

1986

Metropolitan Property and Liability Insurance Company v. Neal W. Finlayson, Lee Childs, Michelle Childs : Unknown

Utah Court of Appeals

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DOCKET NO. 860204-CA IN THE COURT OF APPEALS
OF THE
STATE OF UTAH

METROPOLITAN PROPERTY &
LIABILITY INSURANCE COMPANY,

Plaintiff and
Respondent,

V.

NEAL W. FINLAYSON, individually
and LEE CHILDS, individually
and as Guardian ad litem of
MICHELLE CHILDS, a minor,

Defendant and
Appellant.

No. 860204 - CA

Before Judge Orme,
Bench and Billings

APPELLANT CHILDS' ANSWER TO RESPONDENT METROPOLITAN'S
PETITION FOR REHEARING

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
the Honorable David B. Dee, District Judge, Presiding

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LIABILITY INSURANCE COMPANY,

Plaintiff and
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APPELLANT CHILDS' ANSWER
TO RESPONDENT METROPOLITAN'S
PETITION FOR REHEARING

No. 860204 - CA

MEMORANDUM OF POINTS AND AUTHORITIES

The Court's opinion addresses the differing plausible interpretations of the undefined policy term "regular use", and concludes that the term as utilized in the policy is ambiguous. The opinion did not address other issues for the obvious reason that it was not necessary to do so once an ambiguity was found to

exist.

Appellants prosecuted this appeal from the lower court's ruling, and specified on appeal the issue presented for resolution. An appellant is free to designate the issue or issues to be considered on appeal, and did so in this case. The appellants' designation presents a single issue, which appears at page 2 of their brief:

The legal meaning of the undefined policy provision "regular use" is the issue for consideration on appeal. The question presented is whether the District Court erred in determining as a matter of law that the accident vehicle was one "available" for the insureds "regular use" under the stipulated facts, the policy terms, and applicable decisional law. (emphasis added)

This Court was faced with only two possible resolutions of the single issue presented by the appeal, which were:

1. To determine that the term "regular use" was not ambiguous; and if so, whether the lower court's judgment was supported by substantial evidence.
2. To determine that the term "regular use" was ambiguous; and if so, reverse the lower court's judgment.

Since under the stipulated facts this Court has found the policy term "regular use" to be ambiguous, it is not necessary for this Court to then apply the appellants' suggested definition of the term in order to determine whether or not the exclusion applies. The policy term "regular use" was found to be ambiguous for the reason that the opposing definitions urged by each of the parties were equally plausible interpretations; one of which preserved and the other of which defeated coverage. Construction against the creator of an ambiguity is a basic

requirement of the law; as is a construction of ambiguous policy language which favors rather than defeats insurance coverage. Construing the ambiguity against its creator and in favor of coverage in this case mandates the action which the Court has taken.

2. Metropolitan argues that this Court has adopted a definition of the term "regular use" in line with appellants' suggested "pattern of use" test. A plain reading of the opinion discloses that the tests suggested by both parties were considered and found to be equally plausible interpretations; meaning that the term has more than one different meaning. This Court has not "adopted" appellants' suggested definition of the term, but has only found there to be an ambiguity which must be resolved against its creator.

3. Metropolitan argues that the policy itself incorporates a "frequency" test rather than a "pattern of use" test because of the "temporary substitute automobile" provision contained within the non-owned automobile coverage exclusion.

The policy nowhere utilizes the term "frequent" or "frequently"; and does not inform the reader just what the term "regular use" means, either in the "furnished" or "available" contexts. The "temporary substitute automobile" language deals only with a substitute automobile; which means one that is utilized in place of the described vehicle. It does not impart clear meaning to the term "regular use".

4. Metropolitan argues that public policy behind the exclusion is not fostered by the adoption of a "pattern of use"

test.

As discussed above, this Court's opinion does not adopt a "pattern of use" test, or for that matter any other "test"; but simply concludes that there is an ambiguity in the policy language which must be resolved against its creator. Metropolitan's argument is deficient in failing to recognize that the exclusion does in fact apply where a non-owned automobile is being use within the scope of the purpose for which it was provided to the insured. There is under the Court's opinion no "free" coverage created for such use. The "drive other cars" coverage is designed to provide coverage where the use being made of the vehicle at the time of a given accident is not within the scope of the purpose for which it was provided; and under circumstances where the insured would ordinarily be driving his own vehicle, for which he had paid a premium. There is in actuality no additional or "free" coverage created under the Court's ruling, since the reason the insured would be utilizing his own vehicle for the drinking activities if he did not happen to be operating the employer's pickup. Metropolitan's exposure would be the same in either event.

5. Metropolitan argues that this Court failed to consider the "business use" exclusion of the policy.

From the stipulated facts, Mr. Finlayson's use of the FINCO pickup could not by any stretch of the imagination be considered a "business use" at the time the accident occurred. This Court clearly addresses that point at page 3 of the opinion:

Since the truck was furnished to Neal Finlayson for the use in the course of his employment, i.e., answering calls for and performing mechanical repairs, his use of the truck to go to and from the "Animal House" bar was outside the course, especially in view of the limitations expressly put on his use of the truck by FINCO. (emphasis added)

It is significant that the policy insuring FINCO's pickup did not insure only its "business use". There has been no suggestion, stipulation, or judicial finding there was any "business use" involved. The stipulated facts and this Court's conclusion are to the contrary.

6. Metropolitan argues that this Court did not consider or address the fact that the truck was "available" to Neal Finlayson for the use to which it was being put at the time of the accident.

The stipulated facts are that the accident vehicle was not "furnished" or "available" to Neal Finlayson for drinking excursions to the Animal House or elsewhere which were unrelated to his employment. As this Court has observed, the undefined policy term "regular use" could plausibly mean what either party contends. The ambiguity is obvious, and its existence in and of itself resolves the only issue presented by this appeal.

7. Metropolitan argues that this Court did not consider the "potential" use for which the employer had made the truck available, which potential use might conceivably include the unauthorized drinking excursion to the Animal House.

If the accident had occurred during the course and scope of Neal Finlayson's employment activities, there would be no

coverage and no problem. The fact is it did not. The "potential" for an unauthorized use does not make the truck into a vehicle "furnished" or "available" for such unauthorized use. If the "potential" for such use were to be determinative, the policy could and should have said so, and it did not. Ironically, Metropolitan's argument itself illustrates the ambiguity of the undefined policy term "regular use".

8. Metropolitan argues that the "use" to which the truck was being put at the time of the accident was the same as it had been on numerous other occasions; i.e., taking Mr. Finlayson home, and that this Court should consider its use for that purpose at the time of the accident to be a part of its "regular use".

The stipulated facts include the parties' agreement that the accident vehicle had never been used to facilitate a drinking excursion as it was on the accident date; either in driving to or from the drinking place. The stipulated facts are that the employer's permission did not cover such use. The fortuitous fact that the Finlayson brothers were headed home after departing from the course of their employment on a Bacchanalian lark at the Animal House does not return them to the course or scope of their employer's business. They had abandoned the employer's business when they decided to take the rest of the day off and drink. Under the stipulated facts, their use of the accident vehicle cannot possibly be considered a "business use" as urged by the appellant.

9. Metropolitan argues that this Court did not address the public policy supporting the "drive other cars" exclusion.

Public policy considerations are not relevant where there are other adequate legal bases for a courts' opinion. The finding of an ambiguity alone obviates any need to address public policy considerations.

10. Metropolitan argues that this Court did not consider the internal language of the exclusion, which it claims supports the contention that there is no ambiguity.

This Court's opinion addresses the arguments and authorities of both parties and the internal language of the policy. It is the policy language itself which creates the ambiguity. There is nothing more to consider in the way of policy language than that which has been presented to and considered by the Court.

11. Metropolitan argues that this Court did not address the fact that the FINCO carrier had previously acknowledged the accident to be one covered by its insurance policy.

The FINCO policy is not at issue in this litigation; and the payment of any sums by way of settlement thereunder has no relevance whatever to the issue of this appeal. Respondent's argument implies that payment under the FINCO policy establishes that the accident arose from a "business use" of the accident vehicle by Neal Finlayson. Such an implication is unwarranted. The FINCO policy does not insure only business use of the described vehicle. It insures other and even non consensual uses. The FINCO carrier could not have escaped liability, and

its payment proves nothing.

Any payment under the FINCO policy must of course must be credited against any verdict in appellant's wrongful death action; but that is its only effect. Full or partial payment under another policy, by another carrier, in behalf of another insured has no relevance whatever to the issue raised by this appeal.

12. Metropolitan argues that there are a number of "other issues" beyond the issue of whether Neal Finlayson's use of the FINCO pickup constituted "regular use" within the meaning of the policy.

All of the "other" issues raised by respondent in its petition are secondary to that of the ambiguity which the court has found to exist, and are rendered meaningless by that finding. The presence of the ambiguity in and of itself mandates this Court's decision; without regard to the various opposing but plausible interpretations of the ambiguous policy term. There is simply no need to go further.

13. Metropolitan argues that the "mere" finding of an ambiguity is not dispositive.

Under the stipulated facts, the ambiguous language leads to different and equally plausible results, one supporting and the other defeating coverage. The Court and the parties are legally bound to that interpretation which favors coverage. Once an ambiguity has been found, there is nothing more to consider.

14. Metropolitan argues that since state law requires the approval of policy forms by the Commissioner of Insurance,

the insurance contract forms are not "unilaterally drafted" by insurance companies and "imposed upon an unsuspecting public".

While it is true that policy forms must be filed with and approved by the Insurance Department before their sale to the public, there is no provision in the Insurance Code (Title 31) which precludes an insurer from incorporating a precise definition of policy terms which would reduce or eliminate ambiguity. The insurance Department would never reject a more precise definition of any policy term.

15. Metropolitan argues that further inquiry into "intent" is required by the Court to determine what effect a particular "definition" may have on the "extent" of the exclusion.

As indicated, the facts are stipulated. There was no "negotiation" with respect to the meaning of the policy term "regular use"; and the term in its policy context is ambiguous. The parties' "intent" (if any) is irrelevant.

16. Metropolitan argues that the policy exclusion does not pertain to a particular use at a particular time, and that the "regular use" exclusion should be broadly interpreted to include the "furnished" or "available" concepts; regardless of the particular use to which the vehicle is being put at the time of a given accident.

The weakness of this argument is that the terms utilized could be read, and have been read by other courts, both as covering and as not covering a particular unauthorized use. It is that possibility of opposing but equally plausible

interpretations which creates the ambiguity.

17. Metropolitan argues that the exclusion's terms incorporate by implication a "frequency" test which this Court should consider to remove the ambiguity. Respondent argues that use of the terms "other than a temporary substitute automobile" in the exclusion incorporates a "frequency" test which must be applied to the undefined term "regular use".

The policy nowhere utilizes the term "frequent" or "frequently". The policy does utilize the term "regular use" in a context which makes it ambiguous under certain factual circumstances such as that to which the parties have stipulated. A "temporary substitute automobile" may or may not be one furnished for "regular use". Under the stipulated facts, it is entirely plausible that the accident vehicle might be considered as a "temporary substitute automobile" and therefore covered by definition; since it was being used in place of Neal Finlayson's own automobile to facilitate the drinking activities. Metropolitan's use of the term "temporary substitute automobile" as an exception to the exclusion does not constitute a policy specification of a "frequency" test or render the term "regular use" any less ambiguous. If anything, the policy's assurance of coverage for a non-owned "temporary substitute automobile" reinforces the argument that coverage should be extended under the present facts; since the accident vehicle was being used as a temporary substitute for the insured's own.

It should be noted that the divergent opinions of other courts which are cited in this court's opinion all involved

policies which contained "temporary substitute automobile" provisions that failed to produce uniform interpretations. The ambiguity persists regardless of the "temporary substitute automobile" provision.

18. Metropolitan argues that if the vehicle is "furnished" or "available" for the regular use of the insured (whether actually used or not), it is not a "non-owned automobile" according to the policy definition.

If the vehicle is not used, there is of course no problem. The purpose of insurance is to cover accidents, which ordinarily occur only while a vehicle is being used. If it is used, one should be able to determine by reading the policy terms what use is covered and what is not. Metropolitan's policy language fails to inform the reader with any degree of certainty what is meant by the term "regular use". The insured cannot tell by reading the policy whether he is covered or not. The fact that the courts themselves have reached opposing interpretations is significant, since judges are generally more capable of reading and understanding contracts than laymen.

19. Metropolitan argues against coverage because Mr. Finlayson did not list the accident truck on his own policy and pay a premium for it.

As demonstrated above, it is the insured's unauthorized, temporary, or irregular use of the vehicle that is covered. The situation is comparable to an insured's borrowing a car, or for that matter, stealing one. Metropolitan was aware when it issued the policy that its insured would occasionally operate other cars

for his purposes. The company included "drive other car" coverage in the policy both to provide for such anticipated use and to make its policy more attractive for the insuring public to buy. A non-owned automobile's use in connection with non-work related drinking activities is precisely the type of unauthorized, temporary or irregular use which the coverage contemplates. The FINCO pickup had never been used for such purposes before, and there is no suggestion that it was ever used for such purposes again.

20. Metropolitan finally and once again argues that this Court failed to consider the policy's "business use" exclusion.

This point of Metropolitan's Petition for Rehearing has been addressed above and at pages 3 and 4 of the Court's opinion.

CONCLUSION

The arguments presented in support of Metropolitan's Petition for Rehearing are, without exception, devoid of merit. Reopening the appeal or reversing this Court's decision would encourage the use of ambiguous policy language. If there is to be any public policy consideration, it should be to foster certainty rather than the uncertainty which would be promoted by ignoring the ambiguity which Metropolitan has created and allowing it to escape liability. The company and not the insuring public should pay for Metropolitan's error in failing to incorporate a meaningful definition of the ambiguous term it chose to use.

DATED this 7 day of April, 1988.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Anthony M. Thurber', is written over a horizontal line.

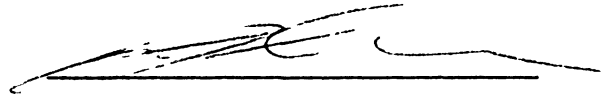
ANTHONY M. THURBER
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CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand delivered, on this 7 day of April, 1988, a true and correct copy of the foregoing to the following:

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A handwritten signature in black ink, appearing to be "J. M. Chipman", written over a horizontal line.