SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2000 Term

FILED
July 14, 2000
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 26658

RELEASED
July 14, 2000
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

DOUGLAS BASS,
Plaintiff Below, Appellee

v.

LAURA COLTELLI-ROSE,
Defendant Below, Appellant

Appeal from the Circuit Court of Berkeley County
Honorable Donald C. Hott, Judge
Case No. 93-C-47

REVERSED AND REMANDED

Submitted: March 21, 2000
Filed: July 14, 2000

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Attorney for Appellant

The Opinion of the Court was delivered PER CURIAM.
JUSTICE SCOTT dissents and reserves the right to file a dissenting opinion.
JUSTICE DAVIS concurs in part, and dissents in part, and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Syl. pt. 1, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962).

2. "Where the terms of a contract are clear and unambiguous, they must be applied and not construed." Syl. pt. 2, *Orteza v. Monongalia County Gen. Hosp.*, 173 W. Va. 461, 318 S.E.2d 40 (1984).

3. "'It is the safest and best mode of construction to give words, free from ambiguity, their plain and ordinary meaning.' *Williams v. South Penn Oil Co.*, 52 W. Va. 181, 43 S.E. 214 (1902), Syllabus Point 4." Syl. pt. 3, *Bennett v. Dove*, 166 W. Va. 772, 774, 277 S.E.2d 617, 619 (1981).

Per Curiam:

Appellant Laura Coltelli-Rose ("Rose"), defendant below, appeals the January 28, 1999 final order of the Circuit Court of Berkeley County, which granted summary judgment in favor of appellee Douglas Bass, plaintiff below, on his claim that Rose had improperly charged a continent fee on recoveries obtained under the medical payments coverage of two separate automobile insurance policies. The circuit court ruled that the recovery of such insurance proceeds was not within the terms of the contracts between Rose and Mr. Bass. We reverse, concluding that such recoveries were contemplated by the provisions of the contracts.

I.

BACKGROUND

The basic facts of this case are not disputed. Douglas Bass was a guest passenger in a car driven by Darren Weakley, when that car was struck on September 30, 1990 by a vehicle driven by Cary Dunham. Mr. Bass was a minor at the time of the accident, and shortly thereafter, on October 16, 1990, his mother, Mabel Bass, hired Rose to represent both her and her son. Mrs. Bass signed an "Authority to Represent" form which authorized Rose to undertake representation with respect to a "claim against Cary Dunham, or whoever is liable for my son, Douglas Bass' injuries or damages resulting from an accident or incident which occurred on or about September 30, 1990 at Berkeley County, WV." The agreement further specified the payment of a one-third contingency fee, and contained an acknowledgment

that "[i]t is understood and agreed that the fee will be calculated on the entire amount of the recovery (settlement or verdict)."

Rose's representation of the Basses resulted in recoveries from several different sources. Initially, Rose sought and obtained reimbursements for Douglas Bass's medical bills under the medical payments coverage of Weakley's automobile insurance policy with State Farm Insurance Company, up to the policy's $25,000 limit. Rose deducted her one-third contingent fee from these proceeds ($8,333.33), and remitted the remaining amounts to Mrs. Bass. Mabel Bass was aware of this procedure, and initially lodged no complaint.

In August 1991, the liability portion of Douglas Bass's claim was resolved through a negotiated settlement. Dunham's liability insurance carrier agreed to pay $200,000, with Rose also obtaining $60,000 under Mrs. Bass's underinsured motorist coverage with State Farm. Douglas Bass had turned eighteen on June 18, 1991, and thus was paid these sums directly. Rose likewise imposed a one-third contingent fee on this recovery, which has never been disputed.

At some point after the liability settlement in August, 1991, the relationship between Mrs. Bass and her son became strained. Because she perceived a conflict of interest in representing both of

them, Rose ceased representing Mrs. Bass, who was subsequently left out of a new contingent fee agreement with Douglas Bass executed on September 28, 1992.[1]

Rose had for some time been seeking additional reimbursement for medical expenses under the medical payments coverage of Mrs. Bass's own insurance policy with State Farm. State Farm initially declined to stack medical coverage payments; however, in August 1992, Rose secured payment of $21,666.52, which was paid to Douglas Bass directly. Rose again took one-third of the recovery, or $7,221.17, as her contingent fee.

Mrs. Bass had previously sought and obtained new counsel in April, 1992, who subsequently demanded that Rose refund the one-third contingent fee she took from the $25,000 medical payment benefit on the Weakley vehicle. At the apparent suggestion of ethics counsel for the West Virginia State Bar, Rose reduced her fee from one-third to one-fourth of the first $25,000 medical payment benefit. She paid this refund ($2,083.33) directly to Douglas Bass. However, the matter was not resolved, and on January 15, 1993, Mrs. Bass filed this action against Rose and Douglas Bass. An amended complaint was filed on April 15, 1993, where Douglas Bass became the party plaintiff. On November 9, 1993, the circuit court granted the defendants' motion for summary judgment. The court later, however, rescinded its initial order, and attempted to certify various questions to this Court. Review was initially granted, but this Court later dismissed the matter, concluding that the issues raised were not factually developed so as

[1]The terms and conditions of this second fee agreement signed by Douglas Bass were identical to those contained in the document previously executed by Mabel Bass in October 1990.

to permit adjudication of the certified questions. *See Bass v. Coltelli*, 192 W. Va. 516, 453 S.E.2d 350 (1994).

The circuit court subsequently granted summary judgment to Douglas Bass on January 28, 1999, concluding that "[t]he contingent fees charged by [Rose] on the medical payment recoveries were not covered by the contingent fee contract entered into by either Mabel Bass or Douglas Bass . . . ." The rationale behind this conclusion was as follows:

> It is the court's opinion that these two contingent fee contracts . . . entered into between the parties were related to and dealt with a tort claim which Mabel and Douglas Bass had against Cary Dunham, or whoever caused . . . the injuries Douglas Bass received in the accident described in the contract, and did not cover, under their terms, any moneys which would be payable under any contract of insurance, except insurance carried by Cary Dunham, or which covered the operation of his vehicle at the time he caused the accident.

The court ordered Rose to refund $13,472.17 in contingent fees previously retained, less a quantum meruit fee for her services. It is from this order that Rose now appeals.

II.

DISCUSSION

This case presents the Court with the straightforward task of determining whether the circuit court properly interpreted the fee contract in question. Specifically, we must ascertain whether the contract between Rose and the Basses contemplated a contingency fee with respect to a recovery obtained under the medical payments coverage afforded by an automobile insurance policy. We find that it did.[2]

The court below determined that the contract in question was not ambiguous. As we stated in *Fraternal Order of Police, Lodge No. 69 v. City of Fairmont*, 196 W. Va. 97, 468 S.E.2d 712 (1996), "it is for a trial court to determine whether the terms of an integrated agreement are unambiguous and, if so, to construe the contract according to its plain meaning." *Id*. at 100, 468 S.E.2d at 715. "A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent."

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[2]Douglas Bass asks this Court take the matter further, and consider whether the circuit court's ruling should be affirmed on the basis that the contingent fee imposed by Rose was excessive. In making this argument, Mr. Bass relied primarily upon *Committee on Legal Ethics v. Tatterson*, 177 W. Va. 356, 352 S.E.2d 107 (1986), where the Court held that charging a one-third contingency fee to collect the undisputed proceeds of a life insurance policy was excessive. While we have previously indicated that "[w]e are not wed . . . to the lower court's rationale, but may rule on any alternate ground manifest in the record." *Conrad v. ARA Szabo*, 198 W. Va. 362, 369, 480 S.E.2d 801, 808 (1996), the Court has more recently cautioned that "[a]lthough our standard of review for summary judgment remains *de novo*, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review," syl. pt. 3, in part, *Fayette County Nat. Bank v. Lilly*, 199 W. Va. 349, 484 S.E.2d 232 (1997). Because the circuit court has not fully delineated the facts necessary to determine whether, under the circumstances of this case, the contingency fee was excessive, we decline to undertake analysis regarding whether summary judgment was appropriate on the alternative ground advocated by Mr. Bass.

Syl. pt. 1, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962). *See also* syl. pt. 2, *Orteza v. Monongalia County Gen. Hosp.*, 173 W. Va. 461, 318 S.E.2d 40 (1984) ("Where the terms of a contract are clear and unambiguous, they must be applied and not construed."). We undertake plenary review of a lower court's facial interpretation of a written agreement. *See Fraternal Order of Police*, 196 W. Va. at 100, 468 S.E.2d at 715; *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 64 n.23, 459 S.E.2d 329, 342 n.23 (1995).[3]

In this case, the circuit court interpreted the pertinent contract language, "claim against . . . whoever is liable for . . . injuries or damages resulting from [the] accident," as referring only to those parties who may be liable in tort for the injuries sustained by the client, Douglas Bass. We do not read this language as restricting Rose's compensable services to obtaining recovery only from wrongdoers. This Court has consistently emphasized that "'[i]t is the safest and best mode of construction to give words, free

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[3]When a court's determination as to the meaning of a contract goes beyond the text of the agreement, our review is more deferential:

> [W]hen a trial court's answers rest not on plain meaning but on differential findings by a trier of fact, derived from extrinsic evidence as to the parties' intent with regard to an uncertain contractual provision, appellate review proceeds under the "clearly erroneous" standard. The same standard pertains whenever a trial court decides factual matters that are essential to ascertaining the parties' rights in a particular situation (though not dependent on the meaning of the contractual terms *per se*). In these types of cases, the issues are ordinarily fact-dominated rather than law-dominated and, to that extent, the trial court's resolution of them is entitled to deference.

Fraternal Order of Police, 196 W. Va. at 100, 468 S.E.2d at 715 (footnote omitted).

from ambiguity, their plain and ordinary meaning.'" Syl. pt. 3, *Bennett v. Dove*, 166 W. Va. 772, 774, 277 S.E.2d 617, 619 (1981) (quoting syl. pt. 4, *Williams v. South Penn Oil Co.*, 52 W. Va. 181, 43 S.E. 214 (1902)). *See also Nisbet v. Watson*, 162 W. Va. 522, 530, 251 S.E.2d 774, 780 (1979) ("the language of a contract must be accorded its plain meaning.").

As this Court long ago recognized, the term "liable" has expansive meaning, which encompasses a party being "'bound or obliged in law or equity'; 'responsible, answerable, or compellable to make satisfaction, compensation, or restitution'; 'obligated'; 'accountable for or chargeable with,' 'as liable for money.'" *Wilhelm v. Parkersburg, M. & I. Ry. Co.*, 74 W. Va. 678, 683, 82 S.E. 1089, 1091 (1914) (citations omitted). *See also Black's Law Dictionary* 915 (6th ed. 1990). Other courts have likewise given this term broad meaning. In *National Sur. Corp. v. Michigan Fire & Marine Ins. Co.*, 59 F. Supp. 493 (D. Minn. 1944), *aff'd*, 156 F.2d 329 (8th Cir. 1946), a grain warehouser had obtained a fire insurance policy providing coverage for damage to, among other things, "merchandise held in trust," so long as the warehouser was "liable therefor." *Id.* at 494. When a portion of the grain that the warehouser was storing as bailee was subsequently destroyed by fire, the insurer refused to indemnify, asserting that word "liable" as contained in the policy referred only to tort liability, to the exclusion of any contractual obligation. The court in *National Surety* rejected this argument, noting that "[t]he general word 'liable' does not indicate of itself upon what the insured's liability must be predicated upon." *Id.* at 495. The use of this term in the present fee contract is no more restrictive.

Rather than limiting the application of Rose's contingent fee to recoveries obtained from third-party tortfeasors, we interpret the plain wording of the provision in question to encompass any recovery secured from a party who is legally obligated to compensate Douglas Bass for the losses occasioned by the car accident in which he was involved. We therefore hold that the circuit court erred in ruling to the contrary.[4]

[4]Rose also brings an assignment of error claiming that the circuit court abused its discretion in failing to disqualify Douglas Bass's lawyer, based upon, *inter alia*, the fact that counsel had initially represented Mabel Bass in the present action. This matter was the subject of a petition for writ of prohibition filed in this Court in April 1998, which was previously denied. We find this claim to be meritless.

III.

CONCLUSION

For the reasons stated, the judgment of the Circuit Court of Berkeley County is reversed and remanded for further proceedings consistent with this opinion.

Reversed and remanded.