IN THE

Supreme Court of Virginia

RECORD NO. 102138

KEVIN CHRISTY,

Appellant,

V.

MERCURY CASUALTY COMPANY,

Appellee.

BRIEF OF APPELLEE

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VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

KEVIN CHRISTY		
Appellant,	)	
v.	)	Rec. No. 102138
MERCURY CASUALTY COMPANY,	)	
Appellee.	)	

BRIEF OF APPELLEE

The appellee, Mercury Casualty Company, ("Mercury") by undersigned counsel, and pursuant to Rule 5:28 of the Rules of the Supreme Court of Virginia, respectfully submits this brief of Appellee.

Statement of the Case

Mercury does not disagree with the Statement of the Case and Material Proceedings Below at page 1 of the Opening Brief of Appellant.

Statement of Facts Necessary to Correct or Amplify Appellant's Statement of Facts

The facts of this matter (aside from the medical causation of Mr. Christy's shoulder surgery) have been agreed by the parties ever since the case started in the Washington County General District Court (see, e.g., Bill of Particulars at Appendix 11-17, and the Answer to Bill of Particulars at

Appendix 25-31.) What follows is a brief statement for purposes of amplification.

Christie alleges that on November 23, 2005, while in the course and scope of his employment, he was a passenger in a police vehicle owned by Washington County and being driven by a Washington County Deputy Sheriff. (Appendix at 187.) The police vehicle was rear ended by a vehicle operated by Kevin Tiller, an insured of Virginia Farm Bureau Mutual Insurance Company. (Appendix at 187.)

Christy was insured by Mercury Casualty Company, under policy No. VA 01020992, which was in effect on the accident date. The policy insured two of Mr. Christy's personal vehicles (neither of which were involved in the accident) with medical payments coverage of $5,000 for each person. (Appendix at 187.).

Plaintiff alleged that he suffered injuries in this collision, including a SLAP tear. (Appendix at 188). This tear was repaired surgically by Dr. Timothy G. McGarry, who opined in writing that Mr. Christy's SLAP tear was caused by the November 23, 2005 accident. (Appendix at 188). The town of Abington worker's compensation carrier, VML, denied coverage for the treatment for Mr. Christy's shoulder, claiming the shoulder issue was pre-existing. (Appendix at 188). Mr. Christy did not contest this

determination or pursue a claim against worker's compensation for payment of the medical bills Mr. Christy incurred for treatment of his shoulder. (Appendix at 188). Instead he has pursued Mercury for payment of these expenses. (Appendix at 189).

Mercury does not and has not conceded that the shoulder expenses are in fact accident related, for the reasons stated in the worker's compensation denial and on the record in this case. The parties specifically agreed and stipulated before the trial court that the pre-existing shoulder condition "is an issue of fact for which they have requested a jury." (Appendix at 104). The trial court never reached the issue, since it held that the exclusion applied to bar recovery, whether or not the factual determination of relatedness was made.

On June 12, 2009, Mercury denied Mr. Christy's claim pursuant to its policy exclusion, stating in a denial letter:

> Exclusion B (p. 5) in Mercury's policy (Medical Expense section) states that "This insurance does not apply: [...] (b) to bodily injury sustained by a person to the extent that benefits therefore are in whole or in part payable under any workmen's compensation law."
>
> The bills in this case were, at least in part, "payable" under the worker's compensation law. In fact, part of Mr. Christy's medical expenses were paid by Mr. Christy's worker's compensation carrier. Mr. Christy was on the job when he was injured and Virginia Law mandated payment by Worker's

> Compensation. The fact that the benefits were "payable" triggers Mercury's exclusion.

(Appendix at 189). Christy sued Mercury in the Washington County General District Court, and again in the Washington County Circuit Court for his medical payments coverage and this appeal followed.

Standard of Review, Argument and Authorities

1. Standard of Review

The Circuit Court granted Mercury's motion for summary judgment relying on stipulated facts. This Court reviews de novo the circuit court's application of law to undisputed facts. Farmers Insurance Exchange v. Enterprise Leasing Company, et al., Record No. 100082 (April 21, 2011), citing Johnson v. Hart, 279 Va. 617, 623, 692 S.E.2d 239, 242 (2010). Additionally, this Court has held that "[i]nterpretation of the provisions of an insurance contract presents a question of law that [it] consider[s] *de novo*. Transcon. Ins. Co. v. RBMW, Inc., 262 Va. 502, 510, 551 S.E. 2d 313, 317, citing Garcia Enterprises,Inc. v. Enterprise Ford Tractor, Inc., 253 Va. 104, 107, 480 S.E.2d 497, 498-99 (1997). Thus, this Court will, again, apply the law to the undisputed facts and insurance contract.

2. The Trial Court was Correct in Ruling the Mercury's Medical Payments Coverage Did Not Apply to the Claim in This Case (Response to Assignment of Error A –C)

Mercury respectfully submits that Judge Lowe's rulings dated April 29, 2010 (Appendix at 171-2) and July 28, 2010 (Appendix at 182-3) were well reasoned and correct. In the former ruling, Judge Lowe held that:

> The Court finds, that based upon this contract language, that payment of worker's compensation, even in part, as a result of this accident triggers the exclusion and precludes payment under the medical expense plan provided by Mercury Casualty Company. See Baker v. State Farm Mutual Insurance Company, 242 Va. 74 (1991), and in Scarbrow v. State Farm Mutual Insurance Company, 256 Va. 37 (1998).

After a hearing on a motion to reconsider, the Court, citing the dissent of Justice Lacy in Baker *infra* 9-10, properly upheld its prior ruling in the reconsideration opinion. (Appendix 182-3.) Mercury contends that Judge Lowe's ruling was correct for the following reasons:

a. The Mercury Exclusion Clearly Applies to the Facts of this Case

The Mercury Exclusion at issue in this case says:

> This insurance does not apply:[...](b) to bodily injury sustained by any person to the extent that benefits therefore are in whole or in part payable under any workmen's compensation law.

(Appendix at 22, 106).

Christy's injuries were payable by worker's compensation law. This fact is conceded. Appellant clearly states in his brief that "[t]he Town of

Abingdon worker's compensation carrier (VML) paid for Mr. Christy's initial treatment ($1,815.68)..." (Appellant's brief, 3). Christy was on the job and in the course and scope of his employment when he was injured. (Appendix at 171, 187). His worker's compensation carrier recognized this and paid his ER bill after the accident. Thus, the worker's compensation carrier paid his bills "in part." The Mercury Medical Payments coverage does not apply:[...](b) to bodily injury sustained by any person to the extent that benefits therefore are in whole or in part payable under any workmen's compensation law."

The determination of the worker's compensation insurer that the shoulder injury was preexisting had absolutely no bearing on the fact that the benefits were "payable" under worker's compensation law. The damages arising out of the accident were paid up to the point that the carrier, VML, determined that there was no causal relationship ("did not agree with Dr. McGarry ...claiming it was pre-existing.") (Appendix at 188) and Mr. Christy "did not pursue a claim against VML for payment of the medical bills he incurred for treatment of his shoulder." (Appendix at 188.) In other words, the workers' compensation carrier decided that the benefits were payable "in part" when it paid $1,815.68, but not "in whole" when it determined there was no causal relationship.

b. This Court has Upheld the Mercury Exclusion Language as Clear, Unambiguous, Valid and Enforceable

The exclusion in the Mercury policy is valid and enforceable and has been upheld, word for word, twice, by this Court in Baker v. State Farm Mut. Auto Ins. Co., 242 Va. 74, 405 S.E.2d 624 (1991), and in Scarbow v. State Farm Mutual Auto. Ins. Co., 256 Va. 37, 504 S.E.2d 860 (1998).

The Baker exclusion said:

> This insurance does not apply: [...] (b) to bodily injury sustained by any person to the extent that benefits therefor are in whole or in part payable under any workmen's compensation law, employer's disability benefits law or any other similar law.
>
> Baker v. State Farm Mut. Auto. Ins. Co., 242 Va. 74, 75, 405 S.E.2d 624 (Va. 1991).

The Scarbrow exclusion said:

> This insurance does not apply: [***] (b) to bodily injury sustained by any person to the extent that benefits therefore are in whole or in part payable under any workmen's compensation law, employer's disability benefits law or any other similar law.
>
> Scarbrow v. State Farm Mut. Auto. Ins. Co., 256 Va. at 359, 504 S.E. 2d at 861(Va. 1998).

The Mercury exclusion in the case at bar says:

> This insurance does not apply:[...](b) to bodily injury sustained by any person to the extent that benefits therefore are in whole or in part payable under any workmen's compensation law.

In both cases, the exclusion was called "clear and unambiguous." Baker, 242 Va. at 76, 405 S.E.2d at 625, Scarbrow, 256 Va. at 360, 504 S.E.2d at 860. The Court in Scarbrow went on to state that "[t]he Exclusion is a reasonable policy provision containing clear and unambiguous language and that it is not inconsistent with Code § 38.2-2201. Therefore, State Farm may enforce the exclusion against Scarbrow." Scarbrow, 256 Va. at 359, 504 S.E.2d at 861(1998).

The medical payments "omnibus clause" is Virginia Code § 38.2-2201. This Court has consistently held that the statute does not address or prohibit policy exclusions, and that exclusions to the statute are valid if "reasonable, clear and unambiguous." Cotchan v. State Farm Fire and Casualty Co., 250 Va. 232, 462 S.E. 2d 78 , citing State Farm v. Mutual Auto Ins. Co. v. Gandy, 238 Va. 257, 258, 383 S.E.2d 717 (1989) and Baker v. State Farm Mut. Ins. Co., 242 Va. 74, 405 S.E.2d 624 (1991).

An annotation to Virginia Code § 38.2-2201 in the current code states that "[a]lthough this section required the insurer to provide medical benefits as a result of bodily injury caused by accident and arising out of the use of a motor vehicle, insurer was permitted to exclude from coverage those benefits payable under a workers' compensation statute. Baker v. State

Farm Mut. Auto. Ins. Co., 242 Va. 74, 405 S.E.2d 624 (1991); Scarbrow v. State Farm Mut. Auto. Ins. Co., 256 Va. 357, 504 S.E.2d 860 (1998)." This is precisely what Mercury has done with its policy in this case.

Mercury's exclusion closely tracks the State Farm exclusions in Baker and Scarbrow, omitting only broadening language concerning "employer's disability benefits law or any other similar law." The more narrowly crafted and unambiguous Mercury policy language is an exclusion firmly approved under Virginia law. The exclusion states that if worker's compensation benefits are "in whole or in part payable" under worker's compensation law, that medical payments coverage is excluded. We know from plaintiff's own brief that payment was made in part by the worker's compensation carrier; thus, payment from Mercury is not due.

Appellant argues that "[p]revious case law has applied this exclusion only when benefits were payable in whole under worker's compensation law." (See Appellant's Brief at 13). Mercury respectfully contends that this argument misreads the facts of Baker. Although this Supreme Court in Scarbrow was, apparently, faced with a situation in which the plaintiff had been paid in whole by worker's compensation for her on the job injuries,

See Scarbrow, 256 Va._at 358, 504 S.E.2d at 860.,[1] the Supreme Court's opinion in Baker does not state that worker's compensation benefits had been *fully* paid. In fact, this Court's opinion in Baker says that he filed his action "to recover *a portion* of the medical expenses he incurred as a result of his injuries." Baker, 242 Va. at 75, 405 S.E. 2d at 625 (emphasis added).

More importantly, Justice Lacy's Baker dissent (which sought to invalidate the exclusion) read the majority opinion to state that "The policy exclusion allows the company to avoid paying benefits if such benefits are compensable under worker's compensation, regardless of whether the insured actually receives any payment under worker's compensation." 242 Va. at 78, 405 S.E.2d at 625. This wording clearly implies that the Baker case did not involve fully paid worker's compensation bills.

In this case, Mercury submits that Justice Lacy's reading of Baker in her dissent was absolutely correct. The policy exclusion at issue in this case allows Mercury to avoid paying benefits if such benefits are "compensable under worker's compensation, regardless of whether the insured actually receives any payment under worker's compensation."

---

[1] The opinion says "The employer's worker's compensation insurance carrer paid Scarbrow's medical expenses arising out of the accident."

The injuries sustained by Mr. Christy were clearly "payable," or compensable, under worker's compensation. The carrier agreed that the injury was compensable, and paid for Mr. Christy's initial treatment "in part," but did not agree with Dr. McGarry and denied coverage for the treatment of Mr. Christy's shoulder, claiming it was pre-existing. The mere fact that worker's compensation did not pay a compensable injury for a lawful reason (a pre-existing condition) does not make the on-the-job accident any less compensable, or "payable."

c. The Circuit Court properly rejected Appellant's "To The Extent" Argument.

Christy argues at length that Christy's bills were only paid "to the extent" of the ER bill, and that thus Mercury's policy language stating "to the extent" means that Mercury must pay the rest. It is very important to note that in making the argument that "to the extent" acts as a term of limitation, Christie ignores (as he must if his argument is to succeed) the words in the same sentence: "in whole or in part." Here (yet again) is the exclusion:

> This insurance does not apply:[...](b) to bodily injury sustained by any person to the extent that benefits therefore are in whole or in part payable under any workmen's compensation law.

The appellant in this case confuses the reach of the exclusion with the reach of coverage. Christy states that, "[b]y using the phrase 'to the extent,' Mercury has limited the scope of its policy exclusion." (Brief of Appellant at 9). In this case, "to the extent" is not a limitation on the exclusion, but limits the coverage of the insurance. When read in context it is clear the exclusion limits the scope of coverage. The Insurance does not apply "to the extent" that any benefits are payable in whole or in part. If we imagine the insurance coverage as a line, then that line does not extend beyond the point where any benefits are payable under a worker's compensation law. Appellant's argument (based upon a dictionary definition and upon non-related and extra-jurisdictional case law) ignores the context of words "in whole or in part" and the context of the exclusion, which is a limitation of the insurance coverage.

Christy's "to the extent" argument is also clearly contradicted by the facts of the Baker case and by Justice Lacy's reading of the holding in the Baker case, which, again, states that benefits are not to be paid if such benefits are compensable under worker's compensation.

In Scarbrow, this Court upheld every word of the exclusion, including the words "to the extent," stating that "[t]he exclusion is a reasonable policy provision containing clear and unambiguous language and that it is not

inconsistent with Code § 38.2-2201. Therefore, State Farm may enforce the exclusion against Scarbrow." Scarbrow v. State Farm Mut. Auto. Ins. Co., 256 Va. at 360, 504 S.E.2d at 861 (Va. 1998). Justice Kinser specifically noted that "Scarbrow concedes that the instant case and Baker are indistinguishable... and that this Court "perceive[d] no reason to depart from our holding in Baker." Id. at 361, 862.

The "clear and unambigiuous" exclusion, in whole, says: "[t]his insurance does not apply:[...](b) to bodily injury sustained by any person to the extent that benefits therefore are in whole or in part payable under any workmen's compensation law." Only an out-of context scrutiny of the individual words, in insolation, and in disregard of clear judicial precedent, can provide the Appellant with any argument at all. The Appellant fails to distinguish Baker and Scarbrow in any meaningful way.

d. Christy's Argument Seeks to Re-Write the Exclusion at Issue In this Case

Christy's argument seeks to re-write the policy language, so that it says "[t]his insurance does not apply: ...(b) to bodily injury sustained by any person to the extent that benefits therefore are in whole or in part PAID under any workmen's compensation law." The exclusion does not say "paid;" rather, it says "payable." The benefits in this case were compensable, or payable, as they were sustained on the job by an

employee covered by worker's compensation insurance, and would have been paid by worker's compensation had there not been a finding (which went unchallenged and unappealed) that there was a pre-existing condition. As Justice Lacy correctly noted in her Baker dissent: "[t]he policy exclusion allows the company to avoid paying benefits if such benefits are compensable under worker's compensation, regardless of whether the insured actually receives any payment under worker's compensation." 242 Va. at 78, 405 S.E.2d at 625.

3. If This Court Invalidates the Exclusion, and the Finder of Fact Determines that the Shoulder Surgery is Related, Mercury's is Only Obligated to pay $6,999.60, "the Amount of the Actual Payment" paid by Christy's Health Insurer per Virginia Code §38.2-2201(3)(b) (Response to Assignment of Error D)[2]

Virginia Code §38.2-2201 (the Medical Payments "omnibus clause" states that

> 3. An expense described in subdivision 1 shall be deemed to have been incurred [...]:
>
> b. If the expense is paid by (i) a health care insurer pursuant to a negotiated contract with the health care provider or (ii) Medicaid or Medicare, where the actual payment with reference to the

[2] Mercury objected to this Assignment of Error, on the basis that the reductions in Virginia Code §38.2-2201A(3)(b) were only "subject to a favorable ruling on causation." See infra at 3 for an explanation of the undecided causation issue of fact. No causation issue was before the Trial Court due to the application of the exclusion. However, this Court granted the Writ of Appeal on all Assignments of Error.

> medical bill rendered by the provider is less than or equal to the provider's usual and customary fee, in the amount of the actual payment; however, if the insured is required to make a payment in addition to the actual payment by the health care insurer or Medicaid or Medicare, the amount shall be increased by the payment made by the insured[...]

This statute demonstrates that the "collateral source rule" does not apply to medpay claims, and that the medical expense payor need only pay the "amount of the actual payment."

The medical bills provided by plaintiff in the case below indicated that there were extensive write-offs. Mercury made a calculation of the amounts actually paid by the plaintiff's health insurer, and of the write-downs the providers were willing to accept from worker's compensation, and asked the Court below (if the exclusion did not apply) to rule that it only need pay the amount after the various write-offs, in the event of a favorable causation ruling. A chart detailing these write-offs is part of the record (Appendix at 10, 92) and the after write-off figure of $6,999.60 is reflected in the Agreed Statement of Facts (Appendix at 190)." Mercury respectfully submits that other, unrelated collection litigation over the payment bears no relationship to the amount payable in this case (if the exclusion does not apply) or to the operation of the Code section.

In the event that this Court finds Mercury's exclusion is invalid, that Mercury is obligated to pay medpay, and a finder of fact holds that the shoulder surgery was caused by the accident, the amount payable should be $6,999.60.

Conclusion

The trial court's rulings in this matter were strongly based in existing, non-controversial and well-established law. The trial Court correctly cited this Court's decisions in Baker and Scarbrow in its initial letter ruling and it correctly read and cited Baker in its written decision rejecting the motion to reconsider. Justice Lacy very clearly stated the rule of this case in her reading of the Baker majority: "The policy exclusion allows the company to avoid paying benefits if such benefits are compensable under worker's compensation, regardless of whether the insured actually receives any payment under worker's compensation." 242 Va. at 78, 405 S.E.2d at 625.

In the Scarbrow case, Justice Kinser cited Selected Risks Ins. Co. v. Dean, 233 Va. 260, 265, 355 S.E.2d 579, 581 (1987), for the proposition that "when a court of last resort has established a precedent, after full deliberation upon the issue by the court, the precedent will not be treated lightly or ignored." Scarbrow, 256 Va. 357, 361, 504 S.E.2d 860. The appeal in this case asks this Court to ignore the precedents of Baker and

Scarbrow, or to distinguish and "lightly treat" those decisions. The rulings of the trial court should be upheld, and its decision should be affirmed.

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CERTIFICATE

This is to certify that I have caused to be mailed three copies of the foregoing Brief of Appellee by first class mail to Daniel H. Caldwell and J. Randall Perkins, McElroy, Hodges, Caldwell, & Thiessen, PO Box 429, Abingdon, Virginia 24212, counsel for appellant.

I further certify that fifteen true and correct copies of the foregoing Brief of Appellee were filed with the Clerk of the Supreme Court of Virginia this 28th Day of April, 2011.

_____
Of Counsel