In The

Supreme Court of Virginia

RECORD NO. 102138

KEVIN CHRISTY,

***Appellant*,**

v.

MERCURY CASUALTY COMPANY,

Appellee.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....iii

MERCURY'S ARGUMENT 1

The Trial Court was Correct in Ruling the Mercury's Medical Payments Coverage Did Not Apply to the Claim in This Case 1

CHRISTY'S REPLY 1

The Trial Court Committed Error By Not Ruling That The Policy Exclusion Applies Only To The Extent That Workers' Compensation Benefits Were Payable to Mr. Christy..... 1

MERCURY'S ARGUMENT 2

The Mercury Exclusion Clearly Applies to the Facts of this Case..... 2

CHRISTY'S REPLY 2

The Mercury Exclusion Applies Only To The Extent That Workers' Compensation Benefits Were Payable To Mr. Christy 2

MERCURY'S ARGUMENT 2

This Court has Upheld the Mercury Exclusion Language as Clear, Unambiguous, Valid and Enforceable 2

CHRISTY'S REPLY 2

Christy Is Not Seeking To Invalidate The Mercury Exclusion 2

MERCURY'S ARGUMENT 4

The Circuit Court properly rejected Appellant's "To The Extent" Argument 4

CHRISTY'S REPLY 4

The Circuit Court Did Not Even Address Christy's "To The Extent That" Argument 4

MERCURY'S ARGUMENT 5

Christy's Argument Seeks to Re-Write the Exclusion at Issue In this Case 5

CHRISTY'S REPLY 5

Mercury Seeks to Re-Write The Exclusion 5

MERCURY'S ARGUMENT 6

If This Court Invalidates the Exclusion, and the Finder of Fact Determines that the Shoulder Surgery is Related, Mercury 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) 6

CHRISTY'S REPLY 6

If This Court Invalidates This Exclusion And The Finder Of Fact Determines That the Shoulder Surgery Is Related, Mercury Is Obligated To Pay $9,500.83 6

CONCLUSION 7

RULE 5:26(h) CERTIFICATE 9

TABLE OF AUTHORITIES

Page(s)

CASES

Baker v. State Farm Mut. Auto. Ins. Co.,
242 Va. 74, 405 S.E.2d 624 (1991) 1, 2, 3

Scarbrow v. State Farm Mut. Auto. Ins. Co.,
256 Va. 357, 504 S.E.2d 860 (1998) 1, 2

STATUTES

Va. Code § 38.2-2201 2

Va. Code § 38.2-2201-A.3.b 6, 7

RULE

Va. Sup. Ct. R. 5:29 1

REPLY BRIEF

Kevin Christy, pursuant to Rule 5:29, in reply to contentions made by Mercury Casualty Company in its Brief of Appellee states:

MERCURY'S ARGUMENT:

The Trial Court was Correct in Ruling the Mercury's Medical Payments Coverage Did Not Apply to the Claim in This Case.

CHRISTY'S REPLY:

The Trial Court Committed Error By Not Ruling That The Policy Exclusion Applies Only To The Extent That Workers' Compensation Benefits Were Payable to Mr. Christy.

Christy submits that the trial court's rulings were neither well reasoned nor correct. The trial court never addressed Christy's argument regarding the meaning of the words "to the extent that" and neither Baker v. State Farm Mutual Insurance Company, 242 Va. 74 (1991) nor Scarbrow v. State Farm Mutual Insurance Company, 256 Va. 37 (1998) were decided based on an interpretation of those words. Justice Lacy's dissent in Baker did not address the meaning of those words.

The trial court simply cited Baker, Scarbrow and Justice Lacy's dissent and ruled in favor of Mercury.

MERCURY'S ARGUMENT:

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

CHRISTY'S REPLY:

The Mercury Exclusion Applies Only To The Extent That Workers' Compensation Benefits Were Payable To Mr. Christy.

The workers' compensation carrier paid $1,815.68 of Mr. Christy's total bills of $16,564.00. The exclusion applies in the amount of that payment of $1,815.68.

MERCURY'S ARGUMENT:

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

CHRISTY'S REPLY:

Christy Is Not Seeking To Invalidate The Mercury Exclusion.

The plaintiffs in both Baker v. State Farm Mut. Auto. Ins. Co., 242 Va. 74, 405 S.E.2d 624 (1991) and in Scarbrow v. State Farm Mut. Auto. Ins. Co., 256 Va. 357, 504 S.E.2d 860 (1998) were asking this Court to invalidate similar exclusions. Their arguments were that the coverage was mandated by statute (Virginia Code § 38.2-2201) and that the statute did not allow the exclusion. Christy is not making and has never made that argument. Mr. Christy is asking the Court to enforce the exclusion according to its clear and unambiguous terms.

Mercury relies heavily on the facts of Baker but misconstrues the facts in Baker. Baker filed his action "to recover a portion of the medical expenses he incurred as a result of the injuries." Baker, 242 Va. 75, 2 S.E.2d 625 (emphasis added). This simply means that Baker's accident-related medical bills amounted to more than his medical expense coverage. So Baker sued to recover all of his medical expense coverage, which coverage constituted "a portion" of the medical expenses he incurred as a result of the injuries. His workers' compensation carrier still paid all of his medical expenses.

Mercury also relies heavily on Justice Lacy's Baker dissent (which sought to invalidate the exclusion). Justice Lacy's dissent, of course, is not controlling as to the interpretation of the majority opinion. And this case presents facts different from those in Baker which require an interpretation of the exclusionary language by this Court.

MERCURY'S ARGUMENT:

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

CHRISTY'S REPLY:

The Circuit Court Did Not Even Address Christy's "To The Extent That" Argument.

Neither of the trial court's opinion letters address or discuss the meaning of the words "to the extent that" in the exclusion.

For the first time during the course of this litigation, Mercury has stated an argument which tries to explain the meaning of the words "to the extent that" in its exclusion. This argument was not put forth to either of the two Courts below and was not adopted, analyzed or commented upon by the trial court.

Mercury now argues that Christy ignores the words "in whole or in part." Christy's argument concerning the meaning of these words in the context of Mercury's limitation is laid out in some detail on pages 9 and 12 in Appellant's Brief.

In fact, the words "in whole or in part" make it clear that Mercury's exclusion applies in this case only to those medical bills attributed to Christy's initial treatment. This point is illustrated by moving the words "in

whole or in part" to the end of the exclusion. Using this exercise to illustrate the point, the exclusion will then read:

> This insurance does not apply: (b) to bodily injuries sustained by any person to the extent the benefits therefore are payable under any workers' compensation, whether those benefits are payable in whole or in part.

The phrase "in whole or in part" in the context of this exclusion is meant to make it clear that Mercury's exclusion applies only to the extent that benefits are payable under worker's compensation. And the use of this language precludes the very argument that Mercury now makes that payment of "part" benefits by workers' compensation carrier has the same effect as payment of "whole" benefits when applying this exclusion.

MERCURY'S ARGUMENT:

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

CHRISTY'S REPLY:

Mercury Seeks to Re-Write The Exclusion.

Mercury could have clearly worded its exclusion to reach the result it argues for here by using the word "**if**" instead of the words "**to the extent that**." The Exclusion would then read:

> "This insurance does not apply: [_ _ _] (b) to bodily injury sustained by any person [***if***] benefits therefore are in whole or in part payable under any workers' compensation law."

By using the words "**to the extent**" instead of the word "**if**," Mercury has worded its exclusion in a way that does not support the outcome Mercury argues for here. But Mercury wants this Court to re-write the exclusion to read as if Mercury had used the word "if" instead of "to the extent that."

MERCURY'S ARGUMENT:

If This Court Invalidates the Exclusion, and the Finder of Fact Determines that the Shoulder Surgery is Related, Mercury 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).

CHRISTY'S REPLY:

If This Court Invalidates This Exclusion And The Finder Of Fact Determines That the Shoulder Surgery Is Related, Mercury Is Obligated To Pay $9,500.83.

Counsel for the parties have agreed on the amounts of Mercury's obligation based on this Court's interpretation of Virginia Code § 38.2-2201(3)(b).

The parties have agreed and stipulated that

> if the Johnston Memorial Hospital bill in question is not governed by Virginia Code § 38.2.2201(3)(b) and if Christy prevails on the issue of causation, then Mercury's obligation is $9,500.83, and
>
> if the Johnston Memorial Hospital bill is governed by Virginia Code § 38.2-2201(3)(b), and Christy wins on causation then Mercury's obligation is $6,999.60.

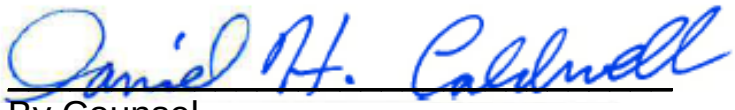
The only question for decision by this Court on this issue is whether the said Johnston Memorial Hospital bill is or is not governed by Virginia Code § 38.2-2201(3)(b). Christy's argument on this point is contained on pages 15 through 17 of Appellant's Brief

CONCLUSION:

Mr. Christy moves this Court to rule that, as a matter of law, under the agreed facts, Mercury's policy language provides the medical payments coverage sought by Mr. Christy. Mr. Christy is not trying to "double-dip." He is not trying to get the same bills paid twice. He is not trying to get the same bills paid by the workers' compensation carrier AND by Mercury. He is trying to get Mercury to pay the bills that the workers' compensation carrier did not pay. And he is entitled to recover payment of those bills from Mercury pursuant to the language of Mercury's policy.

And Mr. Christy moves this Court to rule that, as a matter of law, Virginia Code § 38.2-2201-A.3.b does not apply to the March 24, 2006 Johnston Memorial Hospital bill in the amount of $6,172.00. The payment by United Healthcare to Johnston Memorial Hospital was made to settle pending litigation and not "pursuant to a negotiated contract." The Hospital bill was "incurred" in the amount of $6,172.00, not in the amount "of the actual payment" by United Healthcare to the Hospital.

Respectfully Submitted,



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RULE 5:26(h) CERTIFICATE

Pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia, counsel for the plaintiff/appellant certifies compliance with this Rule as follows:

(1) Appellant: Kevin Christy

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(2) Fifteen paper copies of the Reply Brief of Appellant along with one electronic copy on CD were hand-filed with the Clerk of the Supreme Court of Virginia and three paper copies and one electronic copy on CD of the same were served, via UPS Ground Transportation, to opposing counsel this 12th day of May, 2011.

KEVIN CHRISTY

By_____
Counsel