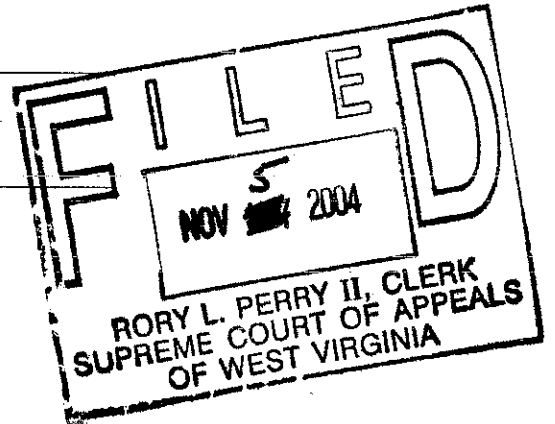


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



TOM COLLINS,

Petitioner,

v.

Appeal No. 31971

KAREN HEASTER, as Administratrix  
for the Estate of David Heaster,

and

JOHN DOE

Respondents.

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APPELLANT'S BRIEF

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FROM THE CIRCUIT COURT OF HARRISON COUNTY  
WEST VIRGINIA

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Now comes Tom Collins and represents that he is aggrieved by the Order of the Circuit Court of Harrison County, West Virginia, entered on November 26, 2003.

THE KIND OF PROCEEDING AND NATURE OF RULING:

This is a personal injury action. The ruling subject of this appeal is the order of the Circuit Court of Harrison County, West Virginia, Hon. John Lewis Marks, Judge, which dismissed Allstate Insurance Company from any obligation to defend "John Doe."

STATEMENT OF FACTS:

On the night of March 7, 2000, a home in Harrison County belonging to Mr. David Heaster caught fire. Petitioner is a paramedic who was working the night shift at Harrison County Emergency Squad. As such, he was called to the scene to assist with any medical emergencies. Both Mr. and Mrs. Heaster were at home at the time of the fire. Mrs. Heaster escaped with minor injuries. However, Mr. Heaster was taken from the house in cardiac arrest and ultimately died as a result of the fire.

Mr. Heaster's Ford pickup truck was parked next to the house and so it was threatened by the fire. Some unknown person (the "John Doe" in this case) got into the vehicle to move it, presumably to keep it from damage in the fire. As that unknown person moved the vehicle, it backed into Petitioner, causing injuries to him.

Mr. Collins described the scene and how the accident occurred:

Q - What did you do when you first got to the Heaster residence?

A - We parked and most of the fire - there were a few firemen on scene at that point and they had already entered the residence, I believe, looking for the victims. I don't believe I was there more than 60 seconds, if that long, before that vehicle struck me.

Q - So you had literally just gotten out of the ambulance and were there a minute?

A - Walked over in the yard and I was assessing the situation.

Collins deposition, pp. 14 - 15

Q - Was there anybody out on the lawn that you can recall other than, you say, there were firemen? Did you identify any injured victims or anything like that?

A - At this point, just prior to that vehicle striking me, I saw a couple firemen moving through in the fog, basically, and that's it. At that point, I don't even remember seeing any bystanders.

Q - And visibility was 12 to 15 feet in front of you or in any direction?

A - Right. Basically, in any direction, really. It just seemed like a big haze. I don't remember a lot of it.

Q - From what direction did the vehicle come?

A - It came from my -- facing the house, it came from my left.

Q - Did you see it at any point before it struck you?

A - I did not even see it until the moment of impact.

Collins deposition, pp. 20-21

Q - Was there anyone driving the [Heaster] vehicle?

A - Yes

Q - Do you know who that was?

A - I have no idea about a name. I came to understand there that it was a neighbor who had jumped in the vehicle and was backing it away from the flames.

Q - Was it a man or a woman?

A - It was a man

\* \* \*

Q - And this accident actually happened on the lawn as opposed to the sidewalk or the street?

A I believe my feet were standing in the grass, but the actual wheels of the vehicle were coming down the berm of the road. I was out in the grass there a little ways and he may have been a foot or two into the grass, actually. He was coming down the edge of the road-

\* \* \*

Q - Were you knocked unconscious, do you believe?

A - No, I was not unconscious, but my bell was rung.

Collins deposition, pp. 123-24

Q - Was the vehicle traveling at a high rate of speed?

A - I wouldn't say a high rate of speed, no. I don't think the engine was running, frankly. I think he was drifting backwards, but I couldn't say for sure about anything there.

Q - When you say you think he was drifting backwards, you just believe that based on the speed of the vehicle and not hearing the engine running?

A - I don't know what I base that on even. With the [fire] engine pumping beside of us, you couldn't hear anything over the pumper running . . . It was quite a chaotic scene

Q - Was anybody pushing the vehicle which struck you?

A - Not that I saw. Of course, that would fit the situation quite well. Some of the neighbors may have shoved him back out of there.

Collins deposition, pp. 26 - 27

After being struck by the truck, Mr. Collins continued to perform his duties as a paramedic. He ministered to Mrs. Heaster. Then, when the firefighters brought Mr. Heaster out of the home in cardiac arrest, Mr. Collins treated him and transported him to the hospital, where Mr. Heaster ultimately died.

This action was commenced against Mr. Heaster's estate and the John Doe who moved the truck. The Estate moved for summary judgment, because the Respondent's

decedent did nothing with or to the truck to move it, and that summary judgment was entered without objection.

Allstate Insurance Company covered Mr. Heaster's pickup truck. Allstate provided the limited defense necessary to obtain the summary judgment for the Heaster estate, and then moved to dismiss the complaint as against Allstate's responsibility to defend because there is no statutory authorization for a third-party John Doe claim.

The Circuit Court of Harrison County, Hon. John Lewis Marks, Judge, dismissed the action as against Allstate.

#### ASSIGNMENT OF ERROR:

A "JOHN DOE" HAD IMPLIED CONSENT TO MOVE THE DEFENDANT'S DECEDENT'S AUTOMOBILE OUT OF THE ZONE OF DANGER, THEREBY TRIGGERING A DUTY ON DEFENDANT'S DECEDENT'S INSURANCE TO PROVIDE COVERAGE FOR "JOHN DOE."

#### ARGUMENT:

There are two issues here. The first is whether one may obtain a judgment against a John Doe. The second is whether John Doe had implied consent to be operating the Heaster vehicle.

The Circuit Court determined that the "true issue" was whether one may obtain a judgment against John Doe after the Heaster estate was dismissed out on summary judgment. The Petitioner respectfully disagrees with that determination of the issue. John Doe actions are relatively common. When the identity of a defendant cannot be ascertained, the

fictitious "John Doe" is used, even in the absence of statutory authorization to do so.

Generally, that is done to preserve a statute of limitations or to create a duty on an insurance carrier, generally the uninsured carrier, to defend an action and pay any judgment. Here, the insurance carrier is that of the vehicle operated by the tortfeasor, not an uninsured motorist. There is no statutory authority for the carrier for the tortfeasor's vehicle to be required to defend, and no statutory authority for that carrier *not* to be required to defend an action. In fact, the only places in the West Virginia Code where the name "John Doe" is used are §33-6-31, the statute relevant to this appeal, and in the comments to the Uniform Commercial Code. The question of whether an insurance carrier has to defend "John Doe" is separate from whether a judgment can be obtained against John Doe. Clearly, such a judgment can be obtained.

The John Doe action is not one *ex contractu* against the insurance company, even though the insurance company may be the real and only party liable. Rather, it is a suit *ex delicto* involving only the establishment of legal liability on the unknown uninsured motorist. *Doe v. Brown*, 203 Va. 508, 515, 125 S.E.2d 159, 164 (1962)

The real issue, as the Petitioner sees it, is whether this particular John Doe had implied consent to move Mr. Heaster's truck.

Generally, insurance contracts and disputes will be construed to favor coverage. *E.g., Erie Ins. Property and Cas. Co v. Stage Show Pizza*, 210 W.Va. 63, 553 S.E.2d 257 (2001) Some cases call for a "liberal" construction. *Universal Underwriters Ins. Co. v. Taylor*, 185 W.Va. 606, 408 S.E.2d 358 (1991).

West Virginia Code §33-6-31(c) provides that the term “insured” applies to, *inter alia*:

“any person, except a bailee for hire, use uses, with the consent, express or implied, of the named insured the motor vehicle to which the policy applies . . . “

Sometimes the consent provision of the statute or a policy is construed as the auto having been “entrusted” to the other driver. A person must be entrusted, whether expressly or impliedly, by the named insured or his/her spouse with possession of the vehicle, with the word “entrust” connoting that the person with possession and authority over the vehicle relinquished that possession and authority to another. *Metropolitan Property & Liability Ins. Co. v. Acord*, 195 W.Va. 444, 465 S.E.2d 901 (1995). Obviously, there was no express consent for John Doe to move Mr. Heaster’s truck. Where implied consent to use a vehicle exists, coverage is precluded only where there is a deviation from the use consented to which amounts to theft or other conduct displaying utter disregard for the return or safekeeping of the vehicle. *Manzella v. Doe*, 664 So.2d 398 (La., 1995)

Therefore, if John Doe had implied consent, Allstate has a duty to defend John Doe. Black’s Law Dictionary, 7<sup>th</sup> Ed. (1999) defines implied consent as “Consent inferred from one’s conduct rather than from one’s direct expression.” The Random House Unabridged Dictionary, 2<sup>nd</sup> Ed. (1993) defines implied consent as “a manifestation of consent to something through conduct, including inaction or silence.”

In the instant case, we do not know what John Doe knew or was instructed to do. Mr. Heaster himself did not instruct John Doe to do anything. It is safe to assume that John

Doe was moving the truck away from the flames to protect the truck. It is unlikely in the extreme that the firemen directed John Doe to do so.

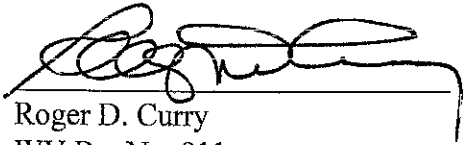
Implied consent can be verbal. "John, please get me a gallon of milk from the grocery store," where the store is miles away and there is only the owner's vehicle present provides John with implied consent. It is not a stretch at all for the person who moved the Heaster truck to have been acting for the owner as surely as if the owner had asked him/her to move the truck away from the fire. We should assume that John Doe was a reasonable person. According to Black's, a reasonable person "acts sensibly, does things without serious delay, and takes proper but not excessive precautions." It is reasonable to believe that if a car is next to a burning building, the owner consents to anyone moving the car to keep it from being destroyed. John Doe's actions here obviously were to the benefit of Mr. Heaster. Being a reasonable person, John Doe undoubtedly was laboring under some excitement due to the fire. That likely is why John Doe backed his truck over Mr. Collins. Under the circumstances, what would a reasonable person do? Moreover, any insurance company should reasonably know that car will be moved by other than the owner under certain circumstances.

There is a public policy purpose to finding coverage in this case. We should encourage responsible behavior. For example, the Good Samaritan law, West Virginia Code §55-7-15 provides a financial encouragement, through the device of immunity, for citizens to act in emergencies for the benefit of others. Even Mr. Collins is covered by a Good Samaritan law, West Virginia Code §16-4C-16, which provides partial immunity to

encourage EMS workers to do their difficult daily tasks. We should be promoting the actions taken by such persons as John Doe here.

CONCLUSION:

Accordingly, the Petitioner prays that the order of the Circuit Court of Harrison County be reversed and that Allstate Insurance Company be required to provide a defense to John Doe.

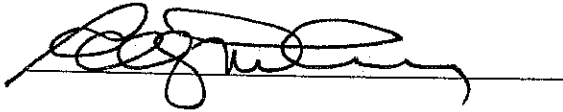


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CERTIFICATE OF SERVICE

I certify that on November 5, 2004, I served the foregoing by United States Mail,  
First Class, Postage prepaid, upon:

Thomas G. Steele  
Steele Law Offices  
PO Box 1494  
Clarksburg, WV 26302-1494

A handwritten signature in black ink, appearing to read "Thomas G. Steele", is written over a horizontal line.