

1968

# Universal Underwriters Insurance Company v. Allstate Insurance Comp Any, a Corporation : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

UNIVERSAL UNDERWRITERS  
INSURANCE COMPANY, a  
Corporation,

*Plaintiff and Appellant,*

—vs.—

ALLSTATE INSURANCE  
COMPANY, a Corporation,

*Defendant and Respondent.*

Case No. 11176

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BRIEF OF RESPONDENT

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Appeal from the Judgment of the  
Third Judicial District Court for Salt Lake County  
Honorable Stewart M. Hanson, Judge

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

HANSON & GARRETT  
W. BRENT WILCOX, Esq.  
520 Continental Bank Building  
Salt Lake City, Utah  
*Attorneys for Appellant*

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Clerk, Supreme Court, Utah

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BRIEF OF RESPONDENT

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STATEMENT OF FACTS

The Appellant's Statement of Facts is correctly stated.

However, Appellant omitted including the fact that the Allstate policy also contained the following provision:

"If there is other insurance

". . . The insurance with respect to a temporary substitute automobile or a non-owned automobile shall be excess insurance over any other collectible insurance." (Exhibit D-1)

## ARGUMENT

### POINT ONE

THE USE OF A CUSTOMER'S CAR BY A GARAGE AS PART OF ITS CONTRACTUAL OBLIGATION OWING TO THE CUSTOMER IS EXCLUDED AS USE IN THE AUTOMOBILE BUSINESS.

The true test of whether a car is being used in the automobile business at the time of an accident should be, we submit, the same test applied to the question of agency. If the driver is an agent for the automobile business, acting within the scope of his agency for the benefit of the business, there should be no doubt that the car was being used in the business.

This Court has recognized that test :

In *National Farmers Union vs. Farmers Insurance Group*, 14 Ut. 2d 89 377 P 2d 786 (1963), the customer, insured by National Farmers Union took his car to Bountiful Motors for repairs. Farmers Insurance Group insured Bountiful Motors. A salesman loaned the customer his private car to drive to the customer's home and enroute the customer was involved in an accident.

The Supreme Court held that the car, under the circumstances, was not being used in the garage business and the Court states, after citing other cases :

"These cases look at the use of the car from the standpoint of the driver. In this case the driver was not an employee or agent of Bountiful Motors."

Company, and was not in any way engaged in the automobile business. The (salesman's) automobile was not turned over to (the customer) to be used by him for any business purpose."

The Plaintiff-Appellant has heretofore been advised by the Supreme Court of Virginia that its position stated to this Court is untenable.

In *Universal Underwriters vs. Strohkorf*, 205 Va. 472, 137 SE 2d 913, the facts were that Perdue, an employee of E. R. Motor Company was driving a customer's car, after repairs, for the purpose of delivering it to another location where the customer was to pick up the repaired car. Enroute the employee of the Motor Company was involved in an accident.

The policy exclusion in the customer's insurance policy was the same as the one here. The Virginia Supreme Court states:

"The admission of Universal that its . . . policy covered the operation of the car by Perdue is necessarily an admission that the operation was 'in the automobile business' of E. R. Motors, because that is one of the hazards insured against under the express terms of Universal's policy. Obviously if the operation of the car by Perdue was a use in the automobile business of E. R. Motors within the meaning of the insuring clause of Universal's policy, it was a use in such automobile business within the meaning of the exclusion clause of United's policy."

“The use of the vehicle was not incidental to E. R.’s business.” *It was an integral part of the service offered customers for the obvious purpose of increasing business.*” (Emphasis added)

In the instant case, Olsen Chevrolet had agreed, as part of their fine super service extended to customers, to pick up, repair, *and return the customer’s car to his door step.* The garage had not yet completed their “contract” when their agent, while attempting to carry out the garage’s duties, was involved in the collision.

The Nebraska Supreme Court, citing with approval this Court’s opinion in the *National Farmers* case (Supra pg. 2) has expertly rationalized the cases.

In *Truck Insurance Exchange vs. State Farm Mutual*, 192 Neb. 330; 154 N.W. 2nd 524 the facts were that Tennison (Service Station) agreed to service Naughton’s car which the customer was to pick up at the station later. While moving the car for the purpose of parking it, Tennison was involved in a collision. The exclusions in the policies were identical with the ones here. The Court states—Page 525:

“... Tennison was engaged in the business of servicing automobiles. In connection with such business, it was necessary to occasionally move and park the vehicles serviced. *They did not have authority to use the Naughton vehicle for their own purposes in the furtherance of their business ... but only to service and care for it.*” (Emphasis ours)

Appellant's cases are not at all as clear as its Brief would indicate.

In *Allstate vs. Skawinski*, 40 Ill. App. 2d 136, 189 N.E. 2d 365, quoted at Page 9 of Appellant's Brief, Allstate insured the garage; the garage man was working on the motor, and not even in the car, when the car jumped forward and injured the car owner. The Court, of course, held that the garage man was not "using" the car, but was repairing it. The Court then states — Page 367:

"If Skawinski was employing the automobile to obtain parts, or for delivery purposes, or as a 'courtesy car' for the benefit of his customers, then he would indeed have been using this non-owned automobile in his business."

Again *Capece vs. Allstate vs. State Farm*, 86 N.J. Super 462, 207 Atl. 2d 207, cited at Page 8 of Appellant's Brief is hardly of help in this case. There, the service station operator was moving the customer's car to put it on a hoist to service it, and the Court held that was not a "use" within the exclusion.

*Cherot v. U. S. F. & G.*, 264 Fed. 2d 767 (Pg. 5 App. Brief) the Court simply held that the driver in question was not engaged in the automobile business in the first place.

In *Western Alliance vs. Cox*, (Texas) 394 S.W. 2d 238 (Pg. 11 App. Brief) the insured asked a friend to drive the insured car to a service station which was owned by the permittee's father, and was involved in an accident enroute. Of course, under those facts, the exclusion would not apply.



Of course, we do not contend that conflict between some Jurisdictions does not exist, on the interpretation of the exclusionary clause in light with different factual situations. From our review of the cases it is quite apparent that some Jurisdictions have refused to deprive the *insured* protection where he is equally liable with the driver. (e.g. Where the owner is liable for the negligence of the driver).

We feel this Court has followed the better reasoned cases, and that the right of the Insurance Companies to limit their coverage so as not to include garages or agents of automobile businesses should be upheld.

7 Appleman Insurance Law and Practice, Sec. 4372, Pg. 341, states:

“Under a standard automobile policy, a limitation is applied to the coverage of the . . . policy so as not to extend coverage over to a . . . garage . . . even though such establishment has rightful custody of the vehicle . . . Such clauses are held reasonable and valid, and have repeatedly been enforced by the Courts, which have considered that the hazard in such a business is undoubtedly greater and have permitted the insurer to limit the risk which it desires to assume.”

## POINT TWO

A GARAGE CUSTOMER HAS NO LEGAL OR OTHER REASON TO PROVIDE LIABILITY PROTECTION FOR THE GARAGE, OR TO REDUCE THE RISKS ASSUMED BY THE GARAGE'S INSURER.

The exclusion under consideration is included in all personal liability insurance policies for a reason, to reduce the risks, and therefore the premiums charged. If Appellant's contentions were correct, and by Judicial Decree of this Court, the exclusion is eliminated from the policy, we need not be a seer to foresee a rise in insurance premiums on all private passenger car policies. This is obvious from the very fact that overnight the companies will have several new "additional insureds" on every policy written in the State of Utah. Every vehicle needs servicing and repairs, and under Appellant's theory, every service station and every garage, every used car dealer and every parking lot that gains temporary custody of a car is from now on a mere permissive user of the owner for whom the owner must pay an additional premium to protect them from legal liability.

The Washington Supreme Court in *Northwestern Mutual Insurance Co. vs. Great American Insurance Co.*, 404 Pac. 2d 995, (App. Brief, Pg. 11) states:

"And so, here, the owner of the car, which had been serviced and was being returned to his home, would be quite astonished to learn that his car — all of the time that it was out of his possession— was being used in the automobile business."

If we may paraphrase that Honorable Court, we might state:

Olsen Chevrolet Company, who had paid a premium to protect itself from liability arising from the negligence of its employees, would be quite astonished to learn that the customers have unwittingly been providing that coverage.

The Appellant is an insurance company who was paid a premium for its Garage Liability Policy. There is no rhyme nor reason why it should be released from the risk it was paid to accept. By this Appeal, the Appellant is attempting to advance its own interest only. It cannot even maintain that it is upholding the interest of its own insured, Olsen Chevrolet Company.

The contention of Universal, therefore, that the policy should be strictly construed against Allstate is without any basis in logic or reason.

In *LeFelt vs. Nasarow*, 71 N.J. Super 538 (App. Brief Pg. 11):

“Solution of a problem of construction of an insurance policy must be approached with a well settled doctrine in mind. If the controlling language will support two meanings, one favorable to the insurer, and the other favorable *to the insured*, the interpretation sustaining coverage must be applied. Courts are bound to *protect the insured* to the full extent that any fair interpretation will allow.

“These general rules of construction have spawned a number of subsidiary ones of equally universal recognition. For example, where the policy provision under examination relates to the inclusion of persons other than the named insured within the protection afforded, a broad and liberal view is taken of the coverage extended. *But, if the clause in question is one of exclusion or exception, designed to limit the protection, a strict interpretation is applied. Cal-Farm Ins. Co. v. Boisserane*, 151 Cal. App. 2d 775, 312 P.2d 401, 405 (D.C. App. 1957).”

Certainly Universal cannot maintain that the policy should be construed in "favor" of Allstate's insured when such a "favorable" interpretation would raise the insured's premium.

### POINT THREE

IN ANY EVENT, UNIVERSAL'S INSURANCE COVERAGE IS PRIMARY.

We believe that it is probably a moot question inasmuch as we feel strongly that the exclusionary clause is enforceable and should be upheld.

However, even if this Court should rule otherwise, both insurance policies provide that if there is other valid and collectible insurance, the policy is secondary coverage to the other policy.

Universal's insured, Olsen Chevrolet Company, through its agent, who was operating the vehicle in the course and scope of his employment, was involved in the accident. There could be absolutely no liability upon Allstate's insured.

Even the Washington Court in the Northwestern Mutual case (*supra*) refused to rule that the customer's insurance was primary.

## CONCLUSION

It is respectfully submitted, therefore, that the Judgment of the District Court should be affirmed.

Respectfully submitted,

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