

1996

VIKING INSURANCE COMPANY OF
WISCONSIN, Plaintiff and Petitioner, vs. ALLEN
COLEMAN, RENE B PETERSON, TRANS
COASTAL TRUCKING, and UTAH
DEPARTMENT OF TRANSPORTATION,
Defendants and Respondents.: Brief in Opposition
to Certiorari

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



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.

Taylor D. Carr; Attorney at Law; Attorneys for Appellee.

Barbara K. Barrett; Weiss Berrett Loyd Petty, L.C.; Attorneys for Appellant.

Recommended Citation

Legal Brief, *Viking Insurance Company v. Coleman*, No. 960278 (Utah Court of Appeals, 1996).
https://digitalcommons.law.byu.edu/byu_ca2/211

This Legal 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
DOCUMENT
KFU
45.9
.S9

UTAH SUPREME COURT
BRIEF

DOCKET NO. 960278-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

VIKING INSURANCE COMPANY OF
WISCONSIN,

Plaintiff/Petitioner,

vs.

ALLEN COLEMAN, RENE B. PETERSON,
TRANS COASTAL TRUCKING, and UTAH
DEPARTMENT OF TRANSPORTATION,

Defendants/Respondents.

Supreme Court No. _____

Case No. 960278-CA

TRANS COASTAL TRUCKING'S AND ALLEN COLEMAN'S BRIEF IN
OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Barbara K. Berrett
WEISS BERRETT LOYD PETTY, L.C.
1100 First Interstate Building
170 South Main Street
Salt Lake City, Utah 84101
(801) 531-7733
Attorneys for Defendant/Respondent
Trans Coastal Trucking

Taylor D. Carr
Attorney at Law
8 East Broadway, Suite 201
Salt Lake City, Utah 84111
(801) 363-0888
Attorney for Defendant/Respondent
Allen Coleman

FILED

JAN 6 - 1997

CLERK SUPREME COURT
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

VIKING INSURANCE COMPANY OF
WISCONSIN,

Plaintiff/Petitioner,

vs

ALLEN COLEMAN, RENE B PETERSON,
TRANS COASTAL TRUCKING, and UTAH
DEPARTMENT OF TRANSPORTATION,

Defendants/Respondents

Supreme Court No _____

Case No 960278-CA

**TRANS COASTAL TRUCKING'S AND ALLEN COLEMAN'S BRIEF IN
OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

Barbara K Berrett
WEISS BERRETT LOYD PETTY, L C
1100 First Interstate Building
170 South Main Street
Salt Lake City, Utah 84101
(801) 531-7733
Attorneys for Defendant/Respondent
Trans Coastal Trucking

Taylor D Carr
Attorney at Law
8 East Broadway, Suite 201
Salt Lake City, Utah 84111
(801) 363-0888
Attorney for Defendant/Respondent
Allen Coleman

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
PARTIES TO THE PROCEEDINGS	1
QUESTIONS PRESENTED FOR REVIEW	1
THE OPINION ISSUED BY THE COURT OF APPEALS	1
STATEMENT OF JURISDICTION	2
CONTROLLING PROVISIONS	2
STATEMENT OF THE CASE	3
NATURE OF THE CASE	3
COURSE OF PROCEEDINGS	3
DISPOSITION BELOW	4
FACTS RELEVANT FOR REVIEW	4
ARGUMENT	7
I. THE STATUTORY INTERPRETATION OF SECTION 31A-22-303(1) IS NOT AT ISSUE, THEREFORE, THE COURT OF APPEALS WAS CORRECT NOT TO ADDRESS THE STATUTE	7
II. THE COURT OF APPEALS APPLIED A “CAUSAL NEXUS” TEST IN THIS CASE AND DID NOT APPLY A “BUT FOR” TEST	8
III. THE COURT OF APPEALS DID NOT BASE THEIR FINDING OF COVERAGE ON THE BASIS OF THE SUBJECTIVE INTENT OF THE INSURED	10
CONCLUSION	11

TABLE OF AUTHORITIES

CASES

<u>Aetna Cas. & Sur. Co. v. McMichael,</u> 906 P.2d 92, 103 (Colo. 1995)	10
<u>DiEnes v. Safeco Life Ins. Co.,</u> 442 P.2d 468, 471 (Utah 1968)	8
<u>Eichelberger v. Warner,</u> 434 A.2d 747 (Pa. Super. 1995)	9
<u>National Farmers Union Property & Casualty Co. v. Western Casualty & Surety Co.,</u> 577 P.2d 961 (Utah 1978)	1, 10
<u>P.E. Ashton Co. v. Joyner,</u> 406 P.2d 306, 308 (Utah 1965)	8
<u>U.S. Fidelity & Guar. Co. v. Sandt,</u> 854 P.2d 519, 521 (Utah 1993)	8

STATUTES

Utah Rules of Appellate Procedure, Rule 46(a)(4)	1
Utah Code Annotated, Section 31A-22-303	2, 7, 8
Utah Code Annotated, Section 31A-22-303(1)	7
Utah Code Annotated, Section 78-2-2(3)(a)	2
Utah Code Annotated, Section 78-2-2(5)	2

PARTIES TO THE PROCEEDINGS

Plaintiff/petitioner, Viking Insurance Company of Wisconsin (hereinafter “Viking”), has correctly stated the relevant parties to this proceeding.

QUESTIONS PRESENTED FOR REVIEW

Viking has cited Rule 46(a)(4), Utah Rules of Appellate Procedure, as grounds for its Petition. Viking contends that the opinion by the Court of Appeals contains three errors. Viking further argues that these three errors encompass important issues of state law which are of first impression to this Court. However, a review of the Court of Appeals’ Opinion demonstrates that the Court of Appeals did not err and, indeed, that the decision rendered in the above-cited case is grounded in precepts set forth earlier by this Court in National Farmers Union Property & Casualty Co. v. Western Casualty & Surety Co., 577 P.2d 961 (Utah 1978). Thus, Viking’s Petition should be denied. (The specifics of defendants/respondents, Trans Coastal Trucking’s (hereinafter “Trans Coastal”) and Allen Coleman’s (hereinafter “Coleman”), objections to the three issues cited by Viking is more thoroughly discussed in the Argument section of this Brief).

THE OPINION ISSUED BY THE COURT OF APPEALS

While it is correct that the Court of Appeals filed its Opinion on November 7, 1996, reversing the trial court’s Order granting Viking’s Motion for Summary Judgment, Viking has mischaracterized the specific holding and basis of said Opinion. Trans Coastal, at the Court of Appeals, argued that a “causal nexus” or “causal connection” test be applied by the Court to determine whether or not the accident arose out of the ownership, maintenance, or use of the vehicle. This test was based on both this Court’s analysis in National Farmers Union Property &

Casualty Co. v. Western Casualty & Surety Co., 577 P.2d 961 (Utah 1978), as well as case law from other jurisdictions cited to the Court by Trans Coastal and Coleman. Indeed, the Opinion issued by the Court of Appeals in this case specifically adopts this “causal nexus” or “causal connection” test, requiring that the accident have a causal connection or nexus to the vehicle. The Court of Appeals clearly did not base its decision on the subjective intent of Coleman rather, it based its decision on the objective facts and circumstances of the case in light of the terms of the insurance contract at issue.

STATEMENT OF JURISDICTION

Jurisdiction of the Utah Supreme Court is appropriate under Utah Code Ann. §78-2-2(3)(a) and (5).

CONTROLLING PROVISIONS

Trans Coastal and Coleman specifically reject the contention made by Viking that this is a statutory interpretation case. Viking’s Complaint requests that the trial court declare the rights and duties of Viking under its insurance contract and does not mention §31A-22-303, Utah Code Ann. (R. 1-4). Additionally, in filing its Motion for Summary Judgment, Viking alleged that there was no coverage under the insurance contract for the accident, and did not ask the court below to interpret the statute now cited. Thus, the rules of construction for insurance contracts apply, and not the rules of construction for statutes. Accordingly, §31A-22-303, Utah Code Ann. is not controlling or relevant to this case.

STATEMENT OF THE CASE

NATURE OF THE CASE

This case came before the Court of Appeals on appeal of the district court's Order finding that the accident in question did not reasonably arise out of the operation, maintenance, or use of an insured vehicle under the terms of the Viking insurance contract issued to defendant Coleman, and as a result thereof, that Viking owed no duty to indemnify its insured, Coleman, or the many defendants who are all claimants.

COURSE OF PROCEEDINGS

Viking filed this action on December 20, 1994, against defendants, Coleman, Trans Coastal, Rene B. Peterson (hereinafter "Peterson") and Utah Department of Transportation (hereinafter "UDOT"). (R. 1-6). This action concerns an accident which occurred on January 7, 1994, on State Road 201 in Salt Lake County, Utah. (R. 2). Viking brought this declaratory judgment action, seeking a determination by the court that the accident in question did not arise out of "the ownership, maintenance or use" of a car as stated in the terms of Viking's insurance contract. (R. 4).

To this end, on May 9, 1995, plaintiff filed its Motion for Summary Judgment on this issue. (R. 82). Subsequently, on May 22, 1995, Trans Coastal filed a Cross-Motion for Summary Judgment on the same issue. (R. 162). Coleman, on May 24, 1995, joined in Trans Coastal's Cross-Motion for Summary Judgment. (R. 195). On May 26, 1995, Peterson joined in Trans Coastal's Cross-Motion for Summary Judgment. (R. 198).

On or about August 1, 1995, oral argument was held before the Honorable Homer

F. Wilkinson on the Cross-Motions for Summary Judgment. At the end of argument, the district court granted Viking's Motion for Summary Judgment and denied Trans Coastal's, Coleman's and Peterson's Cross-Motions for Summary Judgment. (R. 228). Thereafter, on or about October 10, 1995, the court entered its Order granting Viking's Motion for Summary Judgment, certifying the same as final and dismissing all Counterclaims of the defendants. (R. 238).

Trans Coastal and Coleman filed a Notice of Appeal of that decision on November 8, 1995. (R. 246).

On December 6, 1995, Trans Coastal and Coleman filed an Appeal Brief. The case was poured-over to the Court of Appeals. Viking filed its Brief in Opposition on May 8, 1996. On June 14, 1996, Trans Coastal and Coleman filed their Reply Brief. Oral argument was held on September 17, 1996, before Judges Billings, Greenwood, and Jackson.

DISPOSITION BELOW

Thereafter, the Court of Appeals filed its Opinion on November 7, 1996, reversing the decision of the trial court and remanding the matter to the trial court. (See Appendix 1 of Viking's Petition for Certiorari).

FACTS RELEVANT FOR REVIEW

1. Coleman was a named insured under an automobile liability policy, Policy No. 44 00052656, issued by Viking. (R. 97).

2. The policy was issued for a 1983 Oldsmobile Omega, VIN 1G3AE69R7DW351369. (R. 97).

3. The policy provides for coverage as follows:

We promise to pay *damages*, within the limits of our policy, for bodily injury or property damage for which the law holds you responsible because of a car *accident* involving a *car* we insure.

(R. 99).

4. “Car Accident” is defined in the policy as, “an unexpected and unintended event that causes bodily injury or property damage and arises out of the ownership, maintenance or use of a car or other motor vehicle.” (R. 98).

5. On January 7, 1994, Coleman had been having mechanical trouble with his 1983 Oldsmobile Omega automobile. (R. 123).

6. Coleman had experienced a carburetor fire earlier that day while on his way to work. (R. 121).

7. Coleman attempted to drive his vehicle from the point of the carburetor fire to his home in Magna, Utah, in order to effect repairs on the car. (R. 121). While on his way home, Coleman’s vehicle broke down and ceased running. (R. 121).

8. Coleman pulled his disabled vehicle off State Road 201. (R. 121).

9. Coleman exited his vehicle to cross the road to a gas station, to attempt to find a service station who would deliver auto parts. (R. 121).

10. Coleman returned to his vehicle and waited for quite some time, but the delivery truck did not arrive. (R. 121).

11. Coleman got tired of waiting and again exited his vehicle and traveled across the lanes of traffic, climbed the fence and used the pay telephone at the gas station to inquire as to when his parts would arrive. (R. 121).

12 On his way back to the vehicle, Coleman tripped on an uneven surface in the road, injuring his right knee, and could not get up, thereby causing an accident involving the other defendants (R 125)

13 As to why Coleman exited his vehicle and was a pedestrian on the road in question on January 7, 1994, Coleman responded as follows

Q One other question Why did you exit your vehicle on 21st South on January 7th, 1994?

MR PLANT Why did he exit his vehicle?

MS BERRETT Yes

MR CARR You mean after the breakdown?

Q. (By Ms Berrett) Was that the only reason? Was there more than one reason that you exited the vehicle on January 7, 1994?

A My car broke down I had to get -- I had to fix the vehicle or call a wrecker

Q That was the only reason that you were on the road that day, walking?

A. Yes

(R 159)

14 As a result of Coleman's fall in the center of the eastbound lane, in front of on-coming traffic, Peterson, who was driving the Trans Coastal tractor-trailer, swerved to avoid hitting Coleman, causing the tractor-trailer to roll over (R 128)

15 Due to the rollover, Peterson sustained personal injuries, the Trans Coastal tractor-trailer was damaged beyond repair, and UDOT property was damaged (R 1-6, 45-53,

and 222-227)

ARGUMENT

I. THE STATUTORY INTERPRETATION OF SECTION 31A-22-303(1) IS NOT AT ISSUE, THEREFORE, THE COURT OF APPEALS WAS CORRECT NOT TO ADDRESS THE STATUTE.

The Court of Appeals did not address §31A-22-303, Utah Code Ann because it was not raised below, nor is it relevant to the issues presented on appeal Viking, in its Complaint for Declaratory Relief, requested that the trial court declare its rights and duties under its automobile insurance contract issued to Coleman Nowhere in the Complaint did Viking request a statutory interpretation of §31A-22-303 (R 1-4) Additionally, in Viking's original Memorandum in Support of its Motion for Summary Judgment, while Viking cites §31A-22-303(1), three times as "cf" or "see also," nowhere in the Memorandum does it request that the trial court render an interpretation of that statute, or put the statute at issue Additionally, in Viking's Memorandum in Reply to its Motion for Summary Judgment and in Opposition to Defendant Trans Coastal's Cross-Motion for Summary Judgment, Viking makes no mention whatsoever of the statute Thus, the interpretation of §31A-22-303 was not made an issue by Viking in the court below

Moreover, it is clear that this is a case which involves the interpretation of an insurance contract's terms when applied to a specific accident Thus, the rules of construction for insurance contracts should be employed, and not the rules pertinent to statutory construction

The Court of Appeals correctly applied the appropriate rules of construction applicable to insurance contracts which have been so clearly stated in decisions by this Court In

construing the rights and duties of the parties under an insurance contract, this Court has declared

Since 1921 this Court has expressed its commitment to the principle that “insurance policies should be construed liberally in favor of the insured and their beneficiaries so as to promote and not defeat the purposes of insurance ”

U S Fidelity & Guar Co. v Sandt, 854 P 2d 519, 521 (Utah 1993)(other citations omitted)

Indeed, “insurance policies should be strictly construed against the insurer and in favor of the insured because they are adhesion contracts drafted by the insurance companies ” Id At 522 (citing, DiEnes v Safeco Life Ins. Co., 442 P 2d 468, 471 (Utah 1968)). Finally, this Court has historically admonished that “the insured is entitled to the broadest protection that he could reasonably believe the commonly understood meaning of its terms afforded him.” Id (citing, P E Ashton Co. v. Joyner, 406 P 2d 306, 308 (Utah 1965)(emphasis added))

Accordingly, the Court of Appeals did not err in its decision by failing to address §31A-22-303, Utah Code Ann. Additionally, the Court of Appeals correctly applied the foregoing rules of construction to the insurance contract at issue, finding that the Viking policy should provide the broadest coverage reasonably understood from the terms used in said contract.

II. THE COURT OF APPEALS APPLIED A “CAUSAL NEXUS” TEST IN THIS CASE AND DID NOT APPLY A “BUT FOR” TEST.

Viking urges that the Court of Appeals’ Opinion is flawed because the court applied a “but for” test, rather than a “causal nexus” test to determine whether or not there was coverage for the accident at issue. The Court of Appeals correctly found that a “causal nexus,” or “causally connected,” or “integrally related” test was the appropriate test to apply to determine

whether or not the accident was sufficiently related to the ownership, maintenance, and use of the insured vehicle to trigger coverage. Viking contends that the Court of Appeals ignored its own holding and used a “but for” analysis based on one statement found in the Opinion at page 7, i.e., “[t]hus, had Coleman’s vehicle not stopped running, Coleman would not have crossed the freeway to arrange to repair his car.” (See, Opinion at 7, Add. 1, to Viking’s Petition)

Viking’s assertion ignores the express holding of the Court of Appeals, as well as its very thorough analysis, and focuses only on the one sentence quoted above. A careful review of the entire Opinion demonstrates that the Court of Appeals acknowledged that in applying the “causal nexus” test, the determination as to whether or not there is such a nexus between the accident and the ownership, maintenance, or use of the vehicle is a fact intensive examination (See, Opinion at 6). The Court of Appeals then reviewed the relevant facts and determined that “Coleman was continually in the process of trying to repair his vehicle from the moment he pulled off the roadside until said accident.” Indeed, the Court of Appeals expressly found that the intervening events, “crossing the roadway, contacting the auto repair store, returning to his car to await the part delivery, and retracing his steps across the roadway to inquire about the part delivery -- were ‘integrally related’ to Coleman’s ‘ownership, maintenance, or use’ of the vehicle.” (See, Opinion at 7)

Additionally, while the Court of Appeals acknowledged the similarity between the facts in Eichelberger v. Warner, 434 A.2d 747 (Pa. Super. 1995), and the facts in the instant case, the Court used more than the “but for” analysis employed in Eichelberger, and stated that the proximity of the accident to the vehicle is “‘only one factor to be weighed as part of the totality of

the circumstances present in the case ”” (See, Opinion at 7, *citing*, Aetna Cas. & Sur. Co. v. McMichael, 906 P 2d 92, 103 (Colo 1995))

Moreover, the numerous cases from other jurisdictions that are extensively discussed in both Trans Coastal’s and Coleman’s Brief in support of their appeal and their Reply Brief, uphold the analysis employed by the Court of Appeals, as does this Court’s analysis of the language, “arising out of,” as used in another context in National Farmers Union Casualty Co. V. Western Casualty & Surety Co., 577 P d 961 (Utah 1978) Accordingly, there was a sufficient causal nexus between the accident and Coleman’s ownership, maintenance, and use of the vehicle. Thus, this Petition should be denied and the Court of Appeals’ Opinion should stand

III. THE COURT OF APPEALS DID NOT BASE THEIR FINDING OF COVERAGE ON THE BASIS OF THE SUBJECTIVE INTENT OF THE INSURED.

There is nothing in the Court of Appeals’ Opinion which would lead anyone to believe that the Court of Appeals has established a subjective intent test to determine whether or not there is a causal nexus between an accident and the ownership, maintenance, and use of a vehicle The Court of Appeals, in its decision, found a causal connection or nexus between the actions of the insured which lead to the accident, and the ownership, maintenance and use of the vehicle Likewise, Viking’s assertion that the Opinion is so broad that it would eviserate the risks for which automobile liability insurance exists is equally unsupportable The Opinion states that whether or not an accident is causally connected or had a nexus to ownership, maintenance, and use of the vehicle, is a fact intensive analysis The Court looked at the objective facts presented in this case Only one of the factors is the proximity of the insured to the vehicle at the time of the

accident. Viking would have this Court determine nexus based upon strictly the physical proximity of the insured to the vehicle at the time of the accident. The language of the policy does not, however, limit coverage to proximity. Should Viking wish to limit coverage for an accident occurring within five to ten feet of the insured vehicle in connection with the ownership, maintenance, and use of the vehicle, Viking, who authored the insurance contract, could put such a restriction in the policy. Viking did not choose to limit coverage in that way. Accordingly, there is coverage for the accident, and the Court of Appeals' decision, should be upheld.

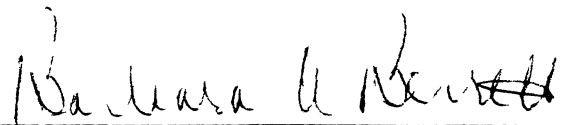
CONCLUSION

Viking's attempts to find error in the Court of Appeals Opinion are disingenuous. Viking makes issues where none exist, or misconstrues the pure language of the Opinion to attempt to create ambiguity. This is not a case of statutory interpretation, rather, this is a fact intensive analysis of the causal connection or nexus between an accident and the ownership, maintenance, and use of a vehicle and the interpretation of those terms as used in the insurance contract at issue. Under the rules of construction for insurance contracts, the language must be construed in favor of the insured to provide the broadest coverage available, which the terms could be reasonably interpreted to afford. Additionally, in the instant case the facts were properly

construed in favor of Trans Coastal and Coleman Thus, the Court of Appeals' Opinion should stand, and Viking's Writ for Certenori should be denied

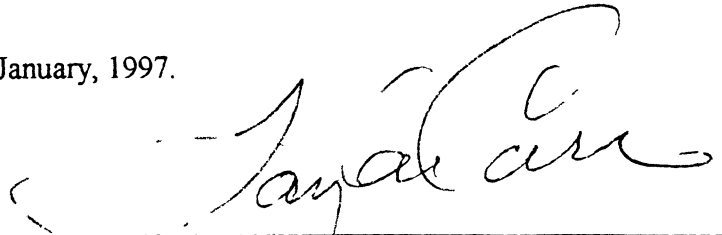
DATED this 6th day of January, 1997

WEISS BERRETT LOYD PETTY, L C

A handwritten signature in dark ink, appearing to read "Barbara K. Berrett", written over a horizontal line.

BARBARA K BERRETT
Attorney for Defendants/Respondents
Trans Coastal Trucking

DATED this 6th day of January, 1997.

A handwritten signature in dark ink, appearing to read "Taylor D. Carr", written over a horizontal line.

TAYLOR D CARR
Attorney for Defendants/Respondents
Allen Coleman

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of January, 1997, 1996, I mailed, postage prepaid, a true and correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the following:

Terry M. Plant
HANSON, EPPERSON & SMITH
Attorneys for Plaintiff/Petitioner
4 Triad Center, Suite 550
Salt Lake City, Utah 84180

Taylor D. Carr
Attorney for Defendants/Respondents Allen Coleman
8 East Broadway, Suite 201
Salt Lake City, Utah 84111

Keith L. Barton
Kenneth G. Johnson
GREGORY, JOHNSON & BARTON
Attorneys for Defendants/Respondent Rene B. Peterson
165 West Canyon Crest Road
Alpine, Utah 84004

Craig Zwick
Executive Director
UTAH DEPARTMENT OF TRANSPORTATION
4501 South 2700 West
Salt Lake City, Utah 84119-5998

