ASPLUNDH TREE EXPERT COMPANY v. PACIFIC EMPLOYERS INSURANCE COMPANY

In *Asplundh Tree Expert Company v. Pacific Employers Insurance Company*, 269 Va. 399, 611 S.E. 2d 531 (decided April 22, 2005) the Virginia Supreme Court held that a trial court retains subject matter jurisdiction in a declaratory judgment action filed by an insurer even after the insurer has funded the settlement of an underlying tort case. In addition, the Court also clarified the criteria for establishment of an exception to the "going and coming" rule. If the transportation in question is a customary practice, and confers a benefit to the employer and the employee, it is considered within the scope of the employment, and therefore does not fall within the "going and coming" rule. In this instance, the Court found that the so-called "employer's liability" exclusion of the business motor vehicle liability policy in issue applied to preclude coverage, and the insurer was entitled to recover the funds it had paid in the underlying settlement.

Asplundh Tree Expert Company employed the plaintiffs in the underlying tort case as part of a brush clearing crew. Most of the members of the crew lived in West Virginia and the work was to be performed in Virginia pursuant to Asplundh's contract with the Virginia Department of Transportation. Asplundh authorized a member of the crew to drive the company truck in order to transport the crew to Virginia each day and return them to West Virginia at the end of the work day. On August 21, 2001, en route from West Virginia to the worksite, the driver lost control of the truck and the plaintiffs were severely injured. Asplundh insured its company vehicles through a business motor vehicle liability policy issued by Pacific Employers Insurance Company. The policy excluded coverage of any bodily injury to an employee arising out of or in the course of employment or performing any duties related to Asplundh's business.

The plaintiffs filed suit in West Virginia Circuit Court against Asplundh for damages for injuries suffered in the accident. During the adjudication of the underlying tort action, Pacific Employers filed an action in Virginia Circuit Court for the city of Roanoke, seeking a declaratory judgment that it was not liable for the tort claims under its policy insuring Asplundh. Ultimately, Pacific Employers agreed to contribute toward settlement in the underlying tort action, but reserved the right to contest liability under its policy. Thereafter, Asplundh settled the claim with funds provided by Pacific Employers.

In the declaratory judgment action brought by Pacific Employers in Virginia, the trial court held that the employees involved were acting within the scope of their employment, and thus, Pacific Employers was not liable for damages under the so-called "employer's liability" exclusion of its business auto liability policy. The court found that Pacific Employers was entitled to recover from Asplundh the money it had contributed to the settlement of the tort claims. Asplundh appealed.

Initially, the Virginia Supreme Court confirmed that there was no prohibition on bringing a declaratory judgment action while an underlying tort case was still pending, even where the ultimate issue of fact determinative of coverage is also at issue in the tort case. Further, distinguishing this case from *Liberty Mutual Ins. Co. v. Bishop, 211 Va. 414, 177*

S.E. 2d 519 (1970), the Court held that the trial court did have subject matter jurisdiction over the declaratory judgment action despite the settlement of the underlying tort case, and that it was proper to award monetary relief in connection with the resolution of the declaratory judgment case. Unlike in *Liberty Mutual*, the settlement of the underlying tort case did not occur before the filing of the declaratory judgment. Furthermore, the Court noted that once a court has established subject matter jurisdiction on equitable grounds, it may render legal remedies that might not otherwise be within its jurisdictional scope. Such jurisdiction has also been mandated by the legislature. As the Court noted, *Code 8.01-184* grants the trial court jurisdiction "to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed."

The Court then addressed the question of whether the plaintiffs were acting in the scope of their employment, thus exempting liability for their injuries from coverage under Pacific's policy, or if this incident fell within the widely recognized "going and coming" rule. Generally, transportation to and from work is not designated as within the scope or course of one's employment, but there are recognized exceptions. The Court held that two criteria must be met to show an exception to the "going and coming" rule. The transportation in question must be customary, and a benefit must be conferred to both the employee and employer. The court found that because the practice of providing transportation to Asplundh's employees had been going on for at least five years in the same manner, it was a customary practice. The court further concluded that there was an obvious benefit to both the employees and Asplundh in continuing this practice.

In view of the foregoing, the Virginia Supreme Court upheld the Chancellor's judgment finding that Pacific Employers was not liable for the injuries incurred, and that it was entitled to a return of the funds contributed to the settlement of the underlying tort action.

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