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Western Casualty and Surety Company v. Transamerica Insurance Company v. Dan Allison : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH

**WESTERN CASUALTY AND
SURETY COMPANY,**

Plaintiff and Respondent,

-VS-

TRANSAMERICA INSURANCE COMPANY,

Defendant and Respondent,

-VS-

DAN ALLISON,

Defendant and Appellant.

Case No. 12265

APPELLANT'S BRIEF

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STATEMENT OF FACTS

The defendant Dan Allison is the named insured under the policy issued by the plaintiff Western Casualty and Surety Company. His 16 year old son, Rick Lee Allison, was also an insured under that policy. (See Exhibit ____.)

The defendant James H. Maddox, the son-in-law of the defendant Dan Allison, owned a jeep that was involved in the accident hereinafter described. The defendants James H. Maddox and Dan Allison used the defendant Dan Allison's automobile to travel to Price, Utah, to attend a horse show. The jeep of the defendant James H. Maddox was delivered by James H. Maddox and Dan Allison to Rick Lee Allison to be used by him in conjunction with his

job of milking cows for a neighbor approximately a mile from the residence of the defendant Dan Allison. Rick Lee Allison's drivers license application was signed by the defendant Dan Allison and imputed negligence as claimed.

The instruction to Rick Lee Allison was not to utilize the jeep except in conjunction with his employment. Contrary to the instruction, however, Rick Lee Allison and a neighbor boy, Blaine Sweat, took the jeep to a high school dance where they run into one Steve Maddox, the son of the defendant James H. Maddox. Steve Maddox took the jeep from Rick Lee Allison to the defendant James H. Maddox's home located in Heber City, approximately five miles from the residence of the

defendant Dan Allison. After some sole-searching, Steve Maddox then returned the jeep back to Rick Lee Allison with an instruction that he was not to "rod it". No other instruction or restriction was given.

Following the return of the jeep to Rick Lee Allison, he and Blaine Sweat encountered Mr. Craig Fuhriman and his passenger, not a party to this action, who had run out of gas in Strawberry Valley, approximately 25 miles East of Heber City. The meeting occurred at the Hub Cafe and Service Station at Heber City. Mr. Fuhriman requested Mr. Sweat and Mr. Allison to take them to his car in Strawberry Valley. After taking home some girlfriends who were with them, the

Allison and Sweat boys returned to the Hub to take Fuhriman and his passenger to Strawberry Valley. The parties made a search for a container to transport gasoline to the Fuhriman car but none was found. However, a siphoning hose was acquired from the Hub Service Station.

The Fuhriman automobile was located adjacent the surfaced portion of the highway West bound. As Allison, Sweat, Fuhriman and his passenger approached the Fuhriman vehicle they proceeded on past East bound to a service station in Strawberry Valley located approximately two miles East of the Fuhriman automobile. They woke up the service station attendant and attempted to locate a container in which to take gasoline to the stalled

automobile. The parties were unsuccessful in obtaining a container, so Mr. Fuhriman purchased \$2.00 worth of gas, which was put in the left tank of the jeep. The parties then proceeded West bound past the stalled automobile, made a "U" turn and pulled up along side the stalled automobile so that the gas tank of the jeep matched the gas tank of the Fuhriman automobile, which was also on the left side. The jeep was parked upon the oiled surface facing East adjacent the Fuhriman automobile which was facing West. The lights of the jeep were left on. There is a disputed claim that they were left on high beam. In addition, the emergency blinker lights of the jeep were turned on. They were located immediately below the head lights.

All of the boys got out of the jeep, whereupon Mr. Allison attempted to siphon the gasoline from the jeep to the Fuhriman automobile. Upon getting a mouth full of gasoline, he stepped to the East and North, bent over trying to clear the gasoline from his mouth. Mr. Sweat then undertook the siphoning. An automobile driven by one Harold Sergent proceeding from the East collided with the rear of the Fuhriman automobile instantly killing the Allison boy and fatally injuring the Sweat boy. The defendant Craig Fuhriman and his passenger were knocked down by the impact and received minor injuries. (See depositions of Steve Maddox, James H. Maddox, Dan Allison, Craig Fuhriman and Officer Joseph E. Giles.)

Following the action, Le Roy Sweat and Virginia Sweat, the mother, father and appointed administrators of their son, Blain Sweat, deceased, commenced suit against the defendants James H. Maddox, Dan Allison and against Rex T. Fuhriman and Craig Fuhriman. Demand for defence against said suit was made to Western Casualty and Surety Company but the same was refused and a denial of coverage for the defendant Dan Allison or his son Rick Lee Allison was proclaimed. Following the Sweat suit, Mr. Lawrence Fountaine, a passenger in the Sergeant car, commenced suit against the defendants James H. Maddox, Dan Allison, the administrator of the estate of Rick Lee Allison, The administrators of the estate of Blaine

Sweat, Craig Fuhriman and David Henry Lunt, who was the passenger in the Fuhriman automobile. Following this, demand for a defense in behalf of the defendant Dan Allison, and estate of Rick Lee Allison were again made upon the plaintiff Western Casualty and Surety Company and again refused. Counterclaim was then filed against the plaintiff for costs of the defense of said suits and for judgment for any liability arising therefrom.

The Fuhriman and Lunt boys were returning from a Flaming Gorge fishing trip at the time of their automobile ran out of gas. They had hitch-hiked a ride into Heber City. At the time they met up with the Allison and Sweat

boys it was late at night between 12:00 and 1:00 A.M. The Fuhriman and Lunt boys were proceeding to their residences in Salt Lake County.

The claims made against the defendant James H. Maddox under the aforesaid suit was based upon imputed liability as was the claim against Dan Allison.

ACTION APPEALED FROM

The plaintiff and the defendant Transamerica Insurance Company, the insurer of James H. Maddox, filed a Motion for Summary Judgment as did the defendant Dan Allison. The Court granted the motion for summary judgment in behalf of Western Casualty and Surety Company, Transamerica Insurance Company and against the defendant Dan Allison.

In addition, the Court signed an Order ruling that the defendant Dan Allison as well as his deceased son, Rick Lee Allison and his estate, not even parties to the subject action, were not entitled to a defense under either insurance policy and not entitled to any protection from judgments arising out of the accident as above described. The rulings appealed from are the granting of the Summary Judgments of the plaintiff Western Casualty and Surety Company, the defendant Transamerica Insurance Company and against the Motion of the defendant Dan Allison for Summary Judgment. The further Order of the Court affecting Rick Lee Allison and his estate are also contested hereby.

ARGUMENT I

RICK LEE ALLISON AND HIS ESTATE ARE INSUREDS UNDER BOTH POLICIES AND ENTITLED TO THE PROTECTIONS PROVIDED THEREIN.

Rick Lee Allison was 16 years of age at the time of the accident and was a resident in the household of the defendant Dan Allison. The insurance afforded under the Western Casualty policy extends to the use of other automobiles when the use is with the express or implied permission of the owner. To quote the language of the policy under "Use of Other Automobiles": ". . . The unqualified word insured includes: (1) Such named insured and spouse, (2) A relative of such named insured and spouse, and (3) Any other person or organization legally responsible for the use by the named insured spouse or relative of

an automobile not owned or hiring by such other person or organization. . ."

Rick Lee Allison, of course, is a relative within the definition of the policy, to-wit: ". . . a relative of the named insured or spouse who is a resident of the same household. . ."

The deceased son of Dan Allison is a separate insured under both policies. See Crompton v. Lumberman's Mutual Casualty Company 129 NE 2d 139.

"A clause insuring others in addition to the named insured such as a family clause. . . does more than afford protection to the named insured or owner of the vehicle, it creates a liability insurance for the benefit of those who come within the clause."
7 Blashfield, Automobile Law and Practice, 576.

There can be no question that Rick Lee

Allison had permission to use the jeep of James H. Maddox. It was delivered to him by James H. Maddox personally. There is nothing in the Western policy requiring any permittee to follow any instruction of the owner on the use permitted though a restriction does appear in Transamerica's policy. The language of Western's policy is as follows: Section I (v) (d), "This insuring agreement does not apply to any automobile. . . (2) used without the express or implied permission of the owner;. . ."

The language in Transamerica's policy is as follows under "Persons Insured:"

". . . (2) any relative,. . .
provided to actual operation. . .
is within the permission or

reasonably believed to be within the permission of the owner and is within the scope of such permission. . ."

Any ambiguity in the clauses must be construed in favor of the insured.

Island v. Firemand Fund 30
Cal. 2d 541, 184 P2d 153,
173 ALR 896. Knowles v.
Lumbermens Mut. Casualty Co.
148 ALR 605, 69 RI 309, 33
A2d 185. Associated Indem.
Corp. v. Wachsmith, 127 ALR
531, 2 Wash2d 679, 99 P2d
420. Schmidt v. Utilities
Ins. Co. 154 ALR 1088, 353
Mo 213, 182 Sw2d 181.

Also, Rick Lee Allison and his estate are not parties to this suit. The Court has no standing to rule on the status of non-parties. (Summary Judgment Order #4.)

ARGUMENT II

THE DEFENDANT DAN ALLISON IS AN INSURED AND PROTECTED FROM IMPUTED LIABILITY UNDER THE INSURANCE POLICIES IN QUESTION.

Insurance policy of Western Specifically names the defendant Dan Allison as the insured. By the terms of that policy said insurance agrees:

"To pay in behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of: (a) Bodily injury; (b) Property damage; arising out of the ownership, maintenance or use of the automobile, and the Western shall defend any suit alleging such bodily injuries or property damage and damages which are payable under this policy, even if any of the allegations of the suit are groundless, false, or fraudulent. . ."

And under "Use of Other Automobiles:"

"If the named insured is an individual or individual and spouse and if during the policy period such named insured or spouse owns a private passenger automobile covered by this policy, such insurance as is afforded by this policy under coverage A and B and Division 1

of coverage C, with respect to said automobile applies with respect to any other automobile subject to the following provisions: (a) The unqualified word insured and spouse, (1) Such named insured includes, (2) Any relative of such named insured or spouse, (3) Any other person or organization legally responsible for the use by such named insured, spouse or relative of any automobile not owned or hired by such other person or organization. . . . (d) "This insuring agreement does not apply to any automobile. . . . (2) used without the express or implied permission of the owner;. . . ."

The defendant Dan Allison arranged with the defendant James H. Maddox for the use of the jeep by Rick Lee Allison while James H. Maddox and Dan Allison was using the automobile of the Dan Allison. He personally verified the permission of the owner to use the jeep. The Contract with Western required no more of him. As

a matter of fact, there were no other practical avenues open to him.

Imputed liability is included. See the following cases where insurance clauses nearly identical with those of Western's policy are construed:

Fazzino v. Insurance Company
of North America 313 P2d 178,
152 Cal. App. 2d 304; Lackey v.
Olds and Staller Interexchange
252 p 672, 80 Cal. App. 687;
Asleson v. Hardware Dealers
Mutual Fire Insurance Company
106 NW 2d 3301, 11 Wis. 2d
624.

ARGUMENT III

THE LOWER COURT'S INTERPRETATION OF
THE PERMISSION REQUIRED IS NOT JUSTIFIED
BY THE LANGUAGE IN THE INSURANCE POLICIES
AND IS CONTRARY TO THE PURPOSES OF THE
FINANCIAL RESPONSIBILITY LAWS.

The lower Court adopted an

interpretation that required the use of the jeep to be not only with the permission of the owner but to remain at all times within the scope of that permission. As indicated before, Western's policy says nothing about the scope of permission as does the policy of Transamerica. To read in such language is to adopt an ambiguity in favor of the parties who drafted the policy. It also gives effect to a legal technicality that serves no useful purpose except to enhance the coffers of the insurance company. Such an interpretation does, however, remove the protection of the insured and the protection of any injured party. A deviation from the permission granted is beyond the control .

of the insured, the insurance company as well as any injured party. To allow such an incident to control the rights and liabilities of all parties involved except the permittee makes very little sense and can lead to the most ridiculous results. Take for example, the permittee who was instructed not to go any place else other than a given course, who comes upon an automobile accident where there are injured parties. Must he refuse to deviate by taking the injured to a hospital in order to preserve the insurance protections set forth in the insurance policy? Suppose the permittee comes upon an accident wherein the parties are not bleeding to death

but are simply stranded, must he leave the parties stranded in this emergency situation to preserve the insurance protection? Is an emergency situation even within the scope of the restrictions given a permittee unless precisely and specifically enumerated? Who is ever to say that the owner would not approve of the use of his automobile by the permittee in an emergency situation? Ninety-nine percent of all people would come to the aid of the stranded Fuhrman and Lunt boys if asked. James H. Maddox is no exception. On any Summary Judgment ruling the Court must construe the facts most favorable to the parties against whom the ruling is made. The Court must in essence construe the facts as eliminating permission even in emergency situations. There is no showing in the

evidence that would justify this conclusion.

For extensive discussions and annotations on the issue of permission see 7 Am. Jur. 2d ~~§~~ 105-126; 26 ALR 2d 1320; 4 ALR 636; 72 ALR 1402; 106 ALR 1259; 126 ALR 552; 5 ALR 2d 600. No Utah cases directly in point has been found. A check of the more recent cases reflect a strong trend toward the adoption of the liberal rule. Certainly the State of Utah ought not to be burdened with a strict construction of the permission requirement. Under any event, deviations for emergencies should be acceptable unless specifically prohibited by direct, precise instruction.

For an annotation of the cases

involving the refusal to defend, see
49 ALR 2d, 694.

CONCLUSION

The evidence does not warrant the trial court's conclusions that no permission existed and hence no coverage or obligation to defend under either policy. The facts when taken most favorable to the defendant Dan Allison reflect no prohibition against use of the vehicle to aid stranded motorists. Also, the vehicle was returned to the driver by Steve Maddox without restriction except the instruction not to "rod it." The use in the case in question would clearly constitute an implied consent.

Regardless of the position taken by

the Utah Court on the interpretation to be afforded to Transamerica's policy, Western's policy makes no reference to the scope of permission and there is no dispute but what actual permission was given by the owner, James H. Maddox, and consented to by the insured, Dan Allison. The Court erred in the construction of said insurance policy and erred in the conclusions to be drawn from the facts presented.

The Summary Judgment granted the plaintiff Western Casualty and Surety Company should be reversed and the defendant Dan Allison's Motion for Summary Judgment against said plaintiff on the issue of coverage should be granted. The Summary Judgment granted the defendant

Transamerica Insurance Company should be reversed insofar as coverage of the defendant Dan Allison, Rick Lee Allison and the estate of Rick Lee Allison are concerned.

Respectfully submitted,

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