

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TOM COLLINS,

Appellant,

v.

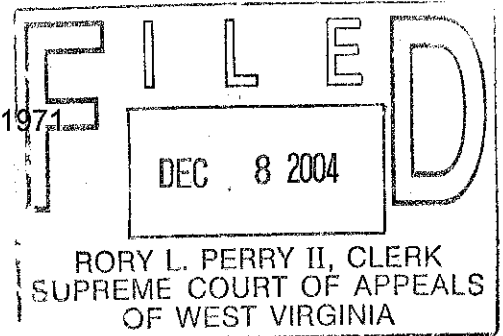
KAREN HEASTER, as Administratrix
for the Estate of David Heaster,

and

JOHN DOE,

Appellee.

No. 31971



BRIEF OF APPELLEE, ALLSTATE INSURANCE COMPANY

From the Circuit Court of Harrison County
West Virginia

Civil Action No. 02-C-318-1

Thomas G. Steele, Counsel for Allstate Insurance Company
Steele Law Offices
360 Lee Avenue
P. O. Box 1494
Clarksburg, West Virginia 26302-1494

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TOM COLLINS,

Appellant,

v.

No. 31971

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

and

JOHN DOE,

Appellee.

BRIEF OF APPELLEE, ALLSTATE INSURANCE COMPANY

Kind of Proceeding and Nature of Ruling in the Circuit Court

The instant proceeding is a personal injury action in which Tom Collins alleges he was injured as a result of being struck by a motor vehicle which was allegedly owned by David Heaster, deceased, which vehicle was driven or pushed by an unknown person on March 7, 2000, in Stonewood, Harrison County, West Virginia.

Collins initiated a civil action in the Circuit Court of Harrison County against Karen Heaster, the administratrix of David Heaster, on March 6, 2002. Although "John Doe" was named in the original Complaint, no service of process was initially effected upon John Doe or any insurer.

After some discovery, including the deposition of Collins, the Circuit Court of Harrison County granted summary judgment in favor of Karen Heaster by Order entered December 19, 2002, as there was no evidence that David Heaster was negligent or could some how be held vicariously liable for the subject accident. Summary judgment was granted without objection by Collins, and that ruling is not the subject of the instant appeal.

As part of the relief granting Heaster's Motion for Summary Judgment, the Harrison County Circuit Court also ordered Collins to advise the Court whether he intended to pursue a John Doe claim. Thereafter, service of process was apparently effected upon Erie Insurance Company

("Erie") on February 27, 2003 through the West Virginia Secretary of State. Presumably, Erie is Collins' own insurance carrier, although Collins has not taken any action of record against Erie.

Allstate Insurance Company ("Allstate") was formally served with a copy of the Summons and Complaint on June 2, 2003, also through the West Virginia Secretary of State. No direct allegations have been made against Allstate.

Given that it was undisputed that Allstate was not Collins' first-party insurance carrier, Allstate filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure as its initial responsive pleading. By Order entered July 7, 2003, the Circuit Court of Harrison County set a hearing on said motion for August 4, 2003, and required Collins to file a response to said motion on or before July 21, 2003.

Collins did not file a timely reply to the Motion to Dismiss, but sent a FAX reply on August 1, 2003 to the undersigned, and filed said reply with the Court on the day of the hearing. On November 26, 2003, the Harrison County Circuit Court entered an Order Granting Motion to Dismiss, which Order is the subject of the instant appeal.

Statement of Fact

On March 7, 2000, a fire occurred at the residence of Karen Heaster and David Heaster, deceased, in Stonewood, West Virginia. David Heaster died as a result of injuries sustained in the fire.

Tom Collins responded to the fire scene in conjunction with his duties as an employee of the Harrison County EMS. After arriving at the Heaster residence, and while standing in front of the Heaster residence, Collins alleges he was struck by a moving vehicle, and sustained injuries as a result thereof.

No eyewitnesses to the subject accident have been identified. Collins does not know who was driving or pushing the subject vehicle, but believes the vehicle was essentially drifting or coasting at the time he was allegedly struck. Contrary to appellant's assertions, there is a question

as to whether any vehicle owned by Karen and/or David Heaster, deceased was involved in the incident.

Based upon the status of the pleadings and Collins' willingness to consent to a summary judgment in favor of Karen Heaster, it was Allstate's understanding, supported by plaintiff's service of process of the Summons and Complaint on Erie Insurance Company in February of 2003, that plaintiff would pursue a John Doe claim, if at all, against his own insurance carrier for uninsured motorist benefits as contemplated by West Virginia Code § 33-6-31(e). Allstate does not assert that Collins is precluded from maintaining an action against his own insurance carrier for uninsured motorist benefits. However, Collins has chosen to pursue a John Doe claim in the third-party liability context, presumably to recover what he believes are applicable third-party liability insurance proceeds, and Allstate maintains that there is no legal authority for such a claim.

Argument

West Virginia Code § 33-6-31(e) is the only recognized mechanism which permits a John Doe claim to be prosecuted to conclusion. This statutory provision allows a plaintiff to maintain a cause of action for uninsured motorist benefits against his own insurer, assuming that other statutory prerequisites are satisfied.

In his Brief, Collins acknowledges that the initial issue for consideration is whether one may obtain a judgment against John Doe. Collins goes on to assert at page 5 that "[J]ohn Doe" actions are relatively common." Common or not, Collins cites no authority in support of that proposition in the context of prosecuting a third-party liability claim against John Doe to conclusion.

Historically, there are West Virginia cases which demonstrate that lawyers have procedurally filed John Doe claims against unknown third-parties, presumably to create a tolling effect on the applicable statute of limitations. However, there is no direct support for this procedure. Given the adoption and evolution of the discovery rule, there appears to be no utility or benefit associated with bringing such a John Doe claim, even for the limited purpose of tolling

a statute of limitations. See Miller v. Monongalia County Board of Education, 210 W. Va. 147 (2001) and Gaither v. City Hospital, Inc. 199 W. Va. 706 (1997).

The obvious problems associated with prosecuting a claim against an unknown person or entity to conclusion reinforce the reasons why West Virginia Code § 33-6-31(e) is the only authority which provides a limited John Doe remedy. To endorse Appellant's position in the instant case would allow any person who suffers from injury or illness to file abstract and indefinite claims against unknown people or entities who the alleged victim believes were a proximate cause of any such injury or illness.

If third-party John Doe claims were allowed, a trier of fact would have to speculate as to the identity and conduct of the unknown John Doe party in conjunction with a plaintiff's alleged claim for damages. The fact that "John Doe" may have acted in a particular context which might invoke the liability insurance coverage of another does not in any way eliminate the vagueness, uncertainty and speculation associated with the prosecution of a third-party John Doe claim to conclusion.

Collins goes on to assert and explain that the real issue in the instant civil action involves whether the unknown driver/pusher, if any, of the vehicle presumed to be owned by the decedent had implied consent to do so. This assertion requires multiple layers of speculation associated with determining whether an unknown person had implied consent to perform an undefined action in conjunction with an unidentified vehicle, which led to an incident which no one saw. Even if the alleged John Doe had permission to drive or push a vehicle, this circumstance would not eliminate the procedural and substantive impossibility associated with pursuing a claim against this unknown John Doe to verdict.

Conclusion

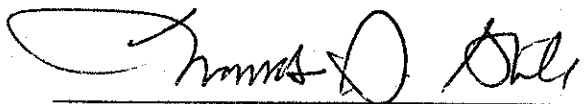
Appellant cites no authority which supports the proposition that a plaintiff may maintain an action against John Doe to verdict, the ultimate purpose of which is to obtain liability insurance proceeds. The only authority in West Virginia which allows plaintiff to prosecute a John Doe claim

to conclusion is that authority found in West Virginia Code § 33-6-31(e), which permits a plaintiff to maintain a cause of action for uninsured motorist benefits against his own insurer.

Allstate Insurance Company is not the insurer for Appellant Collins. Consequently, there is no statutory basis for Collins to maintain a direct action against Allstate.

Although Collins concedes that there is no legal basis to prosecute a third-party claim against John Doe to conclusion, Collins nevertheless maintains that he should be able to pursue such a claim, because Allstate may have a duty to defend such a claim, given that personal property allegedly owned by its deceased insured was involved in this vague and unwitnessed event. In that regard, Collins cites no law which supports the proposition that the potential existence of liability insurance coverage is a circumstance which creates or sustains a legal theory which is not otherwise allowed under the law.

For all of the foregoing reasons, Allstate Insurance Company requests this Court to affirm the Order Granting Motion to Dismiss which was previously entered by the Circuit Court of Harrison County. Allstate Insurance Company also requests the opportunity to present oral argument in support of its position.



THOMAS G. STEELE
Counsel for Allstate Insurance Company

STEELE LAW OFFICES
360 Lee Avenue
P. O. Box 1494
Clarksburg, WV 26302-1494
Bar Identification No: 4990

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TOM COLLINS,

Appellant,

v.

Appeal Number 31971

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

and

JOHN DOE,

Appellee.

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of December, 2004, I served the foregoing **Brief of Appellee, Allstate Insurance Company** upon counsel for the Plaintiff, by depositing a true copy thereof in the United States mail, postage-prepaid, in an envelope addressed to him as follows:

Roger D. Curry, Esquire
Curry & Swisher, PLLC
1414 Country Club Road
Fairmont, WV 26554-1305



THOMAS G. STEELE
Counsel for Allstate Insurance Company

STEELE LAW OFFICES
360 Lee Avenue
P. O. Box 1494
Clarksburg, WV 26302-1494
Bar Identification No: 4990