IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
March 20, 2008 Session

NATIONWIDE ASSURANCE COMPANY v. RUSSELL BROWN, ET AL.

Appeal from the Circuit Court for Knox County
No. 1-411-06 Dale C. Workman, Judge

No. E2007-02203-COA-R3-CV - FILED JUNE 17, 2008

The issue presented in this appeal is whether the trial court correctly granted summary judgment against the insurance company on the ground that Rebecca Neal, who was riding as a passenger in a car driven by her boyfriend at the time of an accident, was not an "insured" as defined by the applicable policy. We agree with the trial court's ruling that the policy's definition of "insured" does not include Ms. Neal under the circumstances, and accordingly, her minor son, who was injured in the accident, is not excluded from coverage for his bodily injuries under the policy. The summary judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

SHARON G. LEE, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR. and D. MICHAEL SWINEY, JJ., joined.

Brian H. Trammell and M. Eric Anderson, Knoxville, Tennessee, for the Appellant, Nationwide Assurance Company.

Timothy W. Hudson, Bristol, Tennessee, for the Appellee, Russell Brown, individually and as father and next friend of Kieran Shannon Brown, a minor.

Larry Weddington, Bristol, Tennessee, administrator ad litem for the Appellee, Estate of James D. Campbell, III.

OPINION

I. Background

On July 31, 2005, a tragic automobile accident occurred that resulted in the deaths of Rebecca Neal[1] and her boyfriend James D. Campbell, III, who was driving the vehicle at the time of the accident. Ms. Neal's minor son, Kieran Brown, was also in the vehicle and injured in the accident. Russell Brown, Kieran's father and Ms. Neal's ex-husband, subsequently brought an action against the estate of Mr. Campbell for Kieran's injuries from the accident.

The automobile driven by Mr. Campbell was insured under an insurance policy issued by Nationwide Assurance Company to Christine Neal, Ms. Neal's mother and the owner of the vehicle. Nationwide brought this action requesting a declaratory judgment that Rebecca Neal was an "insured" under the policy, and that Kieran Brown was a "member of the family of any other insured person residing in the same household" as Ms. Neal, and therefore Nationwide was not liable for injuries suffered by Kieran Brown under an exclusionary provision of the policy. Russell Brown and the administrator of Mr. Campbell's estate each answered and counterclaimed, asserting that Rebecca Neal was not an "insured" under the terms of the policy.

All parties moved for summary judgment. After a hearing, the trial court ruled that Ms. Neal was not an "insured" under the terms of the policy, and therefore Kieran Brown was not excluded from coverage for bodily injury resulting from the accident. The trial court granted summary judgment against Nationwide, holding there was coverage under the insurance policy for Kieran's injuries.

II. Issue Presented

Nationwide appeals, raising the issue of whether the trial court erred in granting summary judgment on the ground that Rebecca Neal was not an "insured" under the insurance policy.

III. Analysis

A. Standard of Review

Our standard of review of a summary judgment was recently restated by the Tennessee Supreme Court as follows:

> Summary judgment is to be granted by a trial court only when the moving party demonstrates that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. *See* Tenn. R. Civ. P. 56.03; ***Byrd v. Hall,*** 847 S.W.2d 208, 210

[1] Rebecca Neal is referred to in the record as "Rebecca Neal Brown," "Rebecca Brown," and "Rebecca Neal." Her mother's testimony indicates that she changed her name back to her maiden name of Rebecca Neal after her divorce, and we will refer to her as "Rebecca Neal" or "Ms. Neal" in this opinion.

> (Tenn. 1993). The party seeking summary judgment bears the burden of demonstrating that no genuine issues of material fact exist and that he is entitled to judgment as a matter of law. ***Godfrey v. Ruiz,*** 90 S.W.3d 692, 695 (Tenn. 2002). In reviewing the record to determine whether summary judgment requirements have been met, we must view all the evidence in the light most favorable to the non-moving party. ***Eyring v. Fort Sanders Parkwest Med. Ctr., Inc.,*** 991 S.W.2d 230, 236 (Tenn. 1999); ***Byrd,*** 847 S.W.2d at 210-11. We review a trial court's grant of summary judgment de novo, according no presumption of correctness to the trial court's determination. ***Blair v. W. Town Mall,*** 130 S.W.3d 761, 763 (Tenn. 2004); ***Godfrey,*** 90 S.W.3d at 695.

Boren v. Weeks, — S.W.3d —, No. M2007-00628-SC-R11-CV, 2008 WL 1945985, at *4 (Tenn. May 6, 2008). In the present case, all facts material to this appeal are undisputed, and the issue presented is solely one of law – the interpretation of the insurance policy.

B. Definition of "Insured" Under Insurance Policy

In the recent case of ***Naifeh v. Valley Forge Life Ins. Co.***, 204 S.W.3d 758 (Tenn. 2006), the Tennessee Supreme Court restated the following well established principles that guide our courts in the interpretation of an insurance policy:

> In interpreting an insurance contract, we must determine the intention of the parties and give effect to that intention. ***Christenberry v. Tipton,*** 160 S.W.3d 487, 494 (Tenn. 2005); ***Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.,*** 521 S.W.2d 578, 580 (Tenn.1975). An insurance policy must be interpreted fairly and reasonably, giving the language its usual and ordinary meaning. ***Parker v. Provident Life & Acc. Ins. Co.,*** 582 S.W.2d 380, 383 (Tenn. 1979). When there is doubt or ambiguity as to its meaning, an insurance contract must be construed favorably to provide coverage to the insured. ***Christenberry,*** 160 S.W.3d at 494. However, the contract may not be rewritten by the Court. ***Id.****; see also* ***Tenn. Farmers Mut. Ins. Co. v. Witt,*** 857 S.W.2d 26, 32 (Tenn. 1993).

Naifeh v. Valley Forge Life Ins. Co., 204 S.W.3d 758, 768 (Tenn. 2006).

Nationwide relies on the following provision of the insurance policy:

This coverage does not apply to:

* * *

14. Any **bodily injury** to:
a) **you**;
b) a **relative**;
c) a **resident**;
d) any other **insured** person under the policy;
e) any member of the family of any other **insured** person residing in the same household with that other **insured**.

(Bold terms in original). Nationwide conceded that Ms. Neal does not fall within the provided definitions of the terms "you," "a relative," or "a resident." Nationwide's position is that Ms. Neal was an "other insured person under the policy." It is undisputed that Kieran Brown was a member of Ms. Neal's family residing in the same household with her, so the question of whether Kieran is covered for bodily injury turns on whether Ms. Neal fell within the definition of "insured."

The pertinent terms are defined by the policy as follows:

1. "POLICYHOLDER" means the first person named in the Declarations. The **policyholder** is the named **insured** under this policy but does not include the **policyholder's** spouse.
2. "YOU" and "YOUR" mean the **policyholder** and spouse if living in the same household.
3. "RELATIVE" means one who regularly resides in **your** household and who is related to **you** by blood, marriage or adoption (including a ward or foster child).
4. "RESIDENT" means a person, other than a **relative**, living in **your** household.
5. "INSURED" means one who is described as entitled to protection under each coverage.

Nationwide argues that Ms. Neal is "described as entitled to protection" under the following coverage provision:

1. We will pay for damages for which **you** are legally liable as a result of an accident arising out of the:
a) ownership;
b) maintenance or use;
c) loading or unloading;
of **your auto**. A **relative** also has this protection.
So does any other person who is liable for use of **your auto** while used with **your** permission.

It is undisputed that "you" and "your" as used in the above provision refer to Christine Neal, who is Ms. Neal's mother, the owner of the car, and the named policyholder. It is also clear that "your auto" includes the vehicle driven by Mr. Campbell and involved in the accident, a 2002 Chrysler PT Cruiser. Under the terms of the policy, this provision covers any other person "who is *liable for [the] use of*" the automobile with permission when such use of the automobile results in an accident. The parties agree that this provision covers Mr. Campbell because he was driving the PT Cruiser with permission at the time of the accident.

Nationwide argues, however, that Ms. Neal is also an "insured" as "described as entitled to protection" under the above provision because *if she had been* driving the PT Cruiser at the time of the accident, she *would have been* covered, and also because Christine Neal bought the automobile for Ms. Neal's primary use and Ms. Neal is described (though not named) in the policy's declarations. We do not agree.

Ms. Neal was not "liable for the use of" the automobile at the time of the accident because she was sitting in the passenger's seat and not driving the vehicle. We cannot agree with Nationwide's argument that Ms. Neal is an "insured" because she would have been insured if she had been driving because, in addition to the fact that this is not what the policy says, under this interpretation *any* guest passenger would be excluded from bodily injury coverage for the same reason, *i.e.*, that they would have been insured had they been driving the vehicle with permission at the time of an accident.

The fact that Ms. Neal was described in the policy's declarations as one of four "rated drivers" does not change the conclusion that she was not an "insured" under these circumstances. The declarations describe the "policyholder (named insured)" as "Ray and Christine Neal." Ray Neal is Christine Neal's ex-husband. The declarations also describe four "rated drivers" by age, gender, and marital status, and it is not disputed that one of these descriptions is of Rebecca Neal. However, there is simply nothing in the language of the insurance policy providing that a person described as a "rated driver" is defined as an "insured" while riding as a passenger in one of the insured vehicles and is thereby excluded from bodily injury coverage in event of an accident.

As we have noted, our Supreme Court has stated that "[w]hen there is doubt or ambiguity as to its meaning, an insurance contract must be construed favorably to provide coverage to the insured . . . . Our cases have regularly held that ambiguous provisions must be resolved against the insurer who drafted them and in favor of providing coverage . . . ." ***Naifeh***, 204 S.W.3d at 768, 770; *accord* ***Christenberry v. Tipton***, 160 S.W.3d 487, 494 (Tenn. 2005). In the present case, the policy expressly defines the term "insured" as "one who is described as entitled to protection under each coverage." As we have discussed, nowhere in the policy is Ms. Neal described as entitled to protection under the circumstances presented. The insurance contract "may not be rewritten by the Court." ***Naifeh***, 204 S.W.3d at 768; ***Christenberry***, 160 S.W.3d at 494. We are of the opinion that to accept Nationwide's position in this case would not only result in a rewriting of the term "insured," but would be rewriting it in favor of the insurer who drafted it, resulting in a denial of coverage.

IV. Conclusion

For the aforementioned reasons, the summary judgment of the trial court in favor of Russell Brown and the administrator ad litem for the estate of James D. Campbell, III, is affirmed. Costs on appeal are assessed to the Appellant, Nationwide Assurance Company.

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SHARON G. LEE, JUDGE