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

IN THE SUPREME COURT OF THE STATE OF UTAH

J. WENDELL MARRIOT, Administrator of the Estate of RUSSELL L. MARRIOT, Deceased,
Plaintiff-Appellant,

vs.

SKYLINE CONSTRUCTION COMPANY, INC., a corporation, et al.,
Defendants-Respondents.

Case No. 11879

Brief of Defendants-Respondents

Appeal from a Judgment of the District Court of Salt Lake County Hon. Leonard W. Elton, Judge

P. KNUTE PETERSON
320 East Fourth South
Salt Lake City, Utah 84111
Attorney for Defendants and Respondents

ARDEN E. COOMBS
3480 Washington Boulevard
Ogden, Utah 84401
Attorney for Plaintiff and Appellant

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NATURE OF CASE

This is an action by the administrator of a deceased workman to recover life insurance and accidental death benefits claimed to be due under a group insurance program.

DISPOSITION IN LOWER COURT

This action was originally filed in the District Court of Cache County, but upon motion of defendants for a change of venue was transferred to the District Court of Salt Lake County. Approximately three and one-half years after the complaint was filed, defendant Skyline Construction Company moved to dismiss the complaint for failure to prosecute or in the alternative for summary judgment. Shortly thereafter, both plaintiff and the other defendants moved for summary judgment. Upon the hearing of such motions, defendant Skyline Construction Company's motion for summary judgment was granted and the other motions were taken under advisement, the parties being requested to file memorandums in support of their motions. After submission of such memorandums, the motion of the other defendants for summary judgment was granted and the motion of plaintiff was denied. Thereafter, plaintiff filed what was denominated "motion to vacate judgment and to enter conforming judgment," which, after hearing, was denied. The notice of appeal was filed one month after the denial of the latter motion but several months after the entry of the order granting the summary judgment in favor of the other defendants (respondents herein). No appeal has been taken from the order granting summary judgment in favor of defendant Skyline Construction Company.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the summary judgment.

STATEMENT OF FACTS

The facts of this action are relatively simple and are not in dispute as to any material matter, if at all. Plaintiff's intestate, Russell L. Marriot, became employed as an operating engineer by Skyline Construction Company on August 1, 1964. He worked as such for 198 hours in August and 104 hours in September, 1964 (R. 49-54). On September 17, 1964, he was killed when the crane he was operating came in contact with a high voltage line (R. 50).

By an agreement dated June 1, 1956, between the Operating Engineer's Local Union #3 of the International Union of Operating Engineers and various employers in the construction industry the "Operating Engineer's Trust Fund for Utah" was created (R. 78-88). Pursuant to such agreement, the trustees thereof initiated a group insurance program, under which defendant Pacific National Life Insurance Company was insurer for the life insurance benefits and defendant Continental Casualty Company was insurer for the other benefits provided under the program (R. 91). The premiums were paid by the various employers (under a collective bargaining agreement with the union) based upon the number of hours worked by

eligible employees during the preceding month (R. 53-54).

As an employee became insured for group benefits under the program, a booklet describing the insuring agreements was issued to him and a "Certificate of Coverage" was affixed to the booklet (R. 91). The Certificate-Booklet contains the following language (R. 91, p. 3):

> "The insurance benefits and all of the provisions applicable to the persons insured are described in this booklet and are effective only if the person is eligible for the insurance, *becomes insured and remains insured* in accordance with the provisions of the policies. When the Certificate of Coverage is issued as evidence of the insurance provided and is affixed as provided above, this booklet becomes the individual's Certificate-Booklet." (Emphasis added).

The Certificate-Booklet, as well as the master policies (R. 75) contains the following provision (R. 91, p. 5):

> "The initial eligibility requirements of the plan provide that an employee must work for one or more contributing employers at least 300 hours in a period of three or less consecutive calendar months. Each employee who meets this requirement (herein referred to as a member) *shall first become insured* on the first of the second calendar month next following such period." (Emphasis added.)

Under a section entitled "When Insurance Becomes Effective" the Certificate-Booklet continues (R. 91, p. 6):

"Employees: Your insurance under this Plan becomes effective on the date you are eligible according to the rules described on the previous page."

"Qualification. If you are not in active regular employment, on account of injury or sickness, on the date your insurance would 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 for eligibility and the date your eligibility actually begins, your insurance will take effect as indicated above."

While not necessary to support the trial court's judgment, it should be noted that at the time of his death, Mr. Marriot was not a member of the Operating Engineer's Union as he had failed to pay all of the initiation fee and his application was forfeited (R. 40).

After Mr. Marriot's death, claim was made for payment of a $2,000.00 life insurance benefit and a $2,000.00 accidental death benefit. The claim was denied by the trustees upon the basis that Mr. Marriot had never become insured under the program.

ARGUMENT

UNDER THE CLEAR AND UNAMBIGUOUS TERMS OF THE INSURANCE CONTRACT, MR. MARRIOT HAD NOT BECOME INSURED AT THE TIME OF HIS DEATH

AND WAS NOT ENTITLED TO THE BENEFITS CLAIMED.

There is no dispute between the parties over the fact that Mr. Marriot did not complete 300 hours as an operating engineer for a contributing employer until the middle of September, 1964. Thus, he would not have become insured until November 1, 1964, and was not covered on September 17, 1964, the date of his death. It is a fundamental principle of insurance law that when parties to an insurance contract have made an agreement as to when the coverage is to become effective, such agreement, in the absence of uncertainty or ambiguity, is controlling. The principle is stated in Couch on Insurance, 2d §39:54, page 467, as follows:

> "The parties to a contract of insurance may agree as to when and under what circumstances and conditions the contract shall go into effect, and unless there is uncertainty or ambiguity, the insurance contract speaks for itself as to its effective date.
>
> "The effective date of the contract of insurance may be specified in the policy as the date of issuance or a date prior or subsequent thereto, or before or after delivery. In the absence of statutory prohibition the policy may become effective at once or prior to issuance thereof, or in futuro.
>
> "Since the insurance contract, as in the case of any other contract, is to be interpreted to give effect to the agreement of the parties, it follows that the time which they have specified in the policy as the effective date thereof is binding upon them."

This court has applied that principle on several occasions. For example, in *Jones v. New York Life Insurance Company,* 69 Utah 172, 253 Pac. 200 (1927), it said:

> "It was within the rights of, and was competent for, the parties to provide in the application under what conditions and at what time the policy should become effective and binding. Sterling v. Lodge, 28 Utah 505, 80 Pac. 375; White v. Metropolitan Life Insurance Co., 63 Utah 272, 224 Pac. 1106. It is not, however, as we understand appellant's argument, seriously contended that these provisions are not binding upon the insured."

Rejecting an argument that there had been a waiver by the insurer, of the provisions as to when the contract should go into effect, the court continued:

> "We are not here dealing with the claim of waiver of the terms of an existing contract. The controlling question is, rather, whether there was in fact a contract in effect at the date of death of the insured. The conditions specifically stipulated in the application are that no contract of insurance should come into existence until the policy was delivered to the insured and the first premium paid, and, further, that the insured had not prior to delivery of the policy consulted a physician.
>
> * * *
>
> "The district court's order protects the respondent company in the rights reserved to it in the application by the insured, and does not deny to appellant any relief that she can rightfully

claim under the wording of the application and the proven facts in this case."

More recently, the United States Court of Appeals for the Tenth Circuit, applying Utah law, came to a similar conclusion. *Mofrad v. New York Life Insurance Company,* 206 F.2d 491 (1953). It was held that the insurance policy had not become effective, although the first monthly premium had been paid and the application was written to take effect as of its date, when specified conditions had not occurred prior to the applicant's death. The court stated:

> "But, 'A contract of insurance rests upon and is controlled by the same principles of law applicable to any other contract. What the contracting parties intended, mutually agreed to and their minds met upon, is the measure of their obligations (citing cases). And if the intentions of the parties are clear from an examination of the contractual documents, this court will not rewrite the contract.
>
> * * * *
>
> "The application for the policy provided that the insurance policy should be dated as of the date of the application.' It with within the rights of, and was competent for, the parties to provide in the application under what conditions and at what time the policy should become effective and binding. Jones v. New Lork Life Insurance Company, 1927, 69 Utah 172, 253 Pac. 200, 202."

Even where a policy has been issued, the parties to the contract may agree that the insurance will not

take effect until the fulfillment of certain conditions. Such an agreement is binding upon the parties. In Couch on Insurance, 2d §39:96 p. 500, it is stated:

> "The parties may agree to delay the effective date of the policy by providing that it must be in force for a specified period, such as one month, before the risk attaches. So, a life insurance policy may provide that there shall be no liability unless the insured lives a specified length of time after issuance of the policy. Similarly, it may be expressly provided in life, health, and accident insurance policies that no liability shall attach in certain cases unless the cause of the disability upon which the claim for recovery is based shall arise after the policy has been in force for a specified length of time."

It is further stated by Couch that a loss sustained during the delay period specified in the policy is not covered (Couch on Insurance, 2d §39.97, page 500):

> "Where a life insurance policy must have been issued and in existence for a year before the risk attaches, there is no recovery for the death of the insured within that year. A policy which is not to be effective until June 1 does not cover disability during May although the application shows no disability in April when the insured was eligible for insurance without evidence of insurability. And where, in order to recover disability benefits, the policy must have been in force for one year prior to the accident, disability for an accident which occurred prior to midnight of the last date of the policy year is not covered."

The fact that the contract is under a group policy

and evidenced by a Certificate-Booklet rather than a policy does not alter this principle. As stated in Couch on Insurance, 2d §82:2:

> "In order to constitute effective group insurance as to a particular employee, it is, of course, necessary to find the existence of all the elements essential to any contract of insurance."

A group insurance plan always establishes certain requirements of criteria for participation and the courts have consistently held that anyone not satisfying such requirements or criteria is not eligible for participation and is not covered in the event of loss. For example, in *Wilson v. Union Labor Life Ins. Co.,* 114 Ga. App. 330, 151 S.E.2d 550, it was held that an employee was not eligible under a group hospital and surgical policy in view of the requirement that an employee must work a minimum number of hours during an eligibility quarter of three months in order to be eligible for insurance for the subsequent insurance quarter of three months. The employee had not worked the required number of hours.

In *Burns v. AGC and Local* 701, 240 Ore. 95, 400 P.2d 2, a group insurance contract required a workman to maintain a reserve of not less than 100 hours, and provided that when the reserve dropped below 100 hours there was no insurance for the next succeeding month, unless the workman elected to keep it in force by cash payment. It was held that since the deceased workman's reserves had dropped below 100 hours, under

the contract the trustees were entitled to treat the account as inactive. Thus, life insurance was not in force at the time the workman was killed and his widow could not recover thereon.

The court in that case remarked:

> "The insurance was never bargained for between the insurer and the workman, so there is no need to consider whether the agreement was, or could have been, misleading to a given workman. Apparently the contract was not misleading to the trustees, who acted on the workman's behalf. The trustees take the same position in this litigation that the insurer takes. While we have no quarrel with the plaintiff's citation of authorities which hold that ambiguities in an insurance agreement will be liberally construed in favor of the insured, these authorities are beside the point in the case before us."

In *Smith v. Connecticut General Life Insurance Co.*, 25 App. Div. 2d 555, 267 N.Y.S. 579, it was held that a group life insurance policy which provided that it would become effective as to any employee in active service on any day when he performed on a full-time basis at his employer's regular place of employment the regular duties of his occupation or employment, never became effective as to an employee who was confined in a hospital throughout the relevant period.

The insuring agreement in the present case clearly provides that an employee shall "first become insured" on the first day of the second calendar month following

a consecutive period of three months or less in which he had worked at least 300 hours. Mr. Marriot had not worked the 300 hours until shortly before his death. He had never become insured under the program and had no benefits due him from the defendants.

In his brief plaintiff argues that there was a waiver by the defendants as to the effective date of insurance. He "finds" this waiver in an additional provision of the Certificate-Booklet (R. 9, p. 6).

> "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 for eligibility and the date your eligibility actually begins, your insurance will take effect as indicated above."

How such language could constitute a waiver of the earlier provision is difficult to understand. All it does is postpone the effective date of the coverage if the employee is not in regular employment because of injury or sickness on the date it would otherwise become effective, except where the employee's disability is sustained on the job. In the latter case, the insurance takes effect the same day as if the employee had continued working. It is true, that in the present case if Mr. Marriot had survived until after Nov. 1, and then succumbed from the injuries he would probably have

been entitled to the life insurance benefits. While it may appear that such result is anomolous or inequitable, nonetheless it is compelled by the explicit agreement of the parties. Moreover, it must be recognized that in group contracts particularly, there must be some standard provision controlling the effective date of the coverage as to each employee. When the effective date is clearly and expressly set forth it cannot be altered merely because the result, as to one employee, may seem to be inequitable. Under the construction contended for by plaintiff, the language "each employee who meets this requirement * * * shall first become insured on the first day of the second calendar month next following such period" would have to have been omitted, but it was not and it must be given its ordinary meaning.

Plaintiff, in this connection, attempts to invoke the rule set forth in Section 302 of the Restatement of Contracts. That rule, however, is not applicable to the circumstances of the present case as is amply shown by the illustrations thereunder.

Plaintiff's additional argument that there should have been a fifth basis for termination of insurance does not appear persuasive. We are not dealing with termination, as the insurance had never gone into effect as to Mr. Marriot.

II

THE LANGUAGE OF THE INSURANCE CONTRACT AS TO ITS EFFECTIVE DATE OF COVERAGE OF AN EMPLOYEE, IS NOT AMBIGUOUS AND THERE IS NO BASIS FOR IT TO BE CONSTRUED AGAINST THE INSURERS.

Defendants have no quarrel with plaintiff's argument that ambiguities in an insurance contract will generally be construed in favor of the insured. However, the principle has no application in the present case. The language of the contract, construed in any reasonable manner, is not ambiguous. Plaintiff's only contention concerning ambiguity relates to whether the term "disabled" as used in the section on qualification (R. 91, p. 6) could be construed to include death. But it is quite universally held that the term "disability" or "disabled" in an insurance contract does not include death. As stated in Couch on Insurance, 2d §53.4, page 25:

> "While in a practical sense death is the most disabling of all disabilities, it is clear that for the purpose of an insurance policy 'disability' and its numerous variant phrases *are used in the sense which requires the continuance of an insured's life.* Conversely, death is confined to the life insurance aspect of the contract and is not regarded as coming within the disability coverage. Thus it is generally held that no liability for death arises under a policy providing for

indemnity to the insured in case of permanent or total disability.

"Neither is death a 'disability' within the meaning of a policy providing for weekly indemnity in the case of accidental injury of an insured resulting in total disability to transact a business of his occupation." (Emphasis added).

In 44 Am. Jur. 2d Insurance, §1595, it is said:

"From the very nature of the insurance involved, it is clear and it is generally held that no liability for death arises under a policy provision for indemnity to the insured in case of permanent or total disability."

Moreover, to hold that the word "disabled" in the section under qualification includes "death" would create a highly anomalous and unintended result. Under the insurance contract, the parties have agreed that Mr. Marriot (and all other members) would not become insured and entitled to life insurance and accidental death benefits until the first day of the second month following completion of 300 hours work. He had no insurance for death until after that date. To argue that if he died before that date he could nevertheless be covered for such benefits results in an obvious non sequiter. The provision under "qualification" is clear and unambiguous. All that it does is postpone coverage where the employee is not in active regular employment because of injury or sickness except when he is injured on the job. Even if Mr. Marriot had only been disabled, he would not have had any insurance benefits

to cover the disability except those that occurred after November 1, 1964.

Plaintiff states that the language should be given a rational and practical construction. Defendants agree but submit that the only rational and practical construction is the one stated above. Moreover, the insurance was not purchased or bargained for by Mr. Marriot. It was obtained by the trustees who take the same position as the insurers. Thus, the argument that Mr. Marriot should be given the insurance he thought he was purchasing does not apply. See *Burns v. AGC and Local* 701, supra.

Plaintiff argues that it would be contrary to public policy to "void the insurance under the terms of the coverage which they had written." This, however, overlooks the fact that there had been no insurance for Mr. Marriot to void. There was merely an agreement that the insurance would take effect on a date which had not arrived when Mr. Marriot lost his life. Such a provision is absolutely necessary in a group insurance policy where participants are being added and dropped at intervals as they become eligible for the insurance. As shown under Point I above, the courts give effect to such provisions and there is nothing contrary to public policy about them. Certainly there is nothing unreasonable about the provision. Plaintiff's argument as to what the result might have been had Mr. Marriot been fired and entitled to conversion privileges has no bearing upon what actually happened in the present case. Cer-

tainly the results might have been different if other things had happened but they didn't. His statement that to find against Mr. Marriot would make it impossible for a person who was killed on the job to avoid forfeiture of all his rights is just not correct. Had he been killed after his coverage went into effect there is no doubt that he would have been covered, but he cannot be covered under a policy which had not gone into effect.

Plaintiff, citing *Metropolitan Life Insurance Company v. Evans*, 189 S.E. 369 (Ga., 1936), argues that at most the effective date (of November 1, 1964) should set the date when the benefits could be collected even though the event happened prior to that time. In the *Evans* case, it was held that even though the accident happened prior to the expiration of one year, total and permanent disability may not have arisen until after the policy had been in effect for one year, since total disability is a question of fact. Here, however, we are dealing with death. There is absolutely no question that this occurred prior to the effective date of the insurance. Other cases cited by plaintiff clearly are not in point, nor are the sections of the insurance code cited by him (§31-23-15, 16, 17).

Also, plaintiff complains of the matter being decided by summary judgment, and states that there should be "the usual prerogative of either party to request a trial by jury. In the present case plaintiff as well as the defendants moved for summary judgment.

There was clearly no dispute as to any material fact. The question decided is one of law. Summary judgment was entirely proper and under the circumstances could only have been granted in favor of defendants.

CONCLUSION

The insurance contract obtained by the union for the benefit of its employees clearly and unambiguously provides that the insurance does not become effective as to a particular employee until the first day of the second month after the employee has become eligible. To become eligible an employee must work 300 hours in three or less consecutive months for a contributing employer. The evidence is undisputed that Mr. Marriot had not become eligible until the middle of September, shortly before he died. The insurance would not have become effective until November 1, 1964, and there was no life inurance or accidental death coverage at the time of his death. There are no ambiguities in any pertinent provision of the insurance contract to be construed against the insurers and no waiver by them of the provisions as to the effective death of coverage. Although one can sympathize with Mr. Marriot's heirs, the language of the contract is binding and must be given effect to uphold summary judgment in favor of defendants.

Respectfully submitted,

P. KNUTE PETERSON

320 East Fourth South
Salt Lake City, Utah 84111

Attorney for Defendants and
Respondents