Brigham Young University Law School
BYU Law Digital Commons

Utah Court of Appeals Briefs

1986

Shelter America Corporation v. Ohio Casualty and Insurance : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

Part of the Law Commons

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

John A. Beckstead; John H. Rees; Callister, Duncan and Nebeker; Attorneys for Appellant.
Raymond M. Berry; John R. Lund; Snow, Christensen and Martineau; Attorneys for Respondent.

Recommended Citation
Reply Brief, *Shelter America Corporation v. Ohio Casualty & Insurance*, No. 860174 (Utah Court of Appeals, 1986).
https://digitalcommons.law.byu.edu/byu_ca1/68

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF
UTAH
DOCUMENT
K F U
50
A10
DOCKET NO. 860174-CA

IN THE COURT OF APPEALS

FOR THE STATE OF UTAH

SHELTER AMERICA CORPORATION, a Colorado corporation,

Plaintiff-Appellant,

vs.

OHIO CASUALTY & INSURANCE COMPANY, an Ohio corporation,

Defendant-Cross Appellant/Respondent.

Case No. 86-0174-CA

Supreme Court No. 860104

SUPPLEMENTAL REPLY BRIEF OF CROSS APPELLANT/RESPONDENT

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

CALLISTER, DUNCAN & NEBEKER
John A. Beckstead (A0263)
John H. Rees (A4031)
Suite 800
Kennecott Building
Salt Lake City, Utah 84113
Telephone: (801) 530-7300

Attorneys for Appellants Shelter America Corporation

SNOW, CHRISTENSEN & MARTINEAU
Raymond Berry (A0310)
John R. Lund (A4368)
Attorneys for Cross Appellants/Respondent Ohio Casualty & Insurance Company
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

RECEIVED
OCT 20 1987
COURT OF APPEALS

IN THE COURT OF APPEALS

FOR THE STATE OF UTAH

SHELTER AMERICA CORPORATION, a Colorado corporation,

Plaintiff-Appellant,

vs.

OHIO CASUALTY & INSURANCE COMPANY, an Ohio corporation,

Defendant-Cross Appellant/Respondent.

Case No. 86-0174-CA

Supreme Court No. 860104

SUPPLEMENTAL REPLY BRIEF OF CROSS APPELLANT/RESPONDENT

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

CALLISTER, DUNCAN & NEBEKER
John A. Beckstead (A0263)
John H. Rees (A4031)
Suite 800
Kennecott Building
Salt Lake City, Utah 84113
Telephone: (801) 530-7300

Attorneys for Appellants
Shelter America
Corporation

SNOW, CHRISTENSEN & MARTINEAU
Raymond Berry (A0310)
John R. Lund (A4368)
Attorneys for Cross Appellants/
Respondent Ohio Casualty &
Insurance Company
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

TABLE OF CONTENTS

	Page
ARGUMENT	1
POINT I: INCLUSION OF MOBILE HOMES IN THE DEFINITION OF "MOTOR VEHICLE" IS A SUBSTANTIVE CHANGE AND SHOULD NOT BE APPLIED RETROACTIVELY	1
POINT II: THE DEFINITION OF MOTOR VEHICLES DID NOT INCLUDE MOBILE HOMES PRIOR TO THE AMENDMENT	4
CONCLUSION	6

TABLE OF AUTHORITIES

CASES

Foil v. Ballinger, 601 P.2d 144 (Utah 1979)	2, 3
Stephens v. Henderson, 63 Utah Adv. Rpt. 10 (August 13, 1987) .	2
Thorp Finance Corporation v. Wright, 16 Utah 2d 267, 399 P.2d 206 (1965) . . .	4, 5, 6

STATUTES

Utah Code Ann. § 41-3-7	4
Utah Code Ann. § 68-3-3	2
Utah Code Ann. § 78-14-8	2

OTHER

Black's Law Dictionary, p. 687 (5th ed. 1979)	5
Utah Senate Debate; Second Reading of Senate Bill 63; February 9, 1987, Day 29; 47th Legislature	5

IN THE COURT OF APPEALS

FOR THE STATE OF UTAH

SHELTER AMERICA CORPORATION, a Colorado corporation,

Plaintiff-Appellant,

vs.

OHIO CASUALTY & INSURANCE COMPANY, an Ohio corporation,

Defendant-Cross Appellant/Respondent.

Case No. 86-0174-CA

Supreme Court No. 860104

SUPPLEMENTAL REPLY BRIEF OF CROSS APPELLANT/RESPONDENT

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

ARGUMENT

POINT I

INCLUSION OF MOBILE HOMES IN THE DEFINITION OF "MOTOR VEHICLE" IS A SUBSTANTIVE CHANGE AND SHOULD NOT BE APPLIED RETROACTIVELY.

The coverage of Ohio Casualty's motor vehicle dealer's bond should be determined by reference to the definition of motor vehicle which existed at the time that bond was issued. Appellant argues for retroactive application of the amendment

adding mobile homes. This belies appellant's doubt that the earlier definition included mobile homes. Moreover, retroactive application is plainly inappropriate. Utah Code Ann. § 68-3-3 provides that: "No part of these revised is retroactive unless expressly so declared."

Retroactivity was most recently addressed by the Utah Supreme Court in Stephens v. Henderson, 63 Utah Adv. Rpt. 10 (August 13, 1987), where the Liability Reform Act was considered. The court decided that the act, which eliminates joint and several liability, should not be applied retroactively because it affected substantive rights. "The application of a statute is retroactive if it alters the substantive law on which the parties rely." Id. at 10. Ohio Casualty issued its bond in reliance on the existing definition of motor vehicle. To now expand the scope of that bond and Ohio Casualty's corresponding obligation, would directly affect the substantive rights of the parties. As in Stephens, the amendment should not be given retroactive effect.

Appellant's argument that the amendment is simply a clarification of existing law begs the question. Furthermore, the case cited for applying clarifications retroactively is distinguishable from the present case. In Foil v. Ballinger, 601 P.2d 144 (Utah 1979), a medical malpractice claimant failed to comply with the notice of intent to sue provisions of Utah Code

Ann. § 78-14-8. While the action was pending, the legislature amended that statute to expressly provide that it did not apply to actions arising prior to its effective date nor did it determine when an action was commenced for statute of limitations purposes. The legislative history made it quite clear that the legislature had added this amendment to clarify its original intent. The court noted:

> Representative Bangerter, a co-sponsor of the original act as well as of the amendment, stated in the House of Representatives that a problem as to effectuation of legislative intent with respect to the 1976 Act had become apparent following an interpretation of the Malpractice Act by the courts. He noted that this Court had applied the notice requirement retroactively and that the amendment was presented for the purpose of overturning that decision and making it clear that Section 78-14-8 is applicable only to causes of action arising after April 1, 1976.

Id. at 150. Based on this history, the amendment was clearly intended to correct and clarify the initial act. No such legislative history is present here.

In Foil, the court further acknowledged the danger of applying acts retroactively whether for purposes of clarification or otherwise. The court stated:

> We recognize the potential mischief, indeed, the grave constitutional problems, that could arise if the Legislature were to attempt to determine the outcome of a particular case by passage of a law intended to accomplish such a purpose.

Id. at 151. This observation is quite appropriate in the present case where appellant has procured an affidavit from a

state administrator to the effect that the amendment was sought "in response to this type of litigation." Affidavit of Joseph C. Fackerell, Jr., ¶ 7. If the Motor Vehicle Administration considered an amendment to the statute necessary, it was certainly appropriate to seek that amendment. However, it is inappropriate to attempt to enforce such an amendment in a case that arose prior to the amendment.

POINT II

THE AMENDMENT ADDS MOBILE HOMES WHERE THEY WERE NOT INCLUDED BEFORE.

Contrary to appellant's argument, the amendment including mobile homes as motor vehicles does not imply that mobile homes were included before the amendment. If mobile homes were included before, then there was no need for the amendment. Most importantly, appellants have ignored the effect of the Supreme Court's decision in Thorp Finance Corporation v. Wright, 16 Utah 2d 267, 399 P.2d 206 (1965).

In Thorp the court interpreted the definition to include as motor vehicles only those units for which the primary purpose is use on the highways. Id. at 207. This is entirely consistent with the definition itself which only includes "vehicles(s) intended primarily for use and operation on the public highways." Utah Code Ann. § 41-3-7 (before and after amendment). Hence, twenty years ago, the Supreme Court

concluded that house trailers were not motor vehicles. The legislature's recent amendment overrules this decision and the rule of law that it created.

The fact that state agencies have treated mobile homes as motor vehicles is of no consequence. These agencies, at least the Tax Commission, treated house trailers as motor vehicles when Thorp was decided. Id. at 208. That did not affect the court's interpretation of the definition. It requires legislative action, not just historical agency practice, to change the law. From the ruling in Thorp until the legislative amendment, the law of this state did not include mobile homes within the definition of motor vehicles.

Appellant further suggests that the legislative history of the amendment sheds no light on the question presented. This is not quite correct. The legislature did indicate that one of the objectives of the bill was to broaden the definition of automobile dealer. Utah Senate Debate; Second Reading of Senate Bill 63; February 9, 1987, Day 29; 47th Legislature. Clearly, that objective was met by adding mobile home dealers.

The fact that the amendment uses the term "including" has no bearing. Indeed, the current edition of Black's Law Dictionary suggests that "include" can connote an addition as well as a clarification. According to Black's Law Dictionary, p. 687 (5th ed. 1979), "include" means:

> To confine within, hold as in an enclosure, take in, attain, shut up, contain, enclose, comprise, comprehend, embrace, involve. Term may, according to context, express an enlargement and have the meaning of and or in addition to, or merely specify a particular thing already included within general words therefore used. "Including" within statute is interpreted as a word of enlargement or illustrative application as well as a word of limitation.

Hence, the use of the term "including mobile homes," is entirely consistent with the expressed legislative intent to broaden the scope of the statute.

The suggestion that "including mobile homes" was simply a clarification of the statute must be rejected. The statute was clarified by the Utah Supreme Court in Thorp Finance Corporation v. Wright to not include mobile homes. The practice of state agencies treating mobile homes as vehicles intended primarily for use and operation of the public highways was simply contrary to the definition contained in the statute before its amendment. This court should not give retroactive effect to the effort by those agencies to bring the law into conformity with their practices.

CONCLUSION

For these reasons as well as those stated in Ohio Casualty's previous briefs, Ohio Casualty's bond should not have been construed by the lower court to cover fraud involving mobile homes because mobile homes are not motor vehicles as that term

was defined by the governing statute. Ohio Casualty respectfully requests that this Court reverse the ruling of the lower court and rule that Ohio Casualty is not liable to Shelter America in any amount.

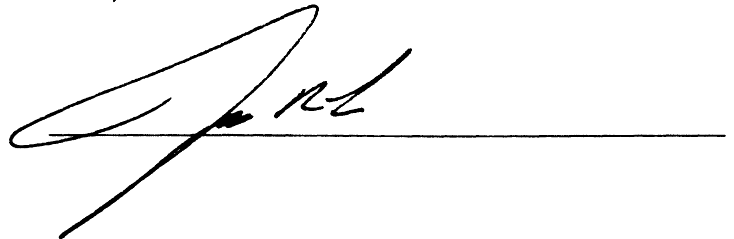
DATED this 19th day of October, 1987.

SNOW, CHRISTENSEN & MARTINEAU

By ______________________
Raymond M. Berry
John R. Lund

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed four (4) true and correct copies of the Supplemental Reply Brief of Cross Appellant/Respondent to John A. Beckstead, Callister, Duncan & Nebeker, Suite 800, Kennecott Building, Salt Lake City, Utah 84113 on the 19th day of October, 1987.



SCMJRL125