1981

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

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

- -

GOVERNMENT EMPLOYEES
INSURANCE COMPANY,

Plaintiff-Appellant,

vs.

WILLIAM CHARLES DENNIS,

Defendant-Respondent, No. 17267

vs.

JAMES C. HOLDER, et al.,

Defendants-In-
Intervention and
Respondents.

- -

REPLY BRIEF OF APPELLANT

- -

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable Jay E. Banks

- -

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REPLY BRIEF OF APPELLANT

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Appellant Government Employees Insurance Company strongly disagrees with numerous factual statements made by Respondents as well as their legal theories and analysis. For the convenience of this Court, Appellant will adopt the organizational outline utilized by Respondents in replying to these erroneous statements.

DISPOSITION IN LOWER COURT

Respondents state that the lower court "had almost granted" a Motion for Directed Verdict to Respondents but mysteriously decided to submit the case to the jury.

(Respondents' Brief, p. 1-2). Such a statement is both irrelevant and unsupported by the record in this case.

Next, Respondents assert that Instruction No. 14 was erroneous since it spoke in terms of intention and required an examination of facts and circumstances in deriving such intention. Respondents then conclude that the jury found against them and in favor of Appellant "based on the testimony of William Charles Dennis that his intentions were to eventually move out of his father's house and return to Florida." (Respondents' Brief, p. 2). Such an assertion is purely conjecture on the part of Respondents as to what elements the jury utilized in its evaluation of the residency question. As such, Respondents' conjecture is entitled to no weight whatsoever.

RELIEF SOUGHT ON APPEAL

Appellant does not dispute the standards outlined regarding appellate review of judgments notwithstanding the verdict. Nor does it dispute that in cases in which only one reasonable inference can be drawn from the facts it is proper to reverse a jury verdict. However, it should also be noted that this Court has in the majority of cases involving a judgment notwithstanding the verdict reversed the lower court and reinstated the verdict on the grounds that the lower court intruded upon contested issues of fact. See for example, Winters v. W. S. Hatch Co., 546 P.2d 603

(Utah 1976); Mel Hardman Production, Inc. v. Robinson, 604 P.2d 913 (Utah 1979) and cases cited therein. Unlike the Kilpack case referred to by Respondents, the present controversy contains disputed inferences based upon undisputed facts which could have resulted in a verdict for either party. Submission to the jury was thus required.

UNCONTROVERTED DISPOSITIVE FACTS

Respondents refer to some twelve numbered paragraphs of "uncontroverted dispositive facts". (Respondents' Brief, P. 4-6). Subsequently they refer to "Other Facts Which Are Not Relevant or Material." (Respondents' Brief, p. 8-9). While Appellant agrees that the facts as stated were not disputed, Appellant strongly disagrees with the slanted and one-sided characterization of these facts and the complete omission of other facts in Appellant's favor. It is interesting to note that all of the facts stated by Respondents in their twelve-numbered paragraphs were argued by them in support of residency. On the other hand, all facts urged by Appellant are either completely omitted in Respondents' Brief or are categorized as "not relevant or material."

Appellant would submit that the facts listed in its Brief in Chief are much more accurate and objective in presenting the evidence in support of both positions. (Appellant's Brief, p. 16-19). Had the facts been as one-sided and clear as represented by Respondents, there would be less doubt

that a fact question existed and that the matter could be determined as a question of law. However, Respondents' distorted view of the facts when compared with the evidence in the record shows that a hotly contested controversy existed and that numerous undisputed facts with disputed inferences were presented by both parties.

ARGUMENT

STATEMENT OF THE APPLICABLE LAW TO THE UNCONTROVERTED DISPOSITIVE FACTS.

Respondents place great evidence on an annotation contained at 93 A.L.R.3d 420-465. Portions of the annotation are even attached as an appendix to Respondents' Brief. However, Respondents have completely distorted and misquoted the annotation with regard to its treatment of "intentions" and the "inclusion" vs. "exclusion" category. (Respondents' Brief, p. 7-8).

Respondents conclude that the annotation states that if a child is not living apart in a separate household at the time in question, the parties' intentions are not material or relevant." (Respondents' Brief, p. 7). There is no such statement made in the annotation in which intention is excluded merely because a child is living at the insured's home at the time of the accident.

Likewise, there is no discussion whatsoever contained in the annotation in which inclusion cases are separated from

exclusion cases. Rather, the annotation notes that several states have found the term "resident of household" ambiguous and have therefore applied the definition more narrowly in exclusion cases than in inclusion cases. However, no attempt has been made in the annotation, as have Respondents in their Brief, to classify the cases on this basis.

Finally, Respondents assert there are no inclusion cases in which a person who is living with the insured is deemed not to have been a resident. The relevance of this statement is first, of little importance since each of the cases in the annotation was based upon evidence adduced at trial and concerned disputed facts. Second, however, the statement is incorrect since in the annotation itself the case of Indemnity Ins. Co. v. Sanders, 36 P.2d 271 (Okla. 1934), 93 A.L.R.3d at 440, holds that neither a daughter of the insured nor her husband who were staying with the insured at the time of the accident could be considered "residents of the same household." In addition, see Pamperin v. Milwaukee Mutual Ins. Co., 197 N.W.2d 783 (Wis. 1972) where the court held that a niece who was staying with her uncle at the time of the accident was not a "resident of his household." See also, Connolly v. Galvin, 412 A.2d 428 (N.H. 1980).

For the preceding reasons, Appellant takes strong issue with the characterizations made of the annotation and believes that an examination of the annotation and the cases cited

therein does not support Respondents' preliminary statements contained in its Brief at pages 7 through 8. It should also be observed that the "uncontroverted dispositive facts" referred to in this section concern those facts most favorable to Respondents and completely ignores, as mentioned supra, those facts and inferences favorable to Appellant.

THE LOWER COURT INCORRECTLY DETERMINED THAT, AS A MATTER OF LAW, THE ONLY REASONABLE INFERENCE TO BE DRAWN FROM THE UNCONTROVERTED FACTS WAS THAT WILLIAM CHARLES DENNIS WAS A RESIDENT OF HIS FATHER'S HOUSEHOLD AT THE TIME OF THE ACCIDENT AND HENCE, AN ADDITIONAL INSURED UNDER HIS FATHER'S POLICY OF LIABILITY INSURANCE.

Respondents have attempted an elaborate analysis of the cases decided in the country regarding the question of residency of a household. They have divided these cases into the "inclusion" category in which a person is attempting to become an additional insured under the terms of the policy and the "exclusion" category in which the person, under other provisions of an insurance policy, is attempting not to be deemed a resident of the household in order that an action may be brought against the insured. These two categories are further broken down by the respondents to include cases in which the claimant is either living with the insured or is living away from the insured at the time of the accident.

Under Respondents' analysis the question of "intention" is not relevant in those instances where the claimant is

living with the insured at the time of the accident and is seeking to be included under the policy. On the other hand, Respondents state that "intention" is relevant to cases involving exclusion even though the claimant is living with the insured and to cases of inclusion where the claimant is living apart from the insured. In these latter two categories Respondents believe that questions of fact are created while in the first category of inclusion Respondents state that the question is solely a matter of law.

It is the position of Appellant that the distinctions and categories cited by Respondents are completely irrelevant to an analysis of the applicable case law and to a disposition of this case. After extensive research Appellant has been unable to find any authorities in which the distinctions made by the respondents in their Brief have been recognized. To the contrary, all authorities and all cases cited have consistently stated that each case is dependent upon an examination of its own facts and circumstances.

While Appellant admits that ambiguous policy language can be construed narrowly or broadly in favor of an applicant seeking coverage, Appellant does not concede that the term "resident of the same household" is in fact ambiguous so as to require such an interpretation. Appellant adopts the statement contained by the Wisconsin Supreme Court in which it states:

> The previous decisions of this court indicate that no one factor is controlling and that all of the elements must combine to a greater or lesser degree in order to establish the relationship. We also approve the previous determination of this Court that the terms "resident or members of the same household" as used in policies of automobile liability insurance, are not ambiguous and, therefore, should be construed in light of their plain and common meaning. It makes no difference whether the terms are employed to define exclusion or inclusion from coverage, or whether the question is one of creating or terminating the relationship. Pamperin v. Milwaukee Mutual Ins. Co., 197 N.W.2d 783, 789 (Wis. 1972). (Emphasis added).

The Supreme Court of Connecticutt in Griffith v. Security Insurance Co. of Hartford, 356 A.2d 94 (Conn. 1975) has said:

> Appellee argues that the exclusion clause here is ambiguous and should therefore be construed most strongly against the insurer. We are of the view that the exclusionary provision of the policy is clear and legally unambiguous. It is unnecessary to resort to rules of construction in order to ascertain the meaning of an insurance policy when no ambiguity exists.

See also, Stadelmann v. Glen Falls Ins. Co., 147 N.W.2d 460 (Mich. App. 1967); Mun Quon Kok v. Pacific Ins. Co., 462 P.2d 909 (Haw. 1971); and Smitke v. Travelers Indemnity Co., 118 N.W.2d 217 (Minn. 1959).

Those courts which have treated an exclusion policy differently from an inclusion policy have first found the term to be ambiguous. Those other courts, which have not found such ambiguity, have refused to make any distinction. Appellant respectfully suggests that the terms "resident of the same household" are indeed not ambiguous and should

be given the common ordinary meaning contained in the English language without reference to the effect such determination has upon the policy and the claimant.

Even assuming arguendo, however, that the term is ambiguous and that the rule is applicable which narrows the interpretation given in exclusionary policies and broadens it in inclusionary policies, such distinction still does not support the judgment N.O.V. granted by the lower court. In this particular instance, for example, the only method in which a broad interpretation of the terms could be applied to the facts of this case concerned the instructions to the jury given by the lower court. In other words, it is only by the definition applied to the term "resident of the same household" by which a broad or narrow definition can be established. The jury then utilizing such definition applies the law to the facts of the case in reaching its conclusion.

Instruction No. 14 correctly stated the standard to be applied even in a case in which a broad interpretation of the term is utilized. As will be noted infra there is no authority which states that intention is not a relevant factor in determining coverage even when the policy is broadly interpreted. In addition, Respondents have filed no cross-appeal from this instruction and so, for the purposes of this appeal, the instruction must be considered correct.

As such, therefore, the jury was correctly instructed as to the standard to be applied in determining residency even under a broad interpretation given to inclusionary policies where ambiguous language is deemed to have existed.

Respondents throughout the argument portion of their brief continually state two propositions: (1) That as a matter of law cases can be decided where the claimant is living with the insured in inclusionary cases and (2) that intention of the claimant is not relevant in inclusion cases in which the claimant is living with the insured.

The chart contained in Respondents' Brief (p. 16-17) is both erroneous and misleading in these respects. First, it is only Respondents themselves who have made the distinctions and categories contained in the chart. The courts themselves have failed to apply these elaborate distinctions as have all legal authorities discovered by Appellant. Second, Respondents have in numerous cases stated "no jury" but have failed to note that the decision was that of a fact finder judge and that the findings of the judge were reviewed by the appellate court just as would be a verdict from a jury. Third, the characterizations in many of the cases that intention was not relevant or considered is incorrect.

A review of all of these cases shows that with only two exceptions the circumstances and facts of each case determined

the outcome regardless of whether it was an "inclusion case" or an "exclusion case" and whether the claimant was living with the insured or was away from the insured. As noted in Appellant's Brief in Chief, the conflicting inferences existing in this case clearly required a fact finder to make a determination based upon the evidence and the applicable definitions.

A brief review of the cases listed in Respondents' chart and the errors contained therein is as follows:

1. Buddin v. Nationwide Mutual Ins. Co. The Supreme Court of South Carolina reversed a jury verdict in which a nephew was deemed not to be a resident of his uncle's house. The court noted that a judgment N.O.V. should only be granted if the evidence is susceptible to only one reasonable inference. The court then noted the facts of that case including that the nephew had no other place to go, had no furniture except at his uncle's, ate all his food there, and had no intention of looking for another place or moving. 157 S.E.2d 635. The court failed to note a single factor opposing or contradicting residency in direct contrast to the instant case. The court then concluded:

> In our opinion, under the cases cited, there were no factual issues in this case for the jury to resolve. The evidence here is susceptible of only one reasonable inference. Id. at 637.

It should be noted that the court made no distinction between

inclusion or exclusion and the fact that the nephew was actually living with the uncle at the time of the accident. This case simply stands for the proposition that since there were no facts to the contrary, there was no factual determination necessary.

2. Hardware Mutual v. Home Indemnity Co. The decision in this case involved the findings of the trial court as a fact finder. The lower court found that a nephew was a resident of his aunt and uncle's home. It was not decided as a matter of law. The court also noted that the term "residence" means "a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn on transient visit." 50 Cal. Rptr. at 515.

3. Jamestown Mutual Ins. Co. v. Nationwide Mutual Ins. Co. Again, this appeal involved a review of findings of fact by the lower court in which it was determined that a son was a relative in his father's household. As noted by the appellate court:

> William Clark Hamrick had no home of his own. He went back to his father's house, carrying with him all of his possessions. His intent was to remain there until living quarters more convenient to his employment could be found and the living arrangements made for his occupancy of them. . . . We think it clear that under the circumstances he was a "resident of the same household" as his father. He is not in the same position as an adult child who has a home of his own to which

he intends to return and is making a mere visit to his parents. 147 S.E.2d at 417. (Emphasis added).

3A. It should be noted that the Pamperin case should have been included in the first category of "living with inclusion cases" contained in Respondents' chart but was erroneously put in the "exclusion" cases. To maintain ease of comparison, Appellant will discuss this case in its present position.

4. United Services Automobile Assn. v. Mione. Again, this was a case tried before a judge who made specific findings and conclusions as to whether a daughter was a resident of her father's household. The court noted:

> Important factors are the subjective or declared intent of the individual, the relationship between the individuals and the members of the household, the existence of a second place of lodging, and the relative permanence or transient nature of the individual's residence in the household. 528 P.2d at 420.

The court noted no distinction between children living with their parents and children separated from their parents in applying this test.

5. Hardesty v. State Farm Mutual Automobile Ins. Co. This case is quoted extensively in Appellant's main brief. It stands for the proposition, as evidenced by the second remand, that the residency of an individual is a question of fact and not a matter of law. Since there were two potential homes in this case, just as in the instant case, the sole

question to be determined was whether the claimant was a resident of the insured's household. The additional residence always makes the determination a more difficult question than when there is no other living quarters available to the claimant as in several of the other cases cited.

6. Aetna Casualty & Surety Co. v. Means. This case was also extensively cited in Appellant's Brief in Chief. Again, the court made no distinction in applying a different standard to a case in which the minor had left the residence as to cases where the minor resided at the residence. The Tenth Circuit Court of Appeals, after reviewing the undisputed facts, noted the disputed inferences stating:

> There are many cases where a contract of insurance may be construed as a matter of law and the question of liability vel non decided as such by the court. There are other cases where there is a conflict in the evidence or where different inferences are permissible under the uncontroverted evidentiary facts. In the latter kind of situation the issue is a fact issue and one which is properly submitted to the jury. 382 F.2d at 29.

7. American States Ins. Co. v. Walker. Again, Respondents failed to note that this Court affirmed the findings of fact entered by the lower court. In that decision, this Court failed to note any substantial difference in standard because a child is living or not living at the residence at the time of the accident. This Court noted the following:

> A resident of a household is one who is a member of a family who lives under the same roof. Residence emphasizes membership in a group rather than an attachment to a building. It is a matter of intention and choice rather than one of geography. . . .
>
> The trial court heard the evidence and made a finding that at the time of the collision Dixie Ann Walker was still a resident of her father's household. Whether we would have made the same ruling had we tried the case is immaterial, and on appeal we are not justified in substituting our judgment for his, since the evidence was such as to sustain his judgment. 486 P.2d at 1044.

8. Nationwide Mutual Ins. Co. v. Granillo. The Granillo case was one in which summary judgment was granted on the basis that the affidavit and exhibit showed no dispute as to facts or inferences. In that case no discussion was made by the court as to a different standard applied to exclusion cases vs. inclusion cases. There, the married daughter of a service man had moved into her parent's home. The facts reviewed by the court are remarkably similar to the facts in the instant case. The daughter in Granillo intended to reside in her parent's home only until she could afford to rent her own home, did not consider herself a member of the family and her father considered her a guest in his home. The court noted that the girl's car was never used by the family nor the family's car by the girl. The court also observed she brought neither furniture nor other possessions with her when whe left her home in Yuma. The court stated that the intended

duration of a relationship is a fact to be considered in such cases. Again, the court failed to note any different standard which would have been applied had there been an inclusion question rather than an exclusion question.

9. Pamperin v. Milwaukee Mutual Ins. Co. As noted supra, this case should have been included in the inclusion living together category. The court in this case held as a matter of law that a niece who was staying with her uncle was not an insured under his policy. Thus, this case is the exact opposite of the Buddin case in which that court held as a matter of law that the nephew was a resident. The court noted that there were three factors to be considered in determining residency of a household. (1) Living under the same roof; (2) in a close, intimate and informal relationship; and (3) where the intended duration is likely to be substantial. The court stated:

> Living together under one roof as a family is neither the sole nor the controlling test of whether a person is a resident or member of a household. In addition, the intended duration of the relationship is a necessary element whether the attempt is to show the creation or the termination of the relationship. 197 N.W.2d at 787.

10. National Farmers Union Property and Casualty Co. v. Maca. Respondents incorrectly state the conclusion reached in the Maca case. In that case on summary judgment the court held that the son was a resident of his father's household and could not sue his father. The facts were undisputed by

the claimants and therefore the court held that the record established, as a matter of law, that the son who had no other quarters and who intended on remaining with his father indefinitely was indeed a resident of his father's household.

A review of the preceding cases in the chart formulated by the respondents shows that in almost every instance the question of residency was one of fact, not law. In those few cases in which the court ruled as a matter of law as to residency, the facts and inferences were held to be undisputed and incapable of more than one conclusion. In such cases there was no separate living quarters or other circumstances in which conflicting inferences could be made.

Respondents have attempted to create categories of cases which are not recognized in any of the opinions cited by Respondents or in any legal authority. The distinction between inclusion and exclusion cases is only applied by courts in those cases in which the terms are deemed to be ambiguous and where the definitions themselves are either enlarged or restricted. Such definitions are in the form of jury instructions which, in the instant case, must be considered correct since Respondents have failed to cross-appeal from the instructions given.

The distinction attempted by Respondents makes little sense. Under Respondents' analyses if a son visits his parents for three days and intends on returning the following

day he would be automatically included under his father's policy as an additional insured since he "resided under his father's roof" on the day of the accident regardless of his intention of leaving the following day. Taking the same facts, however, into an exclusion case, according to the Respondents, would require an examination of the son's intention and a finding that he was not a resident of the household since he did not intend on staying.

Likewise, if the son went to his own apartment the following day and then became involved in an accident Respondents would urge that a new standard be applied since he was not then residing under his father's roof. Then, his intention and future plans would again come into play even though had he had the accident the previous night before leaving his father's home his intention would have been irrelevant.

Such an analysis is obviously falacious. The standards to be applied in determining residency of a household are applicable in all situations regardless of whether an inclusion, exclusion, living apart from the insured or living with the insured is present. If the court chooses to narrow the definitional terms involved in defining residents of a household that is the court's prerogative under ambiguous insurance policies. However, there are no cases which say that intention is eliminated completely in narrowing the

definitional standard.

It should also be considered that insurance policies are written and premiums are paid based upon the intention of the insuring parties. In the present case, for example, Donald Dennis, the father of William Dennis, some two weeks before the accident failed to change his application of insurance to list his son as an additional driver of the family automobile. (Tr. 490, Exhibit 4). The testimony is also consistent that his father considered his son only to be residing at the residence until he could get enough money to go back to Florida and that he had an understanding with his son that he would only stay there long enough to get himself straightened out. (Tr. 498).

The obvious purpose of such a clause is to restrict the number of insureds which a premium goes to protect. If intended duration is not a factor to be considered, as urged by Respondents, then any relative who happens to be lucky enough to be residing in an insured's home on the night of the accident would automatically receive coverage. Such a standard makes no sense in law or logic and the distinctions attempted to be made by Respondents are not valid or recognized under the authorities.

For these reasons, the trial court erred in overruling the jury verdict finding of non-residency when the inferences in this case were clearly disputed and in which intention of

the insured was clearly an issue of relevance.

CONCLUSION

Respondents in their brief have attempted to divert this Court's attention to the real issue in this case which is whether there was sufficient conflict of factual inferences to justify submission to a jury. Instead, Respondents have attempted to create and categorize selected cases into a pattern for the purpose of trying to show that under the facts of this case the question is one of law and not fact.

A reading of the cases cited by the respondents showed that they have distorted and mischaracterized numerous decisions for the purpose of neatly fitting them into the niches developed under Repondents' theory. In most cases, however, the cases fit the theory as well as round pegs in square holes.

A review of the numerous cases throughout the United States and this Court's own case in Walker shows unequivocably that the facts of each case are the critical and sole focus of decision. Only in rare instances where there is virtually no evidence opposing the contention of residency has the matter been decided as a question of law and not fact.

The jury in this case was given an instruction which even Respondents admit was basically correct. Respondents' only complaint as to the definitional terms concerns the

question of intent. As noted throughout this Brief, however, Respondents have cited no authority showing that intent is not an element in all cases including inclusion "living together" cases.

As such, the jury evaluated the record and concluded that William Dennis was merely staying with his family on a temporary basis to overcome a drug dependency, that his family did not consider him to be a member of the family but merely a guest for a short duration, that all of his ties including personal and possessional were in Florida, that at the time of the accident he had a separate apartment in Florida where the majority of his possessions were kept, that as far as Dennis himself was concerned, he had a household in Florida and wanted to return to it from the day he arrived in Utah and on the day of the accident itself.

While Respondents can cite contrary inferences and facts in their favor, it was for the jury, not the trial court, to decide which set of facts established the "residency of the same household" as contained in the insurance policy. The lower court was obviously swayed by Respondents' categorization effort in persuading the lower court that in cases involving a child living at home in which inclusion is being sought there is no question of fact present and the child is automatically deemed to be a resident.

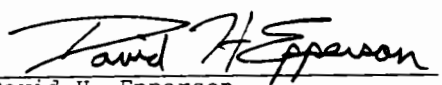
The lower court's conclusion is not supported by any

authority cited in these briefs. While admittedly the scope of definition can be extended or restricted by a court in ambiguous insurance policies, there are no decisions which state that factual examination is not relevant in cases where the child is living at home and claims inclusion. The repeated assertions in support of this theory by the respondents are simply not supported by any legal authorities or, by even common sense.

For the preceding reasons, therefore, Appellant respectfully submits that this Court reinstate the jury verdict and remand the case to the district court for entry of the appropriate order.

Respectfully submitted.

HANSON, RUSSON, HANSON & DUNN

By 
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MAILING CERTIFICATE

I hereby certify that on the 8 day of October, 1981 I mailed first class postage prepaid true and correct copies of the foregoing Reply Brief of Appellant to Joseph C. Fratto, 431 South 300 East, Salt Lake City, Utah 84111, Attorney for Defendant-Respondent; and Stephen G. Morgan, Morgan, Scalley & Davis, 261 East 300 South, Salt Lake City, Utah 84111, Attorneys for Defendants-In-Intervention and Respondents.