father he made only very few visits of short duration to his family in Utah. (Tr. 443-445, 458).

(2) At the time of the accident, William Dennis was merely staying with his family on a temporary basis for so long as it would take to overcome his drug dependency problem. Because of the friction which he had with his father, he indicated that he intended to be present in his father's house no longer than necessary. (Tr. 457-458).

(3) The father, Donald R. Dennis, considered his son to only be residing at the residence until he could get enough money to go back to Florida and had an understanding with his son that he would only stay there long enough to get himself straightened out. (Tr. 498).

(4) William Charles Dennis lived in Florida for nearly two years prior to his return to visit in Utah -- one year of which was with his girlfriend Carol Ketchum. During his residency in Florida he worked in several jobs, including operation of heavy equipment. (Tr. 446-447).

(5) When he arrived in Florida he had a Utah driver's license. He surrendered this license and received a Florida chauffeur's license in its place in 1977. (Tr. 447-448).

(6) When William Charles Dennis arrived in Florida he had a 1963 Chevrolet El Camaro which was registered in Utah. Upon arriving he changed the registration to Florida plates. (Tr. 448).

(7) While he was in Florida he filed a Florida state income tax return for the year 1977. (Tr. 449).

(8) Before leaving Florida he moved into an apartment with a female friend and took all of his household goods, furniture and personal effects. He paid one-half of the rent that was due for the month prior to his leaving.

(9) At the time he left Florida his two televisions, his living room furniture, kitchen goods, and eight-track stereo, several hundred books, wall pictures, clocks, and most of his clothing remained in the apartment. (Tr. 452-454).

(10) When he came to Utah he only brought with him a small amount of clothing, himself, his car, and his dog. (Tr. 454).

(11) Dennis stated that he left his things in Florida because his trip to Utah was more or less a spur of the moment type thing and he always intended on going back. He stated it was not like he was leaving his friends and everything in Florida, but just needed to get away for a while to straighten himself out. (Tr. 455-456).

(12) When asked whether he intended on going back to his apartment upon leaving Florida he stated he did then and still did at the day of trial. He stated that on the day of the accident he fully intended on going back to Florida also. (Tr. 454).

(13) Dennis stated that he had made no arrangements to bring back any of his possessions from Florida and had made no effort to change his license plates from Florida plates to Utah. (Tr. 464).

(14) At the time of the accident Dennis was driving under the authority of a Florida chauffeur's license. (Tr. 447-448).

(15) Dennis stated that while he could not recall the address of the house in which his furnishings were left, he would have had no trouble in finding the house itself and that the female roommate there had an ongoing residence in which he was always welcome. He stated that as far as he was concerned he had a household in Florida and that he could have returned to it at any time and still could at the time of trial. (Tr. 476-478).

(16) Even though Mr. Donald R. Dennis received an application to renew the insurance approximately two weeks prior to the accident, he made no change on the application to add his son William Charles Dennis as an additional driver of the family automobile. Exhibit 4, Tr. p. 490).

(17) Neither William Charles Dennis nor his parents could recall him ever driving the cars belonging to his parents but stated he always drove his own automobile. (Tr. 462, 501,

On the other hand, the evidence favoring the position of the Defendant and the Defendants-in-Intervention was to the effect that:

(1) William Charles Dennis had lived in his father's home from the latter part of November 1977 up to and including the day of the accident, February 25, 1978, a period of about three months. (Tr. 465).

(2) At the time he had left Florida he had only been residing in the apartment with the female roommate for one month and could not even recall the address of the apartment or the roommate's name. (Tr. 450-451).

(3) During the first two months of his visit his mother took care of him and gave him a lot of personal attention so he could recover from his drug addiction. (Tr. 508).

(4) During the third month he obtained a job at the Bangerter Trucking Company and was making about \$600 amonth driving a truck. (Tr. 461).

(5) At the time he applied for the job with the trucking company he used his father's address on the application. (Tr. 466).

(6) During the three month period that he resided with his father he was not paying rent on any other residence, although he was not paying rent at his father's place either. (Tr. 467).

(7) William Charles Dennis ate most of his meals at his father's residence and slept there. He had his own room at the house. (Tr. 467-468).

(8) His parents bought their son small items such as toilet articles and gave him some spending money while he resided with them. (Tr. 502).

(9) At the time of the accident William Charles Dennis gave his address on the police report as that of his father's. (Tr. 468). While his father was under the distinct impression his son would not be staying with him long the subject was never specifically discussed. (Tr. 501).

Certainly, even a cursory review of the arguments propounded by both sides throughout the trial and in their legal memoranda (Plaintiff's Memorandum in Support of Summary Judgment, R. 133-146; Plaintiff's Memorandum in Opposition to Judgment n.o.v. R. 346-360; Defendants-in-Intervention's Memorandum for Summary Judgment; R. 65-126; Defendant and Defendants-in-Intervention's Memorandum for Judgment n.o.v. or New Trial, R. 311-320) shows that there were substantial disputes as to the inferences to be drawn from the existing set of facts and circumstances. It is the weighing of all of these contentions by a trier of fact which determines whether a person can be said to have been a resident of the insured's household.

When there are material facts in dispute or competing reasonable inferences, a trial is required in order that the trier of fact may evaluate the position of both parties. Lecus v. American Mutual Insurance Company of Boston, 260 N.W. 2d 1 (Wis. 1977). "It is for the jury, not the court, to determine the effect of such inferences and circumstances." Aetna v. Means, *supra*, p. 29.

Thus, the lower court correctly submitted the determination of residency to the jury and correctly entered judgment in accordance with such verdict. As noted earlier, however, the error occurred in the court's subsequent action of overturning the verdict and entering judgment as a matter

of law.

C. The Determination of the Jury Was Supported by Substantial Evidence and the Court Therefore Erred in Overruling the Verdict.

It is fundamental that a trial court can enter a judgment notwithstanding the verdict only where there is an absence of any substantial evidence to support the verdict. In determining whether a judgment n.o.v. should be granted, all of the testimony and all reasonable inferences flowing therefrom which tend to prove the jury verdict must be accepted as true, and all conflicts and all evidence which tends to disprove it must be disregarded. Koer v. Mayfair Market, 19 Utah 2d 339, 431 P.2d 566 (Utah 1967).

In a more recent case, this Court stated:

A motion for judgment notwithstanding the verdict presents solely a question of law to be determined by the court. In passing on a motion of this kind, the court is not justified in trespassing in the province of the jury in its prerogative to judge all questions of fact in the case. The court is not free to weigh the evidence, and the weight of the evidence and the credibility of the witnesses are within the jury's sole province.

In considering the verdict, the trial court must view the evidence most favorable to the party against whom the motion is made. This court must apply the same standards in its review of the case. Winters v. W. S. Hatch Company, Inc., 546 P.3d 603, 605 (Utah 1976).

Thus, Respondents in the instant case have a heavy burden to carry on this appeal. The question is not whether William Charles Dennis was a resident of his father's household but is whether there was a sufficient dispute

to warrant submission to the jury in the first instance to support the jury's determination. Appellant submits that Respondents will be unable to carry this burden.

As has been previously noted, there was clearly a substantial dispute as to the inferences to be drawn from the evidence and both parties argued vigorously that each factor supported or opposed a finding of residency. The same factors which allowed the submission to the jury also supports the jury verdict in that there was obviously substantial evidence presented by the plaintiff to show that William Charles Dennis could be found not to be a resident of his father's household. The numerous facts previously recited together with the criteria developed by courts of law throughout the country unquestionably support the jury's conclusions.

The instant case is similar to the recent case of Mel Hardman Productions v. Robinson, 604 P.2d 913 (Utah 1979). Whereas this case involved a dispute as to an insurance contract, the Hardman case involved a dispute as to a motion picture contract. Whereas the instant case concerned the words "residence" and "household," the Hardman case concerned the word "photoplay."

In Hardman, just as in the instant case, motions for summary judgment were filed by the parties and were denied by a district court judge because of the large issues of fact to be resolved. Again, in both cases, the jury was asked a simple yes or no question in terms of the issue being raised.

In both cases the trial judge overturned the finding of the jury and entered a judgment n.o.v.

This Court in Hardman found that such action was clear error since the meaning of the term "photoplay" as used in the contract was a question of fact for the jury. This Court noted that the lower court is obliged to not only look at the evidence but also to all reasonable inferences that fairly may be drawn therefrom in the light most favorable to the parties moved against. The judgment of the lower court was accordingly reversed and the jury verdict reinstated.

The granting of the judgment n.o.v. by the lower court in the instant case was also clearly erroneous. The jury was entitled to utilize the court's instructions as well as common sense to determine whether William Charles Dennis could be deemed to be a resident of his father's household within the common meaning of such words.

Because of the substantial variance of circumstances and inferences argued by both parties in this lawsuit, it was impossible for any court to state, as a matter of law, that William Charles Dennis was or was not a resident of his father's household. Since a court could not make such a determination on motions for summary judgment, or on motions for directed verdict at the conclusion of the evidence, the court similarly could not make the determination of a post trial motion for judgment notwithstanding the verdict.

For these reasons, the lower court committed prejudicial error in granting the judgment n.o.v. when the issue was clearly ripe for jury determination and where there was substantial evidence to support the jury's conclusion.

CONCLUSION

The issue in this case goes beyond the determination of Defendant's insurability under the terms of his father's policy. The true issue raised by this appeal concerns the fundamental right to trial by jury and the power a court may exercise in diluting that right.

The initial determination of whether a person qualifies as an additional insured via the "resident of household" inclusion is, almost without exception, always a question for the trier of fact. In this case, a brief review of the numerous memoranda and the testimony given at trial shows the substantial dispute which occurred as to the various factors and circumstances argued to support or oppose such residency.

The question was clearly ripe for jury determination. The lower court could not, as a matter of law, have entered judgment for either party on motions for summary judgment or motions for directed verdicts. The subsequent entry of a post judgment motion was equally erroneous in view of the substantial evidence which would have supported the jury regardless of which side it supported.

The lower court during the motion for judgment n.o.v. admitted that the evidence showed William Charles Dennis was a resident of Florida when he left and that Dennis always intended on returning back there as soon as possible. The court, however, discounted these factors and substituted other factors which the court thought more compelling. Such weighing of factors was for the jury -- not the court. It was for the jury to consider all of the facts and circumstances surrounding William Dennis' travels, desires, and living habits. It was for the jury to decide if these events met the instructed criteria for "residency of a household."

The jury did decide. This Court must reinstate that decision.

Respectfully submitted,


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MAILING CERTIFICATE

This is to certify that two copies of the foregoing Brief of Appellant were mailed to Joseph C. Fratto, 431 South 300 East, Salt Lake City, Utah 84111, and to Stephen G. Morgan, 261 East 300 South, Salt Lake City, Utah 84111, this 14 day of January, 1981.

