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J. Wendell Marriott v. Skyline Construction Company, Inc., A Corporation, Et Al. : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

J. WENDELL MARRIOT,
Administrator of the Estate of
Russell L. Marriot, Deceased,
Plaintiff and Appellant,

vs.

SKYLINE CONSTRUCTION COMPANY, INC., a corporation; OPERATING ENGINEERS LOCAL UNION NO. 3 of the INT'L UNION OF OPERATING ENG., a corporation; and OPERATING ENG. TRUST FUND FOR UTAH, a corporation, CONTINENTAL CASUALTY CO., an Insurance Company; and PACIFIC NATIONAL LIFE ASSURANCE CO., an Insurance Company,
Defendants and Respondents.

Case No.
11879

BRIEF OF PLAINTIFF AND APPELLANT

Appeal is taken from the Summary Judgment of the District Court of Salt Lake County, State of Utah, The Honorable Leonard W. Elton Presiding

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NATURE OF CASE

This is a suit for Two Thousand Dollars ($2,000.00) in life insurance coverage and Two Thousand Dollars ($2,000.00) accidental death benefit against the Defendants excepting Skyline Construction Company which was found to have no liability.

DISPOSITION IN LOWER COURT

The District Court of Salt Lake County, State of Utah, ruled in favor of Defendants' Motion for Summary

Judgment and against Plaintiff's Motion for Summary Judgment, dismissing Plaintiff's Complaint. Plaintiff then filed a Motion to Rehear and also to enter Findings of Fact and Conclusions of Law, and for Judgment to be entered in favor of the Plaintiff. Said Motion was heard by the Court on September 15, 1969, and denied.

RELIEF REQUESTED ON APPEAL

The Plaintiff requests reversal of the Judgment of the lower Court and for finding in favor of the Plaintiff and granting of Judgment thereon, or in the alternative to remand to the District Court for trial on the issues.

STATEMENT OF FACTS

Upon ordering of the record in this case it was found that the argument of the counsel at the hearing on Motion for Summary Judgment and the Motion for rehearing were not reported and that the stipulations of counsel contained therein were subsequently not made any part of the written record. However, most of the pertinent facts were not in dispute and the Motion for Summary Judgment of P. Knute Peterson, Attorney for the Defendants, Operating Engineers, Operating Engineers Trust Fund for Utah, Continental Casualty Company, and Pacific National Life Assurance Company dated April 7, 1969, is substantially in agreement with the following facts.

Mr. Russell L. Marriot died on September 16, 1964, as a result of an accident which occurred in the course of his employment with Skyline Construction Company, Inc., and the Defendants do not deny that he was entitled to the privileges of a member of the Operating Engineers

Union and had worked sufficient hours to qualify under a Group Insurance Plan of the Operating Engineers Trust Fund for Utah.

The basic features of this insurance program, so far as introduced in evidence to date, consist of a booklet with the cover printed in green and the title "Operating Engineers Trust Fund for Utah—Group Insurance Program, III Volume reprint January, 1964, Q1-71742-A-43." This program provided for $2,000.00 life insurance coverage and $2,000.00 accidental death benefit and Defendants have refused to honor the claim for the same alleging that the insurance had not yet become effective, that is that the effective date of coverage had not passed prior to the death of Russell L. Marriot.

It is the contention of the Defendants that Mr. Marriot had worked 300 hours at the end of September and that consequently his insurance would have become effective on November 1, 1964, and that since he died before that time, he was not entitled to insurance coverage despite the fact that all of the requirements had otherwise been met.

ARGUMENTS

I. THAT THE INSURANCE COVERAGE AS SET FORTH IN THE BOOKLET FOR JANUARY, 1964, Q1-71742-A43 CONTAINED A WAIVER OF THE REQUIREMENTS AND THAT THE DECEASED, RUSSELL L. MARRIOT, MET THE REQUIREMENTS FOR COVERAGE, EXCEPT SUCH REQUIREMENTS AS WERE WAIVED IN SAID GROUP INSURANCE PROGRAM.

Page 6 of the Insurance Booklet contains the follow-

ing waiver, speaking of the effective date of the insurance, "If you are not in active regular employment on account of *injury or sickness* on the date your insurance would have become effective as indicated above, your insurance will become effective on the date you return to full time work or availability for work; *except that if you become disabled while actively at work between the date on which you complete the necessary hours per eligibility then the date your eligibility actually begins, your insurance will take effect as indicated above.*"[1]

This same booklet then continues, on the same page 6, with four instances when the insurance terminates and admittedly none of them cover the situations now before the Court.

If the insurance company had intended that the beneficiary should not be entitled to any benefits if he died while on the job, and after completing the requirements concerning working hours and membership, the insurance companies could have adequately and clearly made provision by listing a fifth reason for the insurance terminating, and as will be pointed out more fully later, the deceased had performed every act that was necessary to qualify and had given full consideration for coverage, also that if there is any doubt or ambiguity it should be resolved in favor of the insured.

II. IF THE WAIVER OF THE REQUIREMENT AS SET FORTH IN THE PRECEDING ARGUMENT DOES NOT CREATE A CLEAR WAIVER, THEN AT LEAST THERE IS AN AMBIGUITY AND THIS AMBIGUITY SHOULD BE RESOLVED IN FAVOR OF THE APPELLANT.

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[1] Italics supplied.

The ambiguity, if any, is created by the contention of the Defendants that death is not a disability and of course it is widely held that in policies providing for health and disability coverage, the coverage does not apply if the person actually dies, but this is a totally different context than the one now before the Court which seeks to deny to the Defendant benefits which have been earned and paid for by the labor of the deceased, Russell L. Marriot. Going again to th qualification contained on page 6 of the insurance booklet, there is a waiver for injury, sickness, or disability and the question is whether the insurance can take effect when the insured person has in fact died. This, we submit, creates the only ambiguity herein and if such is an ambiguity the law concerning the resolution of it is quite extensive.

Starting with Insurance Law and Practice by Appleman, we find the statements and citations which follow.

> "If the insurance contract is ambiguous as to the date which should control, a construction favorable to the insured is taken."[2]
>
> "It has been almost the unanimous holding of all courts that insurance contracts must be liberally construed in favor of a policyholder or beneficiary thereof, whenever possible, and strictly construed against the insurer in order to afford the protection which the insured was endeavoring to secure when he applied for insurance.[3] The

[2] 12 Insurance Law & Practice 240, §7171 (Axtell v American Livestock Ins. Co. 1923, 194 N.W. 652, 46 SD 498).

[3] ID 13 at page 50, §7401 (Richards v Standard Accident Ins. Co., 1921, 200 P 1017, 58 Utah 622, 17 ALR 1183; Colovos v Home Life Ins. Co. of N.Y., 1934, 28 Pac. 2d 607, 83 Utah 401; Gibson v Equitable Life Assur. Soc of U.S. 1934, 36 P 2d 105, 84 Utah 452; Browning v Equitable Life Assur. Soc. of U.S. 1937, 72 P 2d 1060, 94 Utah 532, rehearing denied, 80 P 2d 348, 94 Utah 570).

courts have felt that the language of insurance policies is selected by one of the parties alone, and the language employed by the parties should be construed against it.[4] Thus if the meaning of the words employed is doubtful or uncertain, or if any reason or ambiguity exists either in the policy as a whole or in portions thereof, the insured should have the benefit of a favorable construction in such instance."

"The Courts have frequently stated that the provisions limiting liability of the insurer—such as exceptions from coverage, exclusions, restrictions, and conditions—are particularly deserving of strict construction so as not to cut down the coverage which the insured believed he was purchasing. This rule applies also to those matters which are purely procedural in their nature, so as to make available the rights which have accrued to the insured under the policy. And the Courts are inclined to give a liberal construction to warranties, particularly in holding them to be mere representations, unless the intention of the parties is so clear that the court has no alternative but to enforce them as written."

The pocket part of the cited section goes on to say

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[4] *Ibid*—footnote states: "There is another principle applying to contracts of insurance to the effect that if they are drawn as to require interpretation and fairly susceptible on two different versions the one will be adopted most favorable to the insured; and will be liberally construed in favor of the object to be accomplished and the conditions and provisions therein will be strictly construed against the insurer, as they are issued upon printed forms prepared by experts at the instance of the insurer, and the preparation of which the insured has no voice." (Guarantee Trust Co. v Continental Life Ins. Co. 1930, 294 P 585, at page 587, 159 Wash. 683).

"* * * the insurer has the burden of sustaining a construction in its favor where the policy is susceptible of a construction in favor of the insured."[5]

"An insurance contract must be construed most favorably to the insured regardless of the amount of premium paid by the insured. Where a doubt arises as to the effective date of a policy, a provision must be construed, if possible, in favor of the insured."[6]

Concerning the question as to whether the deceased was injured, sick, or disabled, American Jurisprudence in discussing such terms as disability, immediate and continuous disability and other terms, states that irrespective of the technical variations in the language employed, the term "total disability" should be given a rational and practical construction. It is a rule of Jurisprudence indicating a policy of the law to give a rational and practical construction and it is appellant's contention that the only rational construction of the language in the insurance booklet would be that the waiver contained in the insurance booklet would include the facts in this case and that to rule otherwise would create a forfeiture and failure of consideration as further discussed in this brief.[7]

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[5] 13 Insurance Law & Practice 106, §7405. (American Fid. and Cas. Co. v Williams, Tex Cixil Ap 1931, 34 SW 2d 397, 402, which says: "The general rule is that a contract of insurance will be construed strictly against the insurer and liberally in favor of the insured, and this rule applies to all provisions relating to a forfeiture of the rights of the insured and to any language in the policy regarding exceptions, warranties, and conditions, and if said language is not clear, it is ambiguous and uncertain, any doubt as to the meaning thereof will be resolved against the insurer.").

[6] *Ibid* at 133, §7424.

[7] 44 Am Jur 2d 496, §1606.

It is the contention of the Plaintiff and Appellant that the wording contained in the second paragraph on page 5 of the insurance booklet should be interpreted, at most, to set the date when the benefits can be collected because under ordinary circumstances payment would be due when the event insured against happened, or proof of it happening was submitted, unless there is a time specified in the policy; furthermore this provision would also apply to the time when benefits for regular disability would start to accrue.[8]

The case of Metropolitan Life Insurance Company vs. Evans is also of interest in connection with interpretation of insurance policies, and especially group insurance policies.[9] This case involved a group insurance policy which provided for payment for permanent and total disability provided the disability commenced one year after the insurance became effective. In this case the policy was issued July 7, 1931, and the injury occurred November 6, 1931, less than six months after its issuance. The jury was charged that if total and permanent disability did not occur until after the insurance had been in effect one year they could find for evidence and the Court of Appeals of Georgia held that the charge was not in error even though the accident causing the disability had happened prior to the expiration of the year since total disability was a question of fact and may not have commenced until the policy had in fact been in effect for one year.

Before leaving the matter of ambiguity and interpre-

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[8] See 46 CJS 135, §1197.

[9] Metropolitan Life Ins. Co. v Evans, Ga 1936, 189 SE 369; rehearing denied December, 1936.

tation, perhaps it would be well to consider the case of Wiernecke v Pacific Fidelity Life Insurance Company.[10] This case held that as to certain insurance transactions, coverage obtained is that which the ordinary layman, acting in ordinary course of business, would reasonably expect by virtue of the transaction, and insurance supported by his contract will be determined accordingly unless it is made clear to him that the coverage provided by the Contract does not conform to what an ordinary layman might reasonably expect under the circumstances. The subject case arose out of an application which was made for insurance subject to revocation by the Company within a certain period upon finding the person to be uninsurable and the application was received July 17, 1962, and the insured died August 3, 1962. In deciding the case the Court said, "To the ordinary layman, payment of an insurance premium constitutes payment for insurance protection." Admittedly this case is not directly in point but appellant believes that it is persuasive since it appears that there are no cases squarely in point on the issues being presented to the honorable Court.

III. THAT THE DECEASED HAD PERFORMED ALL OF THE ACTS WHICH CONSTITUTED THE CONSIDERATION FOR THE INSURANCE COVERAGE, AND THAT THE STATED EFFECTIVE DATE OF THE POLICY WAS A CONDITION SUBSEQUENT FORMING NO PART OF THE CONSIDERATION AND THEREFORE PERFORMANCE OF THE SAME SHOULD BE EXCUSED AND TO RULE OTHERWISE WOULD RESULT IN A FORFEITURE.

The deceased, Russell L. Marriot, had, by working

[10] Wernecke v Pacific Fid. Life Ins. Co., Cal. December 20, 1965, 48 Cal. Rptr. 251.

the number of hours required, given full consideration for insurance coverage and apparently there would be no question that had he been injured and survived, in any State whether conscious or unconscious, until November 1, 1964, his estate would have been entitled to the full amount of the insurance coverage as set forth in the insurance booklet.

In connection with this we should look at Restatement of Contracts which states,

> "*Excuse of Condition That Involves Forfeiture.* A condition may be excused without other reason if its requirement (a) would involve extreme forfeiture or penalty, and (b) its existence or occurrence forms no essential part of the exchange for the promisor's performance."[11]

Continuing on the same question, Williston on Contracts states as follows:

> "Impossibility that would discharge the duty to perform a promise excuses a condition if (a) the debt for performance rendered has already arisen and the condition relates only to the time when the debt is to be discharged, or (b) existence or occurrence of the condition is no material part of the exchange or the promisor's performance and the discharge of the promisor will operate as a forfeiture.
>
> "Both the general rule and the exceptions find frequent application in the law of insurance."[12]

The section cited goes on to explain that failure to comply with the conditions of a policy which forms a mate-

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[11] Restatement of Contracts, §302.

[12] 5 Will. 870, §808.

rial part of the return performance, such as payment of premiums or changing the risk would preclude enforcement but in the case at hand the premiums have been paid through working required hours and since there is no change of risk it appears that under both the Restatement and Williston the appellant is entitled to return performance and consideration from the respondents.

In this same line of thought, in the case of Kentucky Home Mutual Life Insurance Company v Marshall the Court said,

> "We think that Marshall (the insured) did everything that it was possible for him to do. He paid his initiation fee, dues, and advance premiums, and made out his application for insurance which was sent to the company and approved by it. . . ."[13]

To rule against the Plaintiff and Appellant in this case would result in a forfeiture since it is not contested that the premiums were paid into the Fund by the employer, pursuant to contracts with the union. The premiums so paid were a part of the earnings of the deceased and to rule in favor of the Defendants would be a forfeiture of the premiums where all of the conditions had been met, except for the alleged waiting time for vesting of the rights to the insurance. It has been a unanimous and long standing policy of the Courts to avoid forfeitures. In this connection Williston on Contracts states, in part,

> 'From an early date, forfeitures have been sternly contemplated and frowned upon by the Courts; and the cases generally hold that forfeiture pro-

[13] Kentucky Home Mut. Life Ins. Co. v Marshall, Ken. 1942, 163 SW 2d 45, 291 Ky 120.

visions are strictly construed. Thus, in a suit for construction of a deed upon a condition subsequent involving a forfeiture, the Court said: 'forfeitures are not favored by our laws. . . . the courts will not declare a forfeiture, unless they are compelled to do so, by language which will not admit of but one construction and that construction is such as compels forfeiture.

'Forfeiture clauses fail in the event they are ambiguously expressed. . . . If the provision is ambiguous, that alone condemns it as a forfeiture provision. A forfeiture should rest on surer ground. . . . The authority to forfeit a vested right or estate should not rest in provisions whose meaning is uncertain or obscure. It should be found only in language which is plain and clear, whose unequivocal character may render its exercise fair and rightful.' "[14]

The foregoing language is clear, but if there should be any question concerning the problem of sickness, injury, disability and death, as we have in the present case, Williston goes on to explain that the one writing the contract can by exactness in his expression prevent any mistakes in meaning and that a person writing the contract is in a position to prevent these doubts while the person who accepts it does not in reality have this same opportunity; and concludes that any ambiguity of language should be resolved in favor of the person who accepts the writing of another, which in this case would be resolving in favor of the appellant.[15]

IV. IT WOULD BE CONTRARY TO PUBLIC POLICIES AND INEQUITABLE TO ALLOW THE RESPONDENT TO KEEP THE CONSIDERATION

[14] 4 Will. 333, §602a.

[15] *Ibid* 760, §621.

GIVEN AND AT THE SAME TIME TO AVOID ALL LIABILITY UNDER THE INSURANCE COVERAGE.

To rule in favor of the Defendants and Respondents would, in effect, allow them to accept premiums and then void the insurance under the terms of coverage which they had written, even where there had been full compliance with all of the provisions but where the insured, under unusual circumstances had done everything other than continuing to live, even if in a coma, until a certain date had passed; and would result in an inequitable situation which is not favored in the law as shown above.

Also, we would run into a rather peculiar defect in the law wherein if the insured had been fired and been entitled to conversion privileges, the life insurance policy would have been held valid under the laws of Utah..[16] This provides that if a person shall die who is covered by a group life insurance policy, such policy must contain a provision that he continues to be insured during the period within which he would have been entitled to have an individual policy issued to him. It also provides that the amount of the life insurance to which he would have been entitled shall be payable as a claim under the group policy, whether or not application for the individual policy or payment of the first premium has been made.[17]

Under the circumstances just cited, where a person has the privilege of converting insurance after employment terminates and before he is able to actually complete the conversion he is entitled to coverage. Under these circumstances to find against the appellant and plaintiff would make it impossible for a person who was

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[16] 31-23-17 Utah Codes Annotated, 1953.

[17] *Ibid* 31-23-15 and 16, Utah Codes Annotated, 1953.

on the job, and killed on the job to avoid forfeiture of all his rights. It is the clear intention of these sections to avoid forfeiture of insurance and allow for conversion of equity in the insurance to prevent a windfall to insurance companies and recognizes a public policy of preventing forfeitures and windfalls.

CONCLUSION

Plaintiff and Appellant believes that the evidence thus far introduced, as a matter of law, should be resolved in favor of the Plaintiff and Judgment entered accordingly. There was a waiver contained within the insurance booklet, the master policy never having yet been entered into evidence, which contains a waiver sufficient to find for the Plaintiff, and if there are any ambiguities therein we believe that the law clearly states that the ambiguities should be resolved in favor of the Appellant since the consideration for the insurance coverage had in fact been fully performed and to hold otherwise would result in a forfeiture which is not favored by the Courts and furthermore that such a forfeiture would be contrary to public policy.

In view of the Court granting a Summary Judgment and not entering Findings of Fact and Conclusions of Law, and there being no record of the arguments and stipulations, by reason of practice of the Court, and as an alternative to finding for the appellant we feel that the matter should be remanded to the District Court for further proceedings and trial of the matter on its merits with the usual prerogative of either party to request a trial by jury if they should so desire.

Respectfully submitted,

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