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Marilyn Murdock v. Monumental Life Insurance Company, a foreign corporation doing business in Utah : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARILYN MURDOCK,

Appellant,

vs.

MONUMENTAL LIFE INSURANCE COMPANY, a foreign corporation doing business in Utah,

Appellee.

Case No. 981718-CA

Priority No. 15

BRIEF OF APPELLEE

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, HONORABLE SHEILA K. McCLEVE

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JURISDICTION OF THE UTAH COURT OF APPEALS

This court has jurisdiction pursuant to Utah Code Annotated § 78-2a-3(2)(j).

STATEMENT OF RELEVANT FACTS

1. Monumental Life Insurance Company ("Monumental") issued two accidental death policies on the life of Marilyn Murdock's deceased husband, Zachary Murdock. The accident death benefit in those policies states:

> "When we receive due proof that a Covered Person dies, we will pay the benefits shown on the Schedule of Benefits to his named Beneficiary; provided:
>
> (1) Death occurs as a direct result of an Injury;
>
> . . .

Injury is defined as follows:

> "INJURY means bodily injury caused by an accident."

Exclusion (4) of the policies states:

> " We will not pay a benefit for a loss which is caused by, results from, or contributed to by:
>
> . . .
>
> (4) . . . committing an assault or felony." (R. 80-89).

2. On or about April 20, 1996, Richard Moser was working as the theater manager at Cineplex Odeon at 106 South in Sandy, Utah. At about 1:00 in the morning, he and his assistant manager, Deb Alries, went to deposit the night's receipts at Zions Bank. As Mr. Moser was walking to the night drop from the van, two men (Zachary Murdock and an unknown accomplice) wearing dark clothing and ski masks came out of

the bushes. One pointed a hand gun at Mr. Moser and threatened to shoot Mr. Moser if he didn't give them the money. (R. 90-91).

3. Mr. Moser did not respond immediately and the men then hit him repeatedly with a stun gun, tore his clothing, gouged his chest and knocked him to the ground where they continued kicking him and hitting him with the stun gun. The robbers then took the money Mr. Moser carried, turned and attacked Deb Alries with the stun gun. (R. 91).

4. After attacking Deb Alries, the robbers ran out of the bank area. Mr.Moser got into the van and began chasing the two robbers in an attempt to get the money back. The two robbers ran into a field full of construction debris and Mr. Moser followed them in the van. The robber who had the money ran to a gray pick up truck and started to drive off. Mr. Moser pulled his van in front of the robbers pick up truck trying to block the robbers path, but the robber got away. (R. 91).

5. Mr. Moser subsequently learned he had struck and killed one of the robbers (plaintiff's deceased) with the van while driving through the field full of construction debris. (R. 91).

SUMMARY OF THE ARGUMENT

Mr. Murdock's death was not caused by an accident. "Where the insured's conduct threatens death or serious bodily injury to another, the insured should expect or anticipate that the threatened individual will very likely respond with deadly force. Under

those circumstances the death is not considered accidental." *Hoffman v. Life Ins. Co. of North America*, 669 P.2d 410, 418 (Utah 1983).

Even assuming that Mr. Murdock's death was "caused by an accident." The "felony exclusion" precludes coverage. The exclusion states:

> "We will not pay a benefit for a loss which is caused by, results from or contributed to by:
>
> . . .
>
> committing an assault or felony . . . ."

Mr. Murdock committed both a brutal assault and a felony which contributed to his death and, therefore, coverage is precluded.

The exclusionary language is not ambiguous. Mrs. Murdock argues that the exclusionary language is ambiguous because it does not state whether it is referring to the felonious conduct of the insured or the conduct of some other person, not a party to the contract. Mrs. Murdock has not cited a single case in which the felony exclusion was held to be ambiguous because it did not identify whose conduct it was referencing. There is a Utah case which closely scrutinized a similarly worded felony exclusion for ambiguities. *LDS Hospital v. Capital Life Ins. Co.*, 765 P.2d 857 (Utah 1988). In *LDS Hospital*, the only ambiguity found in the exclusion was the word "attempt," a word which is noticeably absent from the exclusion at hand. There, coverage was excluded for deaths arising out of "an attempt at assault or felony." The ambiguity arose because there was a question as to whether a DUI which resulted in an accident and death was truly an "attempt" (inferring intent) at assault or felony. Also, since the word "attempt" had been

used, it was ambiguous as to whether there would be coverage for injuries resulting from "completed" assaults or felonies. Even though ambiguity was the central issue in that case, the court never suggested that not identifying whose felonious conduct is at issue creates an ambiguity. Obviously, it is the insured's conduct which is at issue as was assumed by the Court in *LDS Hospital*. Accordingly, the Trial Court did not err in determining that Mr. Murdock's death was not caused by accident and that the exclusion precluded coverage even if the death had been caused by accident.

ARGUMENT

POINT 1

MR. MURDOCK'S DEATH WAS NOT "CAUSED BY AN ACCIDENT."

The insured has the burden of proof to bring himself within the coverage provisions of the policy. *Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co.*, 868 F.Supp. 1278 (D. Utah 1994), aff'd 52 F.3d 1522. The policy in question is one for accidental death Coverage is provided if death occurs as a direct result of an injury. "Injury" is defined as "bodily injury caused by an accident."

In Utah the general rule is that "if the insured threatens to kill, or inflict serious bodily injury on another person or assaults another person under circumstances making it likely the other person will respond with deadly force, and does so and kills the insured, the insured's death is not accidental." *Hoffman v. Life Ins. Co. of North America*, 669 P.2d 410 (Utah 1983).

In *Hoffman*, the insured's widow/beneficiary brought an action against the insurer to recover on an accidental death insurance policy after her severely mentally ill husband who was armed with a rifle was shot to death by police officers. The trial court granted summary judgment in favor of the carrier, but the Utah Supreme Court reversed and remanded because the insured's mental illness created an issue of fact as to what the insured expected as the result of his actions and it did not appear the trial court had taken the mental illness into account in its ruling. There was also an issue of fact as to whether or not the insured had threatened death or serious bodily injury to the officers before he was shot to death.[1] The court stated:

> "Where the insured's conduct threatens death or serious bodily injury to another, the insured should expect or anticipate that the threatened individual will very likely respond with deadly force. Under those circumstances the death is not considered accidental." Id at 418.

The Utah Supreme Court in *Hoffman*, cites with favor to the case of *Isoard v. Mutual Life Ins. Co.*, 22 F.2d 956 (8th Cir. 1927) which applied Utah law. In *Isoard*, the insured was suspicious of another man's interest in his wife. He confronted the man with his shotgun in hand. Angry words were exchanged and the insured threatened to shoot. The other man shot the insured. The court held that the insured's death was not accidental because the encounter was brought on voluntarily by the deceased.

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[1] There were issues of fact in *Hoffman* because of the insured's severe mental illness and the disputed evidence as to whether the insured had actually threatened to shoot his weapon. Obviously, those issues of fact are not present here as there is no evidence of diminished capacity and the insured pointed a gun at Mr. Moser, threatened to kill him for the money and severely beat Mr. Moser in order to get the money.

Numerous courts from other jurisdictions agree that the death of an armed insured who threatens another but, is killed by the other is not an "accident." See e.g. *Carlyle v. Equity Benefit Life Ins. Co.*, 551 P.2d 663 (Okla. 1976) (Death of insured while attempting to complete an armed robbery did not result from an "accidental bodily injury" so as to entitle insured's widow to an accidental death benefit where death, though it may not have been probable, was too natural a consequence of armed robbery to be labeled merely a fortuitous, unusual or unforeseeable event.); *Rudolph v. New York Life Insurance Co.*, 412 P.2d 610 (Wyo. 1966) (Armed insured who threatened to kill, but was killed by his intended victim did not die by "accident" to entitle his widow to an accidental death benefit because he "must have known and expected that his actions . . . might result in his own death."); *Valley Dental Assoc. v. Great West Life*, 842 P.2d 1340 (Ariz. Ap. 1992)[2] (Armed insured who was stabbed to death by his rape victim, did not die by "accidental means" as required for double indemnity provision of life insurance policy to apply.); *Sellers v. John Hancock Mutual Life Ins. Co.*, 149 SW 2d 404 (Missouri Ap. 1941) (Death of insured from shots fired by police officers as he was trying to escape arrest having run some 30 yards was not accidental so as to entitle him to accidental death benefits.)

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[2] This case contains lengthy string sites best left omitted here, but which stand for the proposition that an "accident" is an event that is at least unexpected and which agree with the Utah Supreme Court's holding in *Hoffman* that "the general rule to be gleaned from the cases is that if the insured threatens to kill, or inflict serious bodily injury on, another person or assaults another person under circumstances making it likely the other person will respond with deadly force, and does so and kills the insured, the insured's death is not accidental." Id. at 1343.

Pursuant to the foregoing authority, when Mr. Murdock brutally beat and robbed Mr. Moser at gun point he should have expected or anticipated that the victim would respond with deadly force or at the very least attempt to get the money back as happened here. Therefore, the insured's death was not accidental qualifying plaintiff for accidental death benefits.

The Utah Supreme Court statement in *Hoffman* that when an "insured's conduct threatens death or serious bodily injury to another, the insured should expect or anticipate that the threatened individual will very likely respond with deadly force" also disposes of plaintiff's argument that the victim's act of pursuing Mr. Murdock was an "intervening" and "superseding" cause of Mr. Murdock's death. In Utah, a "superseding" cause arises only when the intervening force was unforeseeable and may be described, with benefit of hindsight, as extraordinary. *State v. McBride*, 940 P.2d 539 (Utah Ap. 1997). Since the law in Utah is that armed robbers should not only foresee, but should "expect and anticipate" a victim to retaliate, Mr. Moser's chasing after the robber to regain the stolen money was certainly "foreseeable" and not a superseding or intervening cause which could break the causal link between the robbery and the robber's death moments later. The facts here constitute a continuous succession of events linked together making a natural whole. The insured's death was a natural probable consequence of his own violent, felonious actions.

POINT II

THE ASSAULT/FELONY EXCLUSION PRECLUDES COVERAGE.

A. The Exclusion Is Not Ambiguous.

Whether a contract term is ambiguous is a question of law for the court. *Sharon Steele v. Aetna*, 931 P.2d 127 (Utah 1997). If a contract is unambiguous, a trial court may interpret the contract as a matter of law.[3] Id. at 134.

The exclusion simply states:

> "We will not pay a benefit for a loss which is caused by, results from or contributed to by:
>
> . . .
>
> committing an assault or felony . . . ."

Similarly worded exclusions are commonly found in health and accident policies and in double indemnity clauses in life insurance policies. Insurance companies which include such exclusions in their policies, at a minimum, do not want to provide coverage for injuries or death arising out of the violent or felonious conduct of their insureds. Exclusions of this nature are employed because of the increased risk of injury to and death of an insured who engages in violent or felonious conduct. Assaults and felonies can be violent and dangerous and are commonly repelled by victims and police, resulting in injury or death to the perpetrator.

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[3] Interestingly, if a contract is ambiguous, a trial court may not interpret the contract as a matter of law. When ambiguity does exist, the intent of the parties is a question of fact to be determined by the jury. *Plateau Mining Co. v. Utah Div. Of State Lands & Forestry*, 802 P.2d 720 (Utah 1990).

While plaintiff's desire to turn an uncovered risk into a covered one is understandable, the courts of Utah, like those virtually everywhere else, do not re-draft insurance contracts after the fact to eliminate exclusions and thus provide for coverage where none would otherwise exist. E.g., *Mason v. Commercial Union Assurance Co.*, 626 P.2d 428 (Utah 1981); *Overson v. U.S. Fidelity & Guarantee Co.*, 587 P.2d 149 (Utah 1978). An insurance carrier has the absolute right to limit the coverage in its policy through the use of exclusions. *Wagner v. Farmers Ins. Exch.*, 786 P.2d 763 (Utah Ap. 1990); *Farmers Ins. Exch. v. Call*, 712 P.2d 231, 233 (Utah 1985). Once the carrier has expressly done so, Utah law compels that the plain language of the contract must be followed. *Valley Bank & Trust Co. v. U.S. Life Title Ins. Co.*, 776 P.2d 933, 936 (Utah Ap. 1989); *Bear River Mut. Ins. Co. v. Wright*, 770 P.2d 1019, 1020 (Utah Ap. 1989). Utah law does not permit policies to be redrafted with the stroke of a pen simply to achieve a result desired by an insured who demands coverage. The Court is "obliged" to assume that language in an insurance contract "was put there for a purpose." *Marriot v. Pacific Nat'l Life Assurance Co.*, 467 P.2d 981, 983 (Utah 1970).

To find the exclusion inapplicable here, this Court would not only have to ignore what the law of Utah compels, it would have to delete the exclusion from the policy entirely.

The only case relied upon by plaintiff for its ambiguity argument is *LDS Hospital v. Capital Life Ins. Co.*, 765 P.2d 857 (Utah 1988). In *LDS Hospital*, the only ambiguity in the exclusion was the word "attempt," a word which is noticeably absent from the

exclusion at hand. There, coverage was excluded for deaths arising out of "an attempt at assault or felony." Not only was the word "attempt" the only ambiguity there, the facts of the case were utterly different. There, the insured was driving under the influence of alcohol when he collided with another vehicle, the driver of which died five minutes after the impact. The ambiguity arose because there was a question of interpretation as to whether a DUI which resulted in an accident and death was truly an "attempt" (inferring intent) at assault or felony. Secondly, since the word "attempt" had been used, it was ambiguous whether there would be coverage for injuries resulting from "completed" assaults or felonies. Plaintiff attempts to make the ruling in *LDS Hospital* the equivalent of a finding that all such exclusions are ambiguous. The Court did not so hold. In actuality, the ambiguity problem the Court faced in *LDS Hospital* is simply not present here. Furthermore, there, the Court found no felony had occurred at the time the injuries occurred for which coverage was sought.

Here, coverage is excluded for deaths "caused by, resulting from or contributed to by committing an assault or felony." The facts are undisputed that the insured committed an assault and felony which resulted in and certainly contributed to his death when the victim, foreseeably, attempted to get the money back.

Plaintiff also argues ambiguity because the policy does not say whether the exclusion refers to conduct on the part of the insured (Murdock) or the person causing the death of the insured (Moser). The insurance covered the insured and not third parties. Exceptions to coverage for death caused by, resulting from, or contributed to by

committing an assault or felony likewise applies to the insured and not third parties. Furthermore, if that lack of reference as to whose conduct is at issue created an ambiguity, it would have been mentioned in *LDS Hospital*. There, it was the conduct of the insured causing his own injuries for which LDS Hospital was seeking reimbursement for medical expenses incurred. No where in that case, even though ambiguity was the central theme, is it suggested that not identifying whose felonious conduct is at issue creates an ambiguity. Obviously, it is the insured's conduct which is at issue as was assumed by the Court in *LDS Hospital*. This is so obvious, plaintiff was unable to cite even one case to support this ambiguity argument. In every case cited by either party thus far referencing this type of exclusion, it was the conduct of the insured which determined the application of the exclusion.

B. Mr. Murdock's Death Was Caused By, Resulted From Or Was Contributed To By His Commission Of An Assault And Felony.

It is an undisputed fact that the insured, Mr. Murdock committed both an assault and an armed robbery which was a felony. Therefore, the only question is whether his death was caused by, resulted from or was contributed to by his commission of that assault and felony. Anyone committing armed robbery should expect that the victim might retaliate and attempt a retrieval of the stolen money. Therefore, it cannot be said that the victim's attempt to retrieve the stolen money which ended in the insured's death did not result from or was not contributed to by the insured's commission of the felony.

Any lingering doubt in that regard evaporates when one looks at the construction placed on phrases such as "resulting from, contributed to" and "arising out of." In *National Farmers Union Property & Casualty Co. v. Western Casualty Insurety Co.*, 577 P.2d 961 (Utah 1978), the Utah Supreme Court construed the term "arising out of" in determining whether an accident fell within the terms of an exclusion in a homeowners insurance policy. The Utah Supreme Court agreed with other jurisdictions in holding that the phrase "arising out of" requires only that there be some causal relationship between the injury and the risk for which coverage is provided. The court stated that "arising out of" is a phrase of much broader significance than "'caused by' . . ." Id (emphasis added) (*Hartford Accident & Indemnity Co v. Civil Service Employees Ins. Co.*, 33 Cal. Ap. 3rd 26, 32 (1973)).

Likewise, the phrases here, "results from" and "contributed to" have much broader meaning than "caused by" and require only some causal relationship between the insured's commission of the assault/felony and his death to make the exclusion applicable. There is no question that there is some causal relationship between an armed robber threatening to kill his victim, stunning the victim time and again with a stun gun, beating and kicking the victim to get the victim to drop the money and the victim's subsequent attempts to get the money back during which the collision and death occurred.

Plaintiff should not be permitted to accomplish the goal of nullifying the exclusion. None of the cases cited by plaintiff are applicable here. As pointed out above, *LDS Hospital*, *supra* held the exclusion at issue there to be ambiguous because of a single

word which is not contained in the exclusion at hand and because the felony came after the injuries for which coverage was sought. Nor did *LDS Hospital* involve an armed insured who indisputably committed assault and felony. Other cases relied on by plaintiff are likewise easily distinguishable. *Willis v. Willis*, 287 S. 2d 642 (Louisiana Ap. 1973) likewise involved an unarmed insured who was attacked and shot by his wife's boyfriend. The ruling turned on the fact that the insured was unarmed and therefore there was no foreseeability that his life would be endangered. Furthermore, that insured had not committed a felony.

Rachal v. Union National Life Ins. Co., 184 S. 2d 775 (Louisiana Ap. 1966) simply involved an insured who was killed when his pistol discharged as he was using it as a hammer to beat on the windshield of an unoccupied automobile. His actions were not felonious, and the fact that he was not threatening another with the gun made it unforeseeable that his life might be in danger.

In *Republic Nat. Life Ins. Co. v. Huiward*, 568 S.W. 2d 879 (Texas Ap. 1978) the insured was unarmed while engaged in a fight with another who shot the insured. Obviously, engaging in an unarmed fist fight is not a felony.

In *Denies v. First National Life Ins. Co.*, 144 S. 2d 570 (Louisiana Ap. 1962) another unarmed insured who had been drinking in a bar was ordered by the proprietor to leave and the unarmed insured struck him in the face. Afterward, a fight involving multiple parties ensued outside the bar. The insured was eventually shot by his mother-in-law. This case is distinguishable just like the others relied on by plaintiff because the

insured was not threatening anyone else with a deadly weapon and did not commit a felony. Furthermore, the exclusion involved in that case has little or no resemblance to the exclusion at hand.

In sum, plaintiff has failed to cite to even one case in which an armed insured actually committed an assault and felony such as happened here, and the exclusion did not apply. There is simply no authority for plaintiff's proposition that the exclusion does not apply to the facts at hand.

CONCLUSION

Based upon the foregoing, this Court should affirm the summary judgment granted by the Trial Court based upon that Court's ruling that the insured's death was not caused by accident and/or that the exclusion precludes coverage.

DATED this 14th day of September, 1999.

SNOW, CHRISTENSEN & MARTINEAU

By_____
Joy L. Clegg
Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September, 1999, I caused two true and correct copies of the foregoing BRIEF OF APPELLEE to be served by first class mail, postage prepaid upon the following:

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