

1968

George Martin English and United Pacific Insurance Company, a Corporation v. Dairyland Mutual Insurance Company, a Corporation : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

GEORGE MARTIN ENGLISH
and UNITED PACIFIC
INSURANCE COMPANY,
a corporation,

*Plaintiffs and
Appellants,*

vs.

DAIRYLAND MUTUAL
INSURANCE COMPANY,
a corporation,

*Defendant and
Respondent.*

Case No.
11156

BRIEF OF APPELLANTS

Appeal from the District Court
of Salt Lake County, Utah
Honorable Stewart M. Hanson, Judge

WORSLEY, SNOW
& CHRISTENSEN
Raymond M. Berry
7th Floor Continental Bank Bldg.
Salt Lake City, Utah 84101

*Attorneys for
Plaintiffs and Appellants*

L. E. MIDGLEY
702 El Paso Natural Gas Building
Salt Lake City, Utah
Attorney for Respondent

Clerk, Supreme Court, Utah

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*Defendant and
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Case No.
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BRIEF OF APPELLANTS

STATEMENT OF THE KIND OF CASE

This is an action for declaratory judgment on
an automobile liability insurance policy.

DISPOSITION IN LOWER COURT

1. The lower court, as a matter of law, denied
appellants' Motion for Summary Judgment in their
favor wherein they requested the lower court to
declare judgment that defendant's policy afforded
liability coverage for George Martin English for

claims arising out of an accident occurring May 14, 1966, in Salt Lake County.

2. The lower court, as a matter of law, granted defendant's Motion for Summary Judgment declaring defendant's policy did not afford liability coverage for the claims arising from the accident of May 14, 1966, and entered judgment in favor of the defendant and against the plaintiffs on December 26, 1967.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the judgment in the lower court and judgment in their favor as a matter of law. They pray that the lower court be ordered to make and enter judgment declaring that George Martin English was an insured of Dairyland Mutual Insurance Company at the time and place of the accident on May 14, 1966.

STATEMENT OF FACTS

PARTIES

Defendant Dairyland Mutual Insurance Company, (hereinafter called Dairyland), is an insurance company at all times herein mentioned authorized to engage in writing automobile liability insurance in the State of Utah. Plaintiff, George M. English, (hereinafter called English), is an individual residing in Salt Lake City, Utah. Plaintiff United Pacific Insurance Company, (hereinafter called United), is an insurance company at all times

herein mentioned duly authorized to engage in the insurance business in the State of Utah.

DAIRYLAND'S COVERAGE

(Exhibit P. 1)

English purchased policy No. 42-014844 from Dairyland for a premium of \$266. This policy was in full force and effect from June 9, 1965, to June 9, 1966. The policy afforded limits of \$10,000/20,000 BI and \$5,000 PD liability coverage.

In addition, under Section II of said policy, it provided that supplementary defense payments would be made and that Dairyland would defend all suits against the insured English and pay all expenses and costs incurred in defending English against any claim for damages.

The automobile described on Dairyland's policy was a 1964 Chevrolet Sport Impala. Section IV of Dairyland's policy is a clause of expansion and extends coverage to replacement vehicles. Section IV, subparagraph 4, provides:

“Newly Acquired Automobile — an automobile, ownership of which is acquired by the named insured or his spouse if a resident of the same household, if (i) it replaces an automobile owned by either and covered by this policy, or the company insures all automobiles owned by the named Insured and such spouse on the date of its delivery, and (ii) the named Insured or such spouse notifies the company within thirty days following such deliv-

ery date. The insurance with respect to the newly acquired automobile does not apply to any loss against which the named Insured or such spouse has other valid and collectible insurance. The named Insured shall pay any additional premium required because of the application of insurance to such newly acquired automobile." (Emphasis added).

AUTOMOBILE TRADES BY ENGLISH

On February 15, 1966, English traded the 1964 Sport Impala described on Dairyland's policy to Majestic Motors of Salt Lake City for a 1964 Monza Corvair and a 1961 Monza Corvair (R. 55, 61, 62).

No notice of this trade of automobiles was given to defendant Dairyland by English (R. 55, 61, 62).

Approximately ten weeks later on April 28, 1966, English and his wife traded the 1961 Monza Corvair and 1964 Monza Corvair in on a single 1966 Corvair Monza convertible. Dairyland was notified on May 20, 1966, that the 1966 Monza Corvair had been delivered to English. Actual notice was given to Dairyland on May 20, 1966, following an accident that occurred on May 14, 1966 while English was using the 1966 Monza Corvair (R. 55, 61, 62).

RATES AND FILING

Dairyland admits the premium rate for liability coverage on the 1966 Monza Corvair was and

is exactly the same as on the 1964 Sport Impala (R. 41, 45).

Dairyland filed proof of financial responsibility for the period of its policy June 9, 1965 to June 9, 1966. And Dairyland admits its policy was in force and effect on the date of the accident and does not claim its policy was invalid or void at the time of the accident (R. 42, 45).

INVOLVEMENT OF UNITED

On April 28 at the time English purchased a 1966 Monza, Mrs. English, on behalf of her husband and herself, applied for complete insurance from the Archer-Ackerlind Agency. She explained her requirements to Mr. Ackerlind and arranged to have coverage effective on the 1966 Monza from April 28, 1966, covering comprehensive, collision, \$100 deductible and medical payments. Further, she requested liability coverage, \$10,000/20,000 BI and \$5,000 PD, to be in effect from April 28, 1966, or upon the expiration of Dairyland's liability coverage. Mrs. English couldn't furnish Mr. Ackerlind the expiration date of Dairyland's policy and therefore he agreed to obtain coverage for Mrs. English, with the understanding that the comprehensive collision and medical pay would take effect on April 28, 1966, and the liability would take effect on that date or upon the date of the expiration of the policy of Dairyland if that policy was still in effect and still affording coverage. Before the date of expira-

tion of Dairyland's policy was obtained for Mr. Ack-
erlind, the accident occurred (R. 64, 65).

After the accident occurred, Mr. Ackerlind re-
ported the accident to Dairyland and United.

United was advised by English that Dairyland
disclaimed coverage for the accident because Eng-
lish had not reported delivery to Dairyland of the
two interim 1961 Monza Corvairs within thirty
days of their delivery to English.

Thereafter, United reasoned that if Dairy-
land's policy did not afford coverage, its policy did
afford coverage and English and United agreed that
United would defend the claims of Gray and Nel-
son against English and then they would seek re-
covery from Dairyland for the amount of loss, ex-
pense, judgment or settlement made.

The reasonableness of United's settlements
with Gray and English is not disputed.

ARGUMENT

POINT I

AN INSURANCE POLICY SHOULD BE IN-
TERPRETED TO GIVE THE INSURED THE
BROADEST PROTECTION.

In *Jorgensen vs. Hartford Fire Insurance Co.*,
(1962), 13 Utah 2d 303, 373 P.2d 580, this court
said a policy should be interpreted to give the insur-
ed the broadest protection that could be reasonably
understood by the terms of the policy.

Stout vs. Washington Fire and Marine Insurance Co., (1963), 14 Utah 2d 414, 385 P.2d 608, holds that in interpreting a liability insurance policy all doubts are resolved against the insurance company. Effort should be made to interpret an insurance policy to afford coverage and not to deny coverage.

Appellants submit that contrary to the foregoing rules of construction the lower court strictly construed the policy against English and broadly construed the policy in favor of Dairyland.

The lower court misinterpreted the newly acquired automobile coverage and required English to give notice to Dairyland on March 16, 1966, or before, as to the first trades. However, Dairyland's policy merely required English to give notice of a newly acquired automobile within thirty days after delivery of said automobile to him.

POINT II

FAILURE TO GIVE NOTICE OF FIRST REPLACEMENTS DOES NOT DEFEAT COVERAGE FOR LAST REPLACEMENT AUTOMOBILE.

Kaczmark vs. LaPierrier, (1953), Mich., 60 NW 2d 327, correctly states the rule to be followed. In this case, the insured bought an Oldsmobile to replace a Packard covered under the policy and then without giving the insurance company notice of this change, subsequently acquired a Pontiac to replace

the Oldsmobile and then notified the insurer of this last acquisition within thirty days of delivery of the Pontiac to him. In this case the court held the Pontiac was a replacement of the Packard within the meaning of the automatic insurance clause affording coverage on newly acquired automobiles notwithstanding the insured's intervening ownership of the Oldsmobile.

Appellants submit that if notice was to be given to the insurance company within thirty days after the described automobile is traded or sold, the insurance company could easily have made its intention understandable by providing that the company get notice within thirty days after trading or selling the described automobile.

If giving notice within thirty days of selling the described automobile is required, the policy is ambiguous.

POINT III

AN INSURER CAN NOT RELY ON FAILURE
TO GIVE NOTICE UNLESS PREJUDICE IS
SHOWN.

In *Appleman Insurance Law and Practice*, Section 4293, it stated the condition requiring reporting during the policy period of a newly acquired automobile is for premium purposes only and not intended to effect a denial of coverage.

Appleman's analysis is fair and accurate in view of the fact the insurance premium for liability

coverage on a 1966 Monza Corvair was the same as the premium for liability coverage on the 1964 Impala described on the policy.

In at least two cases this court has stated that failure to give notice by an insured is not a defense unless prejudice is shown. *Rasmussen vs. Western Casualty & Surety Co.*, (1964), 15 Utah 2d 333, 393 P.2d 376, involved a situation where an insured who had an audit type policy failed to give the insurer notice of the vehicle involved in the accident during a prior year. The insurer, Western Casualty & Surety Co., in that case took the position that failure to give notice of the automobile during the prior year defeated coverage. However, the court pointed out to the insurer that the insured was entitled to coverage and the insurance company's remedy was to collect the additional premium and that it was not entitled to disclaim coverage.

Johnson Red-E-Mix Construction Co. vs. United Pacific Insurance Co., (1961) 11 Utah 2d 279, 358 P.2d 337, involved a situation where an insured waited three years to give the insurance company notice of an accident where the policy required notice as soon as practical. This court said all the insured was required to do was give notice as was reasonable and that the insured should not be deprived of the benefits for which it paid a premium when the insurer could not show it was prejudiced by the lack of notice.

Unless by the replacement of one vehicle for another the risk has been materially increased, there is no basis for an insurance company to complain about failure to give notice within thirty days of delivery of the last replacement vehicle.

Western Casualty & Surety Co. vs. Lund, (1956), 10 Cir. Okla., 234 F.2d 916, is the leading federal case on this question from the 10th Circuit. In this case Sprague purchased a DeSoto automobile on February 16, 1954. Later, Sprague traded the DeSoto for a Ford automobile and later traded the Ford automobile for an Oldsmobile on March 8, 1964. While driving the Oldsmobile Sprague was involved in an accident and Western Casualty & Surety Company disclaimed coverage because he had failed to notify them of the substitution of automobiles within thirty days after the first trade was made. Western Casualty & Surety Company's policy defined newly acquired automobile as follows:

“Newly Acquired Automobile — an automobile, ownership of which is acquired by the named Insured, who is the owner of the described automobile, if the named Insured notifies the company within thirty days following the date of its delivery to him and if either it replaces an automobile described in the policy or the company insures all automobiles owned by the named insured at such delivery date . . .”

The 10th Circuit Court held the purpose of the foregoing provision was to provide Sprague with

automatic coverage and said giving of the notice within thirty days after delivery of the new vehicle was not a requisite to coverage and that the insured was covered without giving notice within thirty days.

Maryland Indemnity & Fire Insurance Exchange vs. Steers, (1962) 21 Md. 380, 157 A.2d 803, involved a situation where a policy was issued in December of 1955 describing a 1946 Oldsmobile. Later and sometime prior to April of 1956, the Oldsmobile became inoperative and the insured purchased a 1956 Dodge. The purchase of the Dodge was not brought to the attention of the insurer and when the policy was renewed in December of 1956, the Oldsmobile appeared as the described automobile. In March of 1957, the insured sold the Dodge and bought a 1955 Ford transferring the license plates from the Dodge to the Ford. In November of 1957, the insured, while driving the Ford, was involved in a collision and the insurance company endeavored to disclaim the coverage because of the insured's failure to notify the company of the first replacement of the Oldsmobile with the Dodge. The court held the replacement of the Oldsmobile with the Dodge and the Dodge with the Ford was not material and was in fact immaterial under the terms of the policy as there was no increase in hazard and then held the Ford to be covered as a newly acquired replacement automobile.

Ashgrove Lime and Portland Cement Co. vs. Southern Surety Co., (1931), 225 Mo. App. 712, 39 SW 2d 434, is an early leading case on this subject. In this case, the insured exchanged an automobile for one listed on the policy. No notice of the exchange was given and five months later after the date of exchange, an accident occurred. The policy required no notice of an exchange as a condition of the policy to afford coverage. The Missouri Court held the notice provision was not for the purpose of allowing the insured to say whether or not it was willing to exchange coverage for a newly acquired automobile, but was rather to protect the insurer in collecting an additional premium on such cars. The court concluded the provision was not a condition precedent to coverage as the policy contained no forfeiture provision for failure to perform the condition. Since this case was decided many other authorities have yielded to this line of reasoning.

The provision in Dairyland's policy in the newly acquired automobile clause providing that the named insured shall pay any additional premium required because of the application of insurance to such newly acquired automobile, shows the purpose of notice to be for collection of premium and not for denial of coverage.

National Indemnity Co. vs. Giampapa, (1965), 62 Wash. 2d, 399 P.2d 81, discusses the term newly acquired automobile. In this case, Kilmer, the

insured, purchased an automobile liability policy covering a 1949 Cadillac with an effective policy period from September 16, 1960 to September 16, 1961. On March 11, 1961, the Cadillac became inoperable and Kilmer thereafter used a 1956 Ford he had owned when he acquired the policy designating the 1949 Cadillac. No notice was given to the company that Kilmer desired to substitute the 1956 Ford for the Cadillac until after an accident occurred on March 15, 1961, while Kilmer was operating the Ford. The Washington Court held there was coverage as to the 1956 Ford on the theory the Ford was a replacement for a car that had been junked. The court said the purpose of the notice provision was to limit the liability of the insurance company to the operation of one automobile by an insured.

Birch vs. Harbor Insurance Co., (1954), 126 C.A. 2d 714, 272 P.2d 784, is a case involving an identical provision relating to coverage on a newly acquired automobile. In this case, newly acquired automobile was defined as follows:

“(4) Newly Acquired Automobile — an automobile, ownership of which is acquired by the named insured who is the owner of the described automobile, if the named insured notifies the company within thirty days following the date of its delivery to him, and if either it replaces an automobile described in this policy or the company insures all automobiles owned by the named insured at such

delivery date; but the insurance with respect to the newly acquired automobile does not apply to any loss against which the named insured has other valid and collectible insurance. The named insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile."

In this case the policy described a 1950 Ford and was issued to one Martin on July 5, 1950, for a term of one year. On the evening of November 22, 1950, Martin acquired and took delivery of a 1935 Chevrolet. On the afternoon of September 22, 1950, Martin was involved in an automobile accident while driving the Chevrolet. In this case the court held there was coverage for Martin as the Chevrolet replaced the described automobile saying there was coverage for a thirty day period involving the replacement automobile even though no notice of delivery of the additional automobile had been given.

In *Hoffman vs. Illinois National Casualty Co.*, (1947) 159 F.2d 564, the 7th Circuit Court of Appeals affirmed a judgment in favor of an assured under a policy similar to the one involved here. In the Illinois National Casualty Company policy it was provided that the named insured notify the company within thirty days following the date of delivery of a newly acquired automobile. The tractor owned by the plaintiff was involved in an accident on April 1, 1943. Defendant was notified of this accident and a claim for damages was made by plain-

tiff. On April 9, 1943, while the claim was pending, the plaintiff purchased another tractor and thereafter used this tractor. On April 12, 1943, the claim for damages to the first tractor was settled and plaintiff said nothing about wanting coverage on the new tractor. On April 16, while being operated by plaintiff's agent, it was involved in a serious accident. The court held there was coverage for the second accident saying there was automatic coverage on the second tractor for a period of thirty days after its delivery to the plaintiff or insured.

In *Yahnke vs. State Farm Fire & Casualty Co.*, (1966), 4 Ariz. App. 287, 419 P.2d 548, the facts are different. However, the Arizona Appellate Court states there is coverage for a newly acquired automobile if, within thirty days of delivery of it, the company is notified.

Since coverage is automatic through the thirty day period after delivery of a newly acquired vehicle, failure to give notice of a newly acquired automobile is not a defense.

In a recent case the Montana Supreme Court in *Glacier General Assurance Co. vs. State Farm Mutual Auto Insurance Co.*, (1968), Mont., 436 P. 2d 533, the court stated that the "newly acquired automobile" clause is intended to benefit the insured and should be liberally construed in his favor. The court in this case held that although the insured did not give notice to the defendant insurer

within thirty days after acquiring the newly acquired automobile as required by the "newly acquired automobile" clause, the new automobile was covered as to an accident which occurred during the thirty day notice period.

In the *Glacier General* case, Emelyn Stuart, mother of Sherman L. Stuart, owned a 1955 Chevrolet covered by a liability policy issued by State Farm Mutual for a period effective through April 22, 1963. On February 4, 1963, Sherman L. Stuart, the son, purchased a 1957 Cadillac and obtained liability coverage on this automobile with Glacier General effective as of February 4, 1963. On April 8, 1963, Emelyn and Sherman L. Stuart purchased as joint tenants a 1959 Chevrolet and transferred in part payment thereof the 1955 Chevrolet insured under State Farm's policy. Thereafter, on April 22, 1963, Sherman L. Stuart was in an accident while operating the 1959 Chevrolet. Glacier General afforded coverage under its liability policy to Sherman L. Stuart. However, State Farm denied coverage to Emelyn and Sherman L. Stuart and the action was instituted by Glacier General Assurance to compel contribution from State Farm for the sums it had expended in settling claims.

The Montana Court held there was coverage under the State Farm Mutual policy and that coverage was automatic through the thirty day designated period and that it was immaterial whether or not the insurance company had notice of a newly

acquired automobile within the thirty day notice period. The court stated that since coverage was automatic through the designated period it was immaterial whether or not the insured did not notify the company of the acquisition of the newly acquired automobile or whether the insured did or did not pay an additional premium. The court also pointed out that even if Sherman L. Stuart had not intended that he have coverage under the State Farm policy, that the policy was nevertheless in force and effect according to its terms and that coverage should be afforded.

CONCLUSION

The lower court should be reversed and directed as a matter of law to enter judgment in favor of the appellants because:

1. English gave notice within twenty-two days of the delivery of the automobile he was operating at the time of the accident.
2. The purpose of the notice clause is to assist the insurance company to collect an additional premium.
3. The defendant can not show it was prejudiced by the replacement of the 1966 Monza Corvair for the described 1964 Impala.
4. The lower court erred in holding that notification to Dairyland was required by English on March 16, 1966.

5. The policy is ambiguous if it requires notice to be given on March 16, 1966, as claimed by respondent.

6. The insurance policy should be liberally construed to protect the interest of the insured and the intent of the company is not controlling.

For these reasons appellants respectfully submit the lower court should be reversed and directed to enter judgment ordering Dairyland to afford coverage to George Martin English for claims arising out of the accident on May 14, 1966.

Respectfully submitted,

WORSLEY, SNOW
& CHRISTENSEN
Raymond M. Berry
7th Floor Continental Bank Bldg.
Salt Lake City, Utah 84101

*Attorneys for
Plaintiffs and Appellants*