

No. 11-0107

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA

**TERRY HUNDLEY, Individually and as
Administrator of the Estate of AUDREY
HUNDLEY, deceased,**

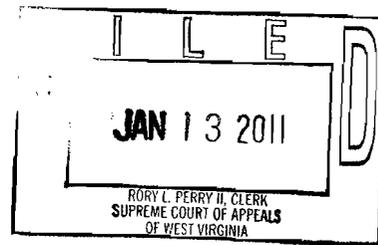
Plaintiff/Respondent,

v.

No. _____

**MUNICIPAL MUTUAL INSURANCE
COMPANY OF WEST VIRGINIA,**

Defendant/Petitioner.



**TERRY HUNDLEY'S RESPONSE IN OPPOSITION TO MUNICIPAL MUTUAL
INSURANCE COMPANY OF WEST VIRGINIA'S PETITION FOR APPEAL**

Appeal from the Twenty-fourth Judicial Circuit
Honorable Darrell Pratt
Civil Action No. 09-C-158

Respectfully Submitted By:

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I. STATEMENT OF FACTS

The key facts of this matter are undisputed. Respondent Terry Hundley is the son of the late Audrey Hundley, and presently lives in Mrs. Hundley's home, which is located on Oakview Drive, Prichard, Wayne County, West Virginia. Since approximately 1983, Mrs. Hundley maintained a homeowners' insurance policy with Petitioner Municipal Mutual Insurance Company of West Virginia ("Municipal Mutual"). Mrs. Hundley passed away, intestate, on November 8, 2007, and at the time of her passing Mrs. Hundley had an active policy of insurance with Municipal Mutual. Terry Hundley was appointed to serve as the personal representative of Mrs. Hundley's estate on May 14, 2008, and Mr. Hundley moved into Mrs. Hundley's former home as a permanent resident sometime in mid-2008. Since Mrs. Hundley's death, and during all times relevant to this matter, Mr. Hundley continued to pay the premiums for the homeowners' insurance. Mrs. Hundley's estate was settled December 1, 2008.

On or about October 25, 2008, an unknown person or persons came onto the Oakview Drive property and unlawfully removed two ATVs that Mr. Hundley had on the property. These ATVs were owned by Mr. Hundley and were used to perform various maintenance work on the Oakview Drive property, both prior to and after Mrs. Hundley's death. On October 27, 2008, Mr. Hundley reported this loss to Municipal Mutual, and he was informed the claim was denied on October 29, 2008. The letter denying Mr. Hundley's claim stated the basis for the denial was that the policy was not assignable and the policy was being rescinded as a result of Mrs. Hundley's death. In December 2008, Municipal Mutual sent Mr. Hundley a cancellation notice, noting the homeowners policy had been cancelled, and Municipal Mutual also sent Mr. Hundley a check purporting to refund the premiums paid since Mrs. Hundley's death. To date, Mr. Hundley has not cashed the check issued by Municipal Mutual.

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III. DISCUSSION OF LAW

A. Standard of Review

The instant appeal requires this Court to review the terms of the insurance policy at issue herein. Generally, “[d]etermination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law.” Syl. Pt. 1, Tennant v. Smallwood, 211 W.Va. 703, 568 S.E.2d 10 (2002).

B. The Circuit Court properly determined that the Municipal Mutual homeowners’ policy issued to Audrey Hundley was not void for lack of an insurable interest.

1. The estate of the decedent maintains an interest in the real property owned by the decedent at the time of death.

Pursuant to West Virginia Code Section 44-1-14 (2010):

(a) The personal representative of an estate of a deceased person shall appraise the deceased’s real estate and personal probate property, or any real estate or personal probate property in which the deceased person had an interest at the time of his or her death, as provided in this section.

(b) After having taken the appropriate oath, the personal representative shall, on the appraisal form prescribed by the tax commissioner, list the following items owned by the decedent or in which the decedent had an interest and the fair market value of the items at the date of the decedent’s death:

(1) All probate and nonprobate real estate

Additionally, the “West Virginia Estate Appraisal and Nonprobate Inventory Forms and Instructions” (attached hereto as **Exhibit 1**) defines “nonprobate real estate” as “real estate that does not pass by the will or the laws of intestacy” such as “real estate jointly held with right of survivorship, real estate held under a trust agreement or contract, life estates, or powers of

appointment.” See Exhibit 1 at Page 2, Part 2. None of these categories apply in this case. Therefore, the real estate owned by Audrey Hundley at the time of her death is considered a probate asset, and “**will** be transferred under the terms of the decedent’s will, or under the laws of intestacy.” See *id.* at Part 3 (emphasis added). Until the probate real estate is transferred, it is “required to be managed (administered) by the fiduciary.” *Id.*

2. The interest in real property held by the estate is an insurable interest that lasts until the estate is closed.

For well over a century West Virginia precedent has made clear that the estate’s interest in real property of the deceased is an insurable interest. See *Sheppard v. Peabody Ins. Co.*, 21 W.Va. 368, 385 (1883):

Under our statute, an administrator has a certain connection with the real property. That he has no estate in it is true, but this we have seen, is not necessary to an insurable interest. He has no power to sell, but if the personal estate be insufficient, he may apply to the court for an order to sell the real estate. It is material to the value of this power and to the objects contemplated by our statute, that the real estate should be protected from injury in the interim; and until the proceedings can be perfected. If the administrator cannot insure the parties interested, the creditors will be practically excluded from a remedy, which all other persons having a similar interest possess. There are many cases, as we have seen, where an agent or trustee may insure the interest of the party beneficially interested. And I therefore conclude, that at least, when the personal estate is insufficient to pay the debts, the administrator would have a right to insure a building on the real estate of the decedent. He has under these circumstances, at least, an insurable interest.

Moreover, the Petitioner’s insurance policy at issue expressly anticipates such a situation by providing to “insure the legal representative of the deceased.” See *Municipal Mutual Insurance Policy* at Page 16, Paragraph 9 (attached hereto as **Exhibit 2**). The Petitioner proposes that this principle may be inapplicable if the personal estate of the deceased is sufficient to pay the debts of

the deceased. However, such a proposition is without merit, as the personal estate cannot be deemed sufficient until the estate is closed. Consequently, the insurable interest attached to the real property must necessarily remain in force and effect “until the proceedings can be perfected.” Sheppard, 21 W.Va at 385.

C. The Circuit Court properly determined that the Municipal Mutual homeowners’ policy issued to Audrey Hundley provided coverage for the personal property of Terry Hundley under Coverage C of the policy.

As stated above, the policy at issue clearly extends coverage to the personal representative of a decedent’s estate. The policy language states:

9. Death. If any person named in the Declarations or the spouse, if a resident of the same household, dies:
 - a. We insure the legal representative of the deceased but only with respect to the premises and property of the deceased covered under the policy at the time of death.

Petitioner has relied upon the words “property of the deceased” to support its position, and maintains that such language limits coverage to specific items of personal property owned by the insured at the time of death. However, Petitioner conveniently overlooks that this provision expressly extends coverage beyond the insured’s death for the premises, which expressly includes coverage for the personal property of others while on the premises, particularly when that personal property is used to service the premises.

In addressing this claim, Petitioner completely ignored the fact that Terry Hundley was the Administrator of Mrs. Hundley’s estate, that all coverage available to Mrs. Hundley was extended to the estate, and that Terry Hundley was entitled to coverage for this loss because the ATVs at issue would have been covered if Mrs. Hundley was alive at the time they were stolen. The relevant

provisions of the insurance policy state:

COVERAGE C – Personal Property

We cover personal property owned or used by an “insured” while it is anywhere in the world. *At your request, we will cover personal property owned by:*

- I. Others while the property is on part of the “residence premises” occupied by an “insured” . . .*

We do cover vehicles or conveyances not subject to motor vehicle registration which are:

- a. Used to service an “insured’s” residence . . .*

See Exhibit 2 at pp. 2-3 (emphasis added).

Had Mrs. Hundley been alive at the time this theft occurred, she could have requested that her insurance cover the property loss. Under the “Death” provision of the policy, whatever coverages would have been available to Mrs. Hundley are available to her personal representative. Petitioner has conceded that no evidence exists to dispute Terry Hundley’s testimony that he used the two stolen ATVs to perform various maintenance tasks at the residence, both when his mother was alive and after her death. See “Order Resolving Plaintiff’s Claims for Breach of Insurance Contract” at Para. 1 (attached to the Petition for Appeal). Therefore, as the Circuit Court correctly determined, the loss of the four-wheelers would be covered under this provision of the policy if Terry Hundley was using them to maintain the premises during the administration of Mrs. Hundley’s estate, and as the Administrator of the Estate, he requested such coverage.

Nevertheless, Petitioner still maintains that coverage properly was denied because such coverage must be requested prior to the loss. Interestingly, Petitioner’s assertion comes after

Petitioner cites authority from this Court stating that “[w]e will not rewrite the terms of the policy; instead, we enforce it as written.” Payne v. Weston, 195 W.Va. 502, 507, 466 S.E.2d 161, 166 (1995). But fabricating new terms in the policy is precisely what Petitioner seeks from this Court. Indeed, the Circuit Court properly found that “[t]here are no provisions in the Policy requiring that the non-registered motor vehicle be owned by the insured. There are no Policy provisions requiring that the non-registered vehicle be on the premises prior to the insured’s death. There are no Policy provisions requiring the insured to request such coverage during her lifetime.” See July 29, 2010 Opinion Order (attached to Petition for Appeal). Most importantly for purposes of this appeal, the plain language of the policy also does not contain any requirement that coverage for the loss of personal property of others be requested prior to the loss. The words “at your request” merely indicate an option for the insured to choose whether to provide a source of compensation for the victim of a loss.

Courts cannot add provisions to a policy of insurance that plainly do not exist. “Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation.” Syl. Pt. 1, Keffer v. Prudential Ins. Co. of Am., 153 W.Va. 813, 172 S.E.2d 714 (1970). Finally, “[w]here the policy language involved is exclusionary, it will be strictly construed against the insurer.” Syl. Pt. 5, Nat’l Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (1987), overruled, in part, on other grounds by Potesta v. U.S. Fid. & Guar. Co., 202 W.Va. 308, 504 S.E.2d 135 (1998). Strict construction here requires that the policy be applied in light of the language that exists in the policy, and not by inserting language that Petitioner now desires.

D. Conclusion

By failing to properly settle Terry Hundley's claim, Municipal Mutual has breached its contract with Mrs. Hundley's estate, and with Terry Hundley as personal representative of that estate. Therefore, judgment properly has been entered in Plaintiff's favor on the issue of breach of contract. The law in West Virginia is clear, a contract of insurance should be applied as written unless an ambiguity exists. See Blake v. State Farm Automobile Ins. Co., Syl. Pt. 3, 224 W.Va. 317, 685 S.E.2d 895 (W.Va. 2009). In the present case, the language of the policy makes it clear this is a covered loss because Terry Hundley is the personal representative and this property would have been covered had Mrs. Hundley been alive.

IV. RELIEF REQUESTED

1. That this Honorable Court refuse the Petition for Appeal;
2. That this Honorable Court remand this case to the Circuit Court of Wayne County for further proceedings;
3. That Respondent be awarded reasonable attorney fees and costs in accordance with Syl. Pt. 1, Hayseeds, Inc. v. State Farm Fire & Casualty, 177 W.Va. 323, 352 S.E.2d 73 (W.Va. 1986).
4. That this Honorable Court grant such further relief as the Court deems just and proper.

Respectfully Submitted,
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EXHIBITS

ON

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CLERK'S OFFICE