

1971

Western Casualty and Surety Company v.
Transamerica Insurance Company v. Dan Allison :
Brief of Respondent Transamerica Insurance
Company

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors Glenn C. Hanni; Attorney for Respondent John L. Chidester; Attorney for Appellant

Recommended Citation

Brief of Respondent, *Western Causalty v. Transamarica*, No. 12265 (Utah Supreme Court, 1971).
https://digitalcommons.law.byu.edu/uofu_sc2/242

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

WESTERN CASUALTY AND
SURETY COMPANY,
Plaintiff and Respondent

v.

TRANSAMERICA INSURANCE
COMPANY,
Defendant and Respondent

v.

DAN ALLISON,
Defendant and Appellant

Brief of Respondent Transamerica Insurance Company

Appeal from the Summary Judgment
District Court of Washington
Honorable Maurice Harbo

RAYMOND M. BECK
ALLAN L. LARSON
WORSLEY, SNOW & ASSOCIATES
Seventh Floor Corner
Salt Lake City, Utah
*Attorneys for Respondent
Transamerica Insurance Company*

John L. Chidester
51 West Center Street
Heber City, Utah
Attorney for Appellant

Glenn C. Hanni
Boston Building, Salt Lake City, Utah
*Attorney for Respondent
Western Casualty & Surety Company*

INDEX

	Page
NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	6
POINT I.	
AS RICKY LEE ALLISON DEVIATED BEYOND THE SCOPE OF THE PERMISSION GRANTED HIM IN USING THE JEEP, HE AND DAN ALLISON ARE NONINSURED OF TRANSAMERICA INSURANCE COMPANY	6
POINT II.	
STEVEN MADDOX HAD NO AUTHORITY TO GIVE RICK ALLISON PERMISSION TO USE THE JEEP....	13
CONCLUSION	16

CASES CITED

Bower v. Hardware Mutual Casualty Co., 13 Wis.2d 21, 108 N.W.2d 271 (1961)	12
Civil Service Employees Insurance Co. v. Roberts, 10 Ariz. App. 512, 460 P.2d 48 (1969)	14
Cypert v. Roberts, 169 Wash. 33, 13 P.2d 55 (1932)	10
Grange Insurance Association v. Eschback, 1 Wash. App. 230, 460 P.2d 690 (1969)	10, 15
Hamm v. Camerota, 48 Wash.2d 34, 290 P.2d 713 (1955)	9, 15
Helmkamp v. American Family Mutual Insurance Co., 407 S.W.2d 559 (Mo. App. 1966)	15
Howe v. Farmers Automobile Inter-Insurance Exchange, 32 Wash.2d 511, 202 P.2d 464 (1949)	10
Indemnity Insurance Co. of North America v. Sanders, 169 Okla. 378, 36 P.2d 271 (1934)	10, 15
Johnson v. Maryland Casualty Co., 34 F. Supp. 870 (W. D. Wis. 1940)	8
Jones v. Indiana Lumbermen's Mutual Insurance Co., 161 So.2d 445, (La. App. 1964)	15
Norris v. Pacific Indemnity Co., 39 Cal.2d 420, 247 P.2d 1 (1952)	14
Truex v. Pennsylvania Manufacturers Association Casualty Insurance Company, 116 Pa. Super. 551, 176 A. 756 (1935).....	9
Wilson v. Farnsworth, 4 So.2d 247 (La. App. 1941)	8

AUTHORITIES CITED

7 Appleman, Insurance Law and Practice, §4367 (1962)	11
--	----

IN THE SUPREME COURT OF THE STATE OF UTAH

WESTERN CASUALTY AND
SURETY COMPANY,
Plaintiff and Respondent,

v.

TRANSAMERICA INSURANCE
COMPANY,
Defendant and Respondent,

v.

DAN ALLISON,
Defendant and Appellant.

Case No.
12265

Brief of Respondent Transamerica Insurance Company

NATURE OF THE CASE

This is a declaratory judgment action brought by Western Casualty and Surety Company seeking a determination of whether liability insurance was extended by it or Transamerica Insurance Company to Dan Allison or Ricky Lee Allison.

DISPOSITION IN LOWER COURT

The District Court of Wasatch County, Honorable Maurice Harding presiding, granted summary judgment

in favor of Western Casualty and Surety Company and Transamerica Insurance Company denying liability coverage to Dan Allison or Ricky Lee Allison.

RELIEF SOUGHT ON APPEAL

Respondent Transamerica Insurance Company seeks affirmance of the judgment of the District Court of Wasatch County.

STATEMENT OF FACTS

Transamerica Insurance Company's policy was issued to James H. Maddox. Western Casualty and Surety Company issued its policy to Dan Allison, father of Ricky Lee Allison.

On May 18, 1968, the afternoon prior to the accident, James H. Maddox left Heber City to go to Price, Utah, in an automobile owned by Dan Allison, his father-in-law.

At the request of Dan Allison, James H. Maddox loaned his 1966 jeep to Ricky Lee Allison for Ricky Lee Allison to use going to and from his milking job. No permission was granted Ricky Lee Allison to use the jeep for any other purpose.

At approximately 2:00 a.m. on May 19, 1968, an accident occurred on Highway 40 some 22 miles east of Heber City. At the time of the accident Blaine Orvel Sweat and Ricky Lee Allison were using the 1966 jeep to assist Craig Fuhrman in putting gasoline in an automobile operated by Fuhrman which had run out of gas. Ricky Lee Alli-

son drove the jeep 22 miles east of Heber City without permission and in violation of specific instructions previously given him by James H. Maddox and Steven Maddox, the minor son of James H. Maddox. The depositions of James H. Maddox, Steven Maddox and Dan Allison were taken and their testimony is as follows:

JAMES H. MADDOX

Mr. Maddox was the owner of the 1966 jeep. He had a conversation with Dan Allison on May 18, 1968. Mr. Allison said Ricky had a milking job and needed transportation. James Maddox agreed to allow Ricky to use the jeep and subsequently called Ricky on the telephone. He told him that "he could use the jeep to milk his cows and to go back and forth to Christiansen's." "I told him I didn't want him driving around anyplace else." Ricky agreed to this, and at no time indicated that he would have a date that night, or that he planned on attending a high school dance (Deposition of James H. Maddox, pages 4, 5, and 6). James Maddox later saw Ricky Allison in front of the Allison home and again told him that he had permission to use the jeep for going back and forth to his milking job, "but that was all" (*Id.* at 7). James Maddox had told his son, Steven Maddox, that Ricky Allison was to have the use of the jeep, but that Ricky was "just to use it to go back and forth to milk his cows" (*Id.* at 9). James Maddox did not authorize his son, Steven Maddox, to loan out any of his vehicles. "I didn't allow Steven to loan the jeep to anybody." "He had no permission to loan my vehicles, never" (*Id.* at 12, 24).

STEVEN MADDOX

Steven knew that his father had loaned the jeep to Ricky Allison to be used only for driving to and from Ricky's milking job. (Deposition of Steven Maddox, pages 7 and 15)

Steven next saw the jeep at the high school parking lot. He subsequently had an argument with Ricky Allison and told him to take the jeep home (*Id.* at 8, 21, 22). He told Ricky that "since dad was good enough to let him take the jeep, he should at least abide by the restrictions that he placed upon it." "If dad was going to let him take the jeep, he should have just took it back and forth to milk, and that I had heard he had been rodding it all over, and that was my gas in it he was running out." Ricky said, "Well, if that's the way you feel about it, get in it and take it home" (*Id.* at 8, 21-24). Steven took the jeep home and subsequently learned that Ricky Allison and Blaine Sweat had two girls up at Ricky's home with no way to take the girls home. Steven called Ricky at about 8:00 p.m. and said "Well, I'll bring the jeep back up so that you can take them home (*Id.* at 26). He then delivered the jeep back to Ricky, apologized for the previous argument, and told Ricky to "Take the girls home with it . . . just don't rod it and don't run all my gas out" (*Id.* at 27). Steven subsequently went home and went to bed. Steven knew that he had no authority to loan the jeep . . . I just gave it to him. I never —I don't believe that I could lend the jeep to anybody I wanted to just on the spur of the moment. It wasn't mine. I had to have permission every time I took it myself, let alone let any-

body else drive it. In fact, I wasn't even sure I had permission to go take it that night — the first time . . .” (*Id.* at 10).

Steven also testified that he had to have permission from his father every time he used the jeep and that his father would be angry if he knew he had used it without permission (*Id.* at 31, 32).

In his deposition, Steven Maddox testified as follows:

“Q. Now, under the circumstances that existed after you had taken the jeep away from Ricky, the circumstances to which I refer are the facts that Ricky and Blaine were at Ricky’s house with the girls, did you believe you had authority to give the jeep to Ricky that night under those circumstances?

“A. No, I didn’t think I had the authority. I just left them and told them to take the girls home. I mean, I’ve done a lot of things my dad wouldn’t have me do, knowing darn well he was going to be mad about it. But I didn’t know whether he was going to be mad about it or not in truth. I just left it.

“Q. You don’t know whether he would object or not to that one, is that what you said?

“A. Yes. I never asked him. I don’t know whether he would have objected or not.” (*Id.* at 12).

DAN ALLISON

Dan Allison is the father of Ricky Lee Allison. He testified that he had a conversation with James Maddox regarding to loaning of the jeep, and that James would see that Ricky got transportation to drive back and forth

to his milking job. The only arrangements made with James Maddox were to get transportation so that Ricky could go back and forth to work (Deposition of Dan Allison, pp. 5-8). He was not aware of his son, Ricky, ever using any of James Maddox's vehicles prior to this occasion (*Id.* at 26).

Other evidence indicates that between 12:00 midnight and 1:00 a.m., May 19, Ricky Lee Allison and Blaine Sweat, with two girls, met the Fuhrman and Lunt boys at a service station in Heber City. They took the girls home and then returned to assist the Fuhrman and Lunt boys with their automobile. The four of them drove approximately 22 miles east of Heber City, at which time the accident occurred. Ricky Lee Allison did not request permission to drive the jeep out of Heber City.

ARGUMENT

POINT I

AS RICKY LEE ALLISON DEVIATED BEYOND THE SCOPE OF THE PERMISSION GRANTED HIM IN USING THE JEEP, HE AND DAN ALLISON ARE NONINSURED OF TRANSAMERICA INSURANCE COMPANY.

The basic issue is: Was Ricky Lee Allison using the jeep within the scope of permission granted him by James H. Maddox at the time of the accident? If he was using the jeep within the scope of the permission granted, he would be an omnibus insured. If he was using the jeep beyond the scope of the permission granted, neither he

nor Dan Allison are extended any insurance coverage under Transamerica's liability policy. Transamerica's policy provides:

"Persons Insured: The following are insureds under Part I:

(a) with respect to the owned automobile.

* * *

(2) any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission"

(Defendant's Exhibit I)

Unless the operation of the jeep by Ricky Lee Allison is within the scope of any permission granted him by James H. Maddox, there is no coverage. Whether the negligence of Ricky Lee Allison is imputed to his father is immaterial. Dan Allison can stand in no better position than the actual operator of the jeep. If Ricky Lee Allison was using the jeep at the time of the accident beyond the scope of the permission granted him by James H. Maddox, neither he nor his father are insureds under the policy of insurance issued by Transamerica Insurance Company.

Transamerica Insurance Company submits that the order of the lower court was correct because the evidence in this case shows that in using the jeep at the time and place of the accident Ricky Lee Allison was engaged in a material deviation beyond the scope of any implied or express permission granted him.

In this case a major deviation occurred. Ricky Lee Allison was given permission to use the jeep only for driving the two or three miles to and from a milking job. Instead, he took the jeep to a dance, took some girls out, and then, in the middle of night at about approximately 1:30 a.m., he took the jeep from Heber City to the place of the accident, 22 miles away. Ricky Allison's deviation was major and clearly beyond the scope of the permission granted him in the use of the jeep.

Where the use of the vehicle is in direct violation of specific express instructions, there is no implied consent to use a vehicle on major deviation.

In *Johnson v. Maryland Casualty Co.*, 34 F. Supp. 870 (W. D. Wis. 1940), an automobile salesman, in violation of his employer's express instructions and company rules, retained the employer's automobile after working hours and was taking his date to dinner to a place five miles outside of the city limits when he was involved in an accident. The court held that Wirth, the driver of the vehicle, was not an omnibus insured as it was clear and undisputed that he was using the vehicle for his own purposes and beyond the scope of the permission granted by the employer.

In *Wilson v. Farnsworth*, 4 So. 2d 247 (La. App. 1941), where an employee took the employer's truck to perform a personal errand without requesting permission and in direct violation of express rules and instructions, and was involved in an accident while so using the truck,

it was held the employee was not an omnibus insured as his use was without permission, express or implied.

Hamm v. Camerota, 48 Wash. 2d 34, 290 P.2d. 713, 717 (1955), states the rule in cases of this nature as follows:

“In order for a person to come within the coverage of the omnibus clause in a standard policy of liability insurance, it must be established that his use of the car was with the permission, expressed or implied, of the person designated in the policy as the named insured.”

No Utah case in point has been discovered. There are, however, many cases dealing with this type of situation. Illustrative of these cases is *Truex v. Pennsylvania Manufacturers Association Casualty Insurance Company*, 116 Pa. Super. 551, 176 A. 756 (1935). In that case, the automobile owner gave permission to a guest to drive another guest to his home four blocks away. Instead, the guests took a pleasure drive in the opposite direction and were involved in an accident several miles away from home. It was held that such a drive was a radical departure from the use for which the automobile was granted, and the owner's liability insurer therefore was not liable. The court said:

“Permission to drive to a designated place four blocks away did not give authority to drive some miles distant in the opposite direction. This was not a slight deviation, it was a radical departure — an entirely new and different use than was averred to have been granted.”

In *Howe v. Farmers Automobile Inter-Insurance Exchange*, 32 Wash. 2d 511, 202 P.2d 464 (1949), the driver had received permission from the owner to repair the automobile and return it to the owner's home. At the time of the accident, he was on business of his own and driving strictly for his own pleasure. The court held that at the time of the accident he did not have express or implied permission to use the car for his own personal pleasure or business, and the owner's insurance policy would not extend coverage to him.

In *Indemnity Insurance Co. of North America v. Sanders*, 169 Okla. 378, 36 P.2d 271 (1934), it was held that an owner allowing one to drive an automobile on a certain mission did not imply permission to allow another person to drive said car the next day in a different town, and no insurance coverage was extended. The court cited from the case of *Cypert v. Roberts*, 169 Wash. 33, 13 P.2d 55, 56 (1932):

"The issue is whether Miss Roberts had the permission of Nalley's Inc., to use the car as and when the collision occurred. That she did not have such permission, express or implied, to use the car at the place, at the time, and under the circumstances, or for purposes existing at the time of the collision, was clearly established and must be so held and declared as a matter of law."

The "additional assured" portion of the insurance contract was held not operative. Also see *Grange Insurance Association v. Eschback*, 1 Wash. App. 230, 460 P.2d 690 (1969).

7 Appleman, *Insurance Law and Practice*, §4367 (1962), states the majority rule to be that the vehicle must be used for a purpose reasonably within the scope of the permission granted, within the time limits imposed or contemplated by the parties, and operated within the geographical limits so contemplated, or the use is not covered.

In this case, it is clear that Ricky Lee Allison operated the jeep beyond the geographical limits of his permitted use. It cannot be implied that his use was within the time limits contemplated going to and from his milking job. His use was also for a purpose entirely beyond the scope of the permission granted him.

When considering the time the vehicle was being used, the geographical place where it was being used and the purpose for which it was being used, it is apparent that Ricky Lee Allison in using the jeep at the time of the accident was engaged in a radical departure from the scope of permission granted him to use the jeep. At the time of the collision he was using the jeep in an area where he had no permission to use it (22 miles east of Heber City), for an unauthorized and un contemplated purpose (helping the Fuhriman and Lunt boys), and at an unusually late hour (2:00 a.m.).

By driving the jeep for a purpose and at a time and place not contemplated by the owner thereof, Ricky Lee Allison removed himself from the provisions of the policy providing coverage to one using the automobile with permission.

The appellant's brief refers to an emergency situation and implies that permission would have been granted

to Ricky Lee Allison to drive 25 miles east of Heber City to assist the Fuhrman and Lunt boys. The appellant poses the question as to whether a permissive user must leave the bleeding victims of an automobile accident along the side of the road in order to preserve the protection of the insurance policy. Obviously, if there was a danger to human life an emergency situation would be present in which the deviation from the agreed-to course of the automobile would be acceptable within reasonable limitations. However, in this case there is nothing to establish an emergency situation on the part of Fuhrman and Lunt. These boys were not in an emergency. They were standing in a service station in Heber City where aid was available and where they were safe.

In *Bower v. Hardware Mutual Casualty Co.*, 13 Wis. 2d 21, 108 N.W.2d 271 (1961), a mother gave her daughter permission to use the automobile to pick up some class pictures. While her daughter was in the studio the police informed her passenger that the car should be moved as it was in a no parking area. While moving the car, the passenger had an accident. The court held that no emergency existed which would create implied consent by the owner of the car to allow the passenger to operate the automobile. Accordingly, the passenger was not covered as an omnibus insured under the mother's liability insurance policy. It would seem that a directive of this nature from a police officer would constitute more of an emergency situation than the gratuitous attempt on the part of Ricky Lee Allison to help Fuhrman and Lunt get their automobile filled with gas.

POINT II

STEVEN MADDOX HAD NO AUTHORITY TO GIVE RICK ALLISON PERMISSION TO USE THE JEEP.

The appellant's brief in its Conclusion claims that the vehicle was returned to Ricky Allison by Steve Maddox without restriction except the instruction not to "rod it." The depositions indicate that it was made perfectly clear to Ricky Allison that he was not only not to "rod it" but was not to use it for any purpose other than taking the girls home.

Further, appellant's argument misses the point . Because a certain restriction is not placed upon the use it does not logically follow that all uses, save uses specifically excepted, are permitted. Appellant cannot find authorized use in every area where no specific restriction was imposed. The scope of permission granted establishes the authorized use — not the possible uses remaining after all restrictions are applied.

Regardless of the actual terms of the redelivery of the vehicle to Ricky to Steve Maddox, Steve Maddox had no authority to deliver the vehicle to Rick Allison on any terms different from those originally entered into by James Maddox and Rick Allison. The record clearly indicates that Steve knew that he had no authority to lend out his father's vehicles. A fortiori, since he testified that he was not even to use his father's vehicles himself without his father's permission, he could not have had authority to expand the rules of permitted use set down by his father.

In *Norris v. Pacific Indemnity Co.*, 39 Cal.2d 420, 247 P.2d 1 (1952), it appeared that the owner of the vehicle had given his son permission to use a car but prohibited him from loaning it to any other person. While at a friend's home, the son loaned the car to another party, who subsequently was involved in an accident. The court held that there was no permission for the third party to use the car and that no insurance applied. The court stated the rule that "where the facts as here showed neither express nor implied permission for the permittee's delegation of the use of the car to another, the third person has been held not to be the responsible person with permission and therefore not protected by the omnibus clause." 247 P.2d at 4.

In *Civil Service Employees Insurance Co. v. Roberts*, 10 Ariz. App. 512, 460 P.2d 48 (1969), the owner of a jeep occasionally allowed his son to drive it. He was required to seek his father's permission for each use of the jeep, and there was a general understanding between them that the jeep was not to be loaned out or driven by others. While using the jeep with permission, he allowed his girl friend to drive it and an accident ensued. The court held that the son was not a named insured or an owner within the meaning of the policy, had no authority to give permission to another to drive the jeep, and thus no insurance applied to the girl who was driving. The court said, "In our view the particular risk resulting in this accident was not one within the contemplation of the parties to this contract and is fairly within this exclusionary clause." 460 P.2d at 51.

A similar case was reported in *Helmkamp v. American Family Mutual Insurance Co.*, 407 S.W.2d 559, (Mo. App. 1966), where the minor son of the owner of the insured automobile was permitted to drive to a church social gathering. The minor had his father's permission to take a girl friend home in the car, but acceded to her request that she be allowed to drive around the block. The court held that the person seeking to be insured did not meet her burden of showing that the owner "either through his words, conduct, or the nature and scope of the permission granted by him to Robert (the minor son), indicated Robert, in turn, would be clothed with authority to pass on (his father's) permission to (the driver)".

Similar results were reached in the cases of *Jones v. Indiana Lumbermen's Mutual Insurance Co.*, 161 So.2d 445, (La. App. 1964); *Indemnity Insurance Co. of North America v. Sanders*, 169 Okla. 378, 36 P.2d 271 (1934); *Grange Insurance Association v. Eschback*, 1 Wash. App. 230, 460 P.2d 690 (1969); and *Hamm v. Camerota*, 48 Wash. 2d 34, 290 P.2d 713 (1955).

It should also be noted that the terms of Transamerica's policy require that the use of a non-owned automobile be "within the permission or reasonably believed to be with the permission, of the *owner* and is within the scope of such permission." Defendant's Exhibit 1 at 6. It is undisputed that Steven Maddox was not the owner of the automobile, and the testimony contained in the depositions clearly establishes that he had no authority to lend the automobile to Ricky Lee Allison.

The appellant's brief sets forth the general proposition that any ambiguity in the insurance policies must be construed in favor of the insured. There is nothing ambiguous about the permissive user clause of Transamerica's insurance policy. It simply requires permission from the owner of the vehicle. The depositions on file herein clearly indicate that no permission was given by the owner of the jeep, nor by his son (who had no authority in any event). It should be apparent that no ambiguity exists.

CONCLUSION

The judgment of the lower court should be affirmed because:

1. Ricky Lee Allison was using the jeep beyond the scope of the express permission granted him by James H. Maddox.
2. The boys did not have implied permission because they were using the jeep on a major deviation at the time of the accident.

Accordingly, the summary judgment in favor of Transamerica Insurance Company should be affirmed.

Respectfully submitted,

Raymond M. Berry
Allan L. Larson

WORSLEY, SNOW & CHRISTENSEN
Seventh Floor Continental Bank Bldg.
Salt Lake City, Utah 84101

*Attorneys for Respondent
Transamerica Insurance Company*

MAILING NOTICE

I hereby certify I mailed two copies of the foregoing brief, postage prepaid, to John L. Chidester, 51 West Center Street, Heber City, Utah, and two copies to Glenn C. Hanni, Boston Building, Salt Lake City, Utah this..... day of, 1971.

.....