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Recent Developments: Allstate Insurance Company v. Atwood: Insurer Bound by Verdict in Tort Action and Could Not Relitigate Same Issues and Obtain an Overriding Declaratory Judgment on Jury's Verdict

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time of his death, was valued at approximately $750,000. Inventories were filed showing $425,000 in real property, $2,500 in tangible personal property and $324,000 in intangible personal property including stocks, bonds and bank accounts.

Miriam E. Emmert was the designated personal representative of her father's estate. In this capacity, she filed a petition for declaratory relief in the Circuit Court for Carroll County. The petition alleged, among other things, that the phrase "personal property was ambiguous; that the testator's intention was to include only tangible personal property..." *Emmert v. Hearn*, 309 Md. at 21, 522 A.2d 377.

The trial court concluded that a latent ambiguity existed as to whether the "personal property" referred to in the second provision of Roberts' will included tangible, as well as intangible, personal property. Extrinsic evidence, including testimony by Emmert, one of the testator's children, and the deposition by the attorney who drafted the will, was admitted to "clear the ambiguity." *Id.* at 22, 522 A.2d at 379. From this testimony, it was gleaned that the intention of the testator was to include only tangible personal property in his second provision. The court held that the words "personal property," as used in the second provision of his will, applied to tangible property only, and that the intangible personal property passed under another provision of the will into the inter vivos trust.

In an unreported opinion, the Court of Special Appeals of Maryland reversed the circuit court judgment. It found that no ambiguity existed as to the words of the will; therefore, extrinsic evidence as to the intention of the testator should not have been permitted. According to the court of special appeals, the trial court was in error in admitting extrinsic evidence of the testator's intention. Certiorari was granted by the court of appeals to consider the important question presented 307 Md. 163 (1986).

Upon review, the court of appeals applied a step-by-step analysis in construing the will. Ordinarily, the court said, the intent of a testator must be gathered from the four corners of the will, giving words their "plain meaning." In so doing, the court recognized that their foremost concern was to ascertain the testator's expressed intent. However, the court stressed that "[e]xtrinsic evidence should not be admitted to show that the testator meant something different from what his language imports... What he meant to say must be gathered from what he did say." *Id.* (quoting *Fersinger v. Martin*, 183 Md. 135, 138, 36 A.2d 716 (1944)).

The court then looked to Webster's Dictionary, as well as Black's Law Dictionary, to determine both the ordinary and the legal meaning of the term "personal property." Both sources included intangible property in their definitions. Additionally, the court noted that bequests of personal property are generally to be construed broadly unless there is some indication in the will to the contrary. The court cited several cases where it had applied this general rule.

In *Leroy v. Kirk*, 262 Md. 276, 283, 277 A.2d 611 (1971), for example, the testator bequeathed "all of my personal property, including my automobile, boat and the contents of my house and outbuildings...." The listing of items put a restriction on the term "personal property" and caused the court to limit, by example, the bequest to tangible personal property.

Returning to the Roberts' will, the court found that nothing on the face of the will limited or qualified the bequest of personal property. No examples were given in the will for the purpose of illustration as to what the testator meant by personal property. The court concluded that the will was unambiguous on its face. Furthermore, the court stated that a latent ambiguity did not exist in the provisions of the Roberts' will. If "the language of the will is plain and single, yet is found to apply equally to two or more subjct or objects then it would indicate latent ambiguity." *Emmert*, 309 Md. at 27, 522 A.2d 377, 381. Extrinsic evidence would be admissible only to resolve an ambiguity. *Id.* Such extrinsic evidence might also indicate that the description in the will is defective.

The court stated that there was no defective description in the will nor was there any indication that Roberts' bequest applied to two or more persons or things.

Thus, "if the language of a will is clear and no latent ambiguity exists, the court's role in the construction of the will is at an end." *Id.* at 28, 522 A.2d at 382. There being no indication that the testator intended anything other than all of his personal property to pass under the second provision, the court held that the bequest in that paragraph was all-inclusive.

The court cautioned that its holding would yield an unfair result to the grandchildren, especially to the son of the deceased child, but such "[A]n inequality cannot influence a court in its duty to find out what a testator meant by his will. ..." *Emmert*, 309 Md. at 28, 522 A.2d 377 (quoting *McCurdy v. Safe Deposit & Trust Co.*, 190 Md. 67, 69, 57 A.2d 302, 303 (1948)).

By its holding the court has once more underscored the important of specificity in the drafting of legal documents. Drafters of wills and other testamentary devices will take note to be as specific as possible in putting into words the *true* intentions of their clients.

— Margaret Ann Willis

Allstate Insurance Company v. Atwood: INSURER BOUND BY VERDICT IN TORT ACTION AND COULD NOT RELITIGATE SAME ISSUES AND OBTAIN AN OVERRIDING DECLARATORY JUDGMENT ON JURY'S VERDICT

In *Allstate Ins. Co. v. Atwood*, 71 Md. App. 107, 523 A.2d 1066 (1987), the Court of Special Appeals of Maryland held that a tort-feasor's insurer, which provided defense for the tort-feasor in an action brought by the victim, in which the jury determined that the defendant's striking of the victim was the result of negligence rather than battery, was bound by the verdict even though it was not a party to the suit. As a result, the insurer could not seek post verdict declaratory relief on the same issues of fact which has been decided in the tort-feasor's trial.

This case stems from an incident which occured in 1983. In an apparently unprovoked attack, the insured, John Atwood, struck another youth in the face. The suit was brought by the victim, individually and through his father, against Atwood in the Circuit Court for Montgomery County. The complaint alleged that the plaintiff's injuries were the result of either Atwood's negligence or intentional assault and battery.

Atwood, who was living with his parents at the time of the incident, relied on their policy with Allstate Insurance Company. The exclusionary clause provided that the insurer is not liable for "bodily injury...intentionally caused by an insured person." *Id.* at 108, 523 A.2d at 1067.

Before the trial, believing Atwood's striking of the victim was intentional and thereby excluded from coverage, Allstate filed for declaratory relief in 1984. The Bill was dismissed on the grounds that it was premature.

At the trial, the jury found that Atwood was negligent which prevented the defendant's conduct from coming within the policy's exclusion regarding intentional conduct. Despite the jury's finding of negligence, Allstate filed for a Bill of Declaratory Relief on the ground that the injuries sustained by the plaintiff "were a direct result... of (Atwood's) intentional

act." *Id.* After both parties successfully had the motion dismissed, Allstate appealed. Writing for the majority in the Court of Special Appeals of Maryland, Chief Judge Gilbert found the vexing issue presented by this case to be: "whether an insurer may... after disposition of the tort matter, relitigate the same issues and obtain a declaratory judgment... that overrides the jury's verdict on the tort action." *Id.* The court found that even though Allstate was not a party to the tort action, it is nevertheless bound by the jury's verdict.

The court cited *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 347 A.2d 854 (1975) as being similar with respect to the conflict between an insurer and an insured. The conflict in *Brohawn* arose out of a complaint that alleged separate and alternative theories of negligence and assault and battery. The insurer insisted because of the conflicting legal theories averred against its insured, the extent of policy coverage (due to an exclusionary clause similar to the case here) should be resolved prior to trial in a declaratory action. Although the *Brohawn* court noted, as did the court here, that the above contention is not without merit, it held that a declaratory action is inappropriate where the questions of fact to be resolved in the declaratory action are also to be litigated in the pending action. *Id.*

The court, in its application of *Brohawn*, found that while an insurer's right to preliminary adjudication on an insured's right to coverage under an insurance policy is limited, it is not a compelling enough reason to allow an insurer to adjudicate issues that will be subsequently litigated at trial. *Allstate*, 71 Md. App. at 1069, 523 A2d. at 1069.

The court further pointed out that *Brohawn* as applied did not strip away all of Allstate's defenses. To begin, the court refused to read *Brohawn* as a bar to an insurance carrier's ability to be a party to the action. Nothing in the cited authority forbids the carrier, after supplying independent counsel to its insured or paying the cost of the insured's choice of counsel, from intervening as a party and from being represented at a tort trial.

Thus, to limit the more severe implications of this holding, the court placed the locus of the blame on Allstate for its failure to intervene, not on Allstate being denied its right to representation.

The court in *Atwood* clearly indicates that a more affirmative role should be played by the insurance carrier in tort litigation in which a plaintiff pleads alternative legal theories of which one will be excluded by the scope of the policy at trial. Implicitly the court held firm in its unwillingness to compromise a jury verdict on an issue of liability, despite the fact that extrinsic evidence may reveal that the jury's finding may well fall into an insurance carrier's exclusionary provision.

—*Michael T. Wyatt*