1971

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

Utah Supreme Court

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

BRIEF OF RESPONDENT

GLENN C. HANNI
Attorney for Respondent, Western Casulty and Surety Company
604 Boston Building
Salt Lake City, Utah 84111

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STATEMENT OF THE NATURE OF CASE

This is an appeal from a summary judgment entered in favor of Western Casualty and Surety Company (hereinafter referred to as Western) and Transamerica Insurance Company (hereinafter referred to as Transamerica) declaring that defendant, Dan Allison, and the estate of his deceased son, Rick Lee Allison, were not entitled to coverage under automobile liability insurance policies issued by Western and Transamerica.

DISPOSITION IN THE LOWER COURT

Motions for summary judgment were filed by Western and Transamerica seeking a declaration of the court that Dan Allison and the estate of his son, Ricky Lee Allison, were not entitled to coverage for liability arising from an automobile accident under automobile liability policies issued by said companies. Dan Allison filed a Motion for Summary Judgment seeking a declaration that there was coverage under both policies. The trial court granted the Motions of Western and Transamerica and denied the Motion of Dan Allison and entered judgment accordingly.

RELIEF SOUGHT ON APPEAL

The trial court's judgment should be affirmed.

STATEMENT OF FACTS

In order to give more specific record references and in order to supplement the facts as stated in appellant's brief, respondent Western will restate the factual context of this appeal.

On January 2, 1968, Western issued an automobile policy to Dan Allison, the named insured. The policy, which was in effect at the time of the accident in question, provided insurance coverage for Mr. Allison and his family for those instances specifically contracted for in the policy.

On May 18, 1968, the appellant and James H. Maddox, appellant's son-in-law, desired to attend a horse show in Price, Utah. However, because it was

necessary to take the vehicle normally used by Rick Lee Allison, appellant's son, in his employment as a dairy worker, appellant asked Mr. Maddox if Ricky could use the Maddox jeep for that purpose. (James Maddox deposition, p.4). Mr. Maddox consented but expressly told both Mr. Allison and Rick that the jeep was only to be used for the purpose of driving to the Christiansen farm where the milking was to be performed. (James Maddox deposition, pp. 5-7). Mr. Maddox also informed his own son, Steve, that Rick was only to use the jeep for that specific purpose. (Deposition of Steve Maddox, p. 16).

Rick Allison obtained possession of the jeep from Mr. Maddox. That evening Steve Maddox, 17 year old son of James Maddox, learned that Rick was using the jeep to drive around the Heber-Midway area. Because Mr. Maddox had specifically said that he did not want Rick to use the jeep to drive around town, Steve and a friend began searching for Rick and the jeep. (Steve Maddox deposition p. 20). After a fruitless search, Steve located the jeep at Heber High School where a dance was being held. Rick was told by Steve that he had better take the jeep back to Rick's house until he needed it for his milking job the following morning. Rick agreed to do this and took the jeep, along with two girls and one boy, back to his house. (Steve Maddox deposition p. 22). Shortly thereafter Steve arrived at Rick's house. At this time Rick and Steve got into an argument about the jeep's use which finally ended in Steve taking the vehicle

back to the Maddox residence. (Steve Maddox deposition pp. 24-25).

Upon arriving home Steve parked the jeep and drove back to the high school in his own car. While he was there he learned that the two girls with Rick had not returned to the dance. Steve called Rick at home and asked him if he had any way of taking the two girls home. Rick replied that he did not have any transportation available so Steve went home and took the jeep back to the Allison residence. (Steve Maddox deposition pp. 26-27). When he arrived, the two boys apologized for their previous flareup. Steve told Rick to "take the girls home with it [the jeep], just don't rod it and run all my gas out." (Steve Maddox deposition p. 27).

Rick Allison, Blaine Sweat, and the two girls then drove around in the jeep until they arrived at the Hub Cafe and Service Station in Heber City. It was here that they met Craig Fuhriman and David Lund. Mr. Fuhriman and Lund told Rick that they had run out of gas and asked if Rick would help them. Upon being asked where the car was, Mr. Fuhriman replied, "It's about 20 miles back up the canyon." (Craig Fuhriman deposition pp. 14-15). The boys left, took the girls home, and returned back to the service station.

Although the service station did not have a gas can, it apparently did have a siphoning hose. They drove to the area where the car was stranded, found

a service station nearby, and awakened the attendant. Upon learning that the station did not have a gas can, Mr. Fuhriman purchased two dollars worth of gas for the jeep. (Craig Fuhriman deposition p. 17). The parties then proceeded westbound past the stalled automobile, made a "U" turn and parked parallel to the Fuhriman vehicle. Thus, the stalled car was facing west and was about 3 feet from the edge of the road while the jeep was facing east adjacent to the car. (Craig Fuhriman deposition p. 19-20). At this time the emergency flashers of the jeep as well as the headlights were in operation. No lights of the stalled vehicle were on. Rick attempted to siphon, but got a full mouth of gasoline. While Rick was trying to clear the gasoline from his throat, Blaine Sweat undertook the siphoning. (Craig Fuhriman deposition p. 25). It was at this time that Mr. Fuhriman saw an oncoming car and shouted a warning to the two boys. Before the boys could escape, a car driven by Harold Sergent crashed into the stalled car. (Craig Fuhriman deposition pp. 29-30). Mr. Fuhriman, although being hit by some flying object, managed to get up to assist the injured. Shortly thereafter, another car approached, but instead of stopping, crashed squarely into the Maddox jeep. None of the victims of the first accident were harmed by this second accident, however. (Craig Fuhriman deposition p. 36). As a result of the first accident Rick Allison was instantly killed and Blaine Sweat was fatally injured.

Following the accident, several separate actions were brought as noted in appellant's brief. This Court has already decided one such action in *Sweat vs. Fuhriman*, 23 Utah 2d 331, 463 P.2d 3 (1969). As also noted, Western and Transamerica have consistently refused to defend Dan Allison and the estate of his deceased son in any of these actions because of no coverage.

ARGUMENT

POINT I

BECAUSE THE MADDOX JEEP WAS NOT USED "WITH THE EXPRESS OR IMPLIED PERMISSION OF THE OWNER" AS REQUIRED BY WESTERN'S POLICY, RICK LEE ALLISON AND HIS ESTATE ARE NOT "INSUREDS" UNDER THE TERMS OF THE POLICY AND DAN ALLISON IS NOT PROTECTED UNDER THE TERMS OF THE POLICY.

There is no dispute that Rick Lee Allison was potentially an "insured" under the Western policy. The applicable policy provisions are:

> V. USE OF OTHER AUTOMOBILE: 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 Coverages A, B, and Division 1 of Coverage C with respect to said automobile applies with respect to any other automobile, subject to the following provision:
> * * *

(d) This insuring agreement does not apply to any automobile:

(1) * * *

(2) Used without the express or implied permission of the owner.

It is Western's position that the facts of this case show that no such permission was ever given to Rick Allison.

The appellant argues that because the Western policy did not contain the words "and is within the scope of such permission," that the matter of "scope" should not be taken into account by a court in determining "permission." Western contends that these additional words are not necessary in an insuring agreement since the word "permission" necessarily includes "scope." This contention is supported by numerous cases throughout the country. In *Collins vs. New York Casualty Co.*, 82 S.E.2d 288 (W. Virg. 1954) a similar argument was made. In this case the owner of the car had loaned it to a friend who said that he was going to town to collect a debt. The car was given with the understanding that it would be returned within an hour after the debt had been collected. However, the friend could not find the debtor and instead went to a tavern where he became drunk, met a friend, and was later involved in an accident more than five and a half hours after he had first borrowed the car. The "friend" contended he was covered under the owner's policy because "the actual use of the automobile [was] with the permission of

the named insured." The court rejected this argument. It said:

> The words "with the permission of the insured," in our opinion, are controlling. Certainly the word "permission" of itself has a definite meaning. It has been defined in Black's Law Dictionary, Fourth Edition, 1298, as "a license to do a thing; an authority to do an act which, without such authority, would have been unlawful;" and in Webster's New International Dictionary, Second Edition, Unabridged, 1824, the word is defined as an "act of permitting; formal consent; authorization; leave; license or liberty granted." The very definition of the word "permission" implies its application variously to the things permitted to be done by the person granting the permission, so that inherently the words "with the permission of the insured" in the omnibus clause of the instant policy suggests that the *scope of the permission* is that which the parties intended." Id at 297 (emphasis added).

Similarly, in *Continental Casualty Co. vs. Padgett*, 219 F.2d 133 (4th Cir. 1955) that court was confronted with the interpretation of a policy which provided coverage when "the actual use of the automobile is by the named assured, or with his permission." In this case an employee was told by his employer that he could use company truck to transport wood to his mother's house if he would bring the truck back to the business. After performing the chore, the employee used the truck for his own social purposes at which time he was involved in an accident. The court rejected the argument that the accident occur-

red while the truck was being used with the owner's permission. It said:

> The language of the omnibus clause, which brings within the coverage of the policy any one who uses the insured vehicle with the permission of the assured, is clear enough. Equally clear is the undisputed testimony that Taylor was given permission to use the car [truck] for a specific purpose for his own convenience after business hours . . . [H]e violated his instructions, removed the car from the parking place and made use of it, not in the business of his employer but for the pleasure of himself and his friends. It is plain, unless the words of the contract are distorted from their clear and normal meaning, that the fatal ride was not made with the permission of the insured within the meaning of the policy. Id. at 135.

In *Long vs. Superior Insurance Co.*, 230 F.2d 507 (10th Cir. 1956) the Court of Appeals affirmed a lower court decision holding that an omnibus clause of an insurance policy [covering any person while using the automobile . . . provided the actual use of the automobile is by the named insured or with his permission] did not cover the brother of the named insured who was given permission to go to the city dump and deliver trash with the insured truck but who used the truck for a pleasure trip of his own. The court concluded:

> There would seem to be ample evidence to support the trial court's conclusion that this pleasure trip was outside the scope of the permissive use of the vehicle . . . Id. at 510.

In *Travelers Insurance Co. vs. Kinney*, 238 F. Supp. 652 (D. Mo. 1964) the question of "permission" once again arose. The permittee, in this case, was given permission to use the owner's car for a limited purpose but was instructed to return it after such use. When the permittee went to the home of the owner to give the car back, the owner was not at home. Instead of leaving the car as instructed, he took the car and was involved in an accident while on a personal trip of his own. The court said:

> Nowhere does the record reveal that Shumake expressly or impliedly by any language or conduct, conferred permission on Kinney to use the car after returning it on Christmas morning. Quite to the contrary, Kinney had specific permission and instructions only to use it to drive home on the evening of the 24th and to return it that next morning.
>
> Therefore, the only conclusion that can be drawn is that Kinney was not using the car with the permission of a named insured under the policy at the time of the accident in question and therefore was not a permissive user within the terms of plaintiff's policy. Id at 653.

Finally, the Georgia Court of Appeals in *Ditmyer vs. American Liberty Insurance Co.*, 160 S.E. 2d 844, 117 Geo. App. 512, (1968) faced a similar "permission" problem. After the court found that the permittee was only given limited permission, but had deviated from this permission for his own personal use, the court said:

> In the majority of the jurisdictions it is

held, as here, that while a slight or inconsequential deviation from the permission given will not annul the coverage of the omnibus clause, *there is an absence of permission within the meaning of the policy if the vehicle is being driven at a time or a place or for a purpose not authorized by the insured.* For a collection and discussion of the cases and the varying rules see 72 A.L.R. 1398-1409; 106 A.L.R. 1259-1263; 5 A.L.R. 2d 594-668. Id. at 850 (emphasis added).

See also *Savage vs. American Mutual Liability Ins. Co.*, 182 A.2d 669, 158 Me. 259, (1962); *Williams vs. Travelers Ins. Co.*, 265 F.2d 531 (4th Cir. 1959); *Laroche vs. Farm Bureau Mutual Auto Ins. Co.*, 7 A.2d 361 (1939); *Caldwell vs. Standard Accident Insurance Co.*, 98 F.2d 364 (6th Cir. 1938).

It is obvious from the preceding discussion that the "scope" of permission is an important factor in determining whether there had been "permission" at the time of an accident. It seems equally apparent that in the case at bar Rick Allison was not within the permission given to him by James Maddox. This can be seen by reviewing the applicable depositions.

Q. Okay. Now, Ricky was home, you were on the phone — on the telephone at the Ford Motor Company and you talked to Ricky?

A. Right.

Q. What did you say?

A. I told him he could use the jeep to milk his cows and go back and forth to Christiansens.

Q. Okay. Did you say anything else?

A. Yes. I told him I didn't want him driving around anyplace else.

(James Maddox deposition, p. 5, Ins. 11-19)

* * * * * *

Q. Okay. Now, when did you next see Ricky?

A. My wife and I rode up to his house. This was right after lunch. And Ricky was standing in front of his house with another boy. But — I don't know the Sweat boy, but my wife said it wasn't him — said it was another boy. She knows him. And she was with me when we told him, you know, explained to Ricky again that we didn't want him to take the jeep anyplace except to milk.

(James Maddox deposition p. 6, Ins. 3-9).

* * * * * *

Q. Do you know when arrangements were made by Ricky to be allowed to use the jeep?

A. Yes. My dad told him he could use it to go to milk and back and nothing else. And I can remember this particularly because one of the reasons he wouldn't let me take the jeep that night was because he didn't want it running up and down Main Street all night long.

(Steven Maddox deposition, p. 15, Ins. 9-15).

Thus, James Maddox specifically gave Rick Al-

lison permission to use the jeep *only* for transportation to his milking job. When Rick used the jeep to joy ride in town, he had gone beyond the scope of that permission.

POINT II

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

The fact that Steven Maddox later allowed Rick to take the jeep for the purpose of taking the girls home had no effect on the initial permission. Steven had no authority to change or modify his father's express permission.

> I don't believe that I have the authority— 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 everytime I took it myself, let alone let anybody else drive it. In fact, I wasn't even sure I had permission to go take it that night — the first time. (Steven Maddox deposition, p. 10, lns. 5-11).

For cases holding that the first permittee has no authority to delegate the use of the automobile to another or to enlarge the permission given by the owner to the first permittee, see *Norris vs. Pacific Indemnity Co.*, 39 Cal.2d 420, 247 P.2d 1 (1952); *Helmkamp vs. American Family Mutual Ins. Co.*, 407 S.W.2d 559 (Mo. Appeals 1966); *Civil Service Employees Ins. Co. vs. Roberts*, 10 Ariz. App. 512, 460 P.2d 48 (1969); *Jones vs. Indiana Lumbermen's*

Mutual Ins. Co., 161 So.2d 445 (La. App. 1964); *Indemnity Ins. Co. of North America vs. Sanders*, 169 Okla. 378, 36 P.2d 271 (1934); *Grange Insurance Association vs. Eschback*, 1 Wash. App. 230, 460 P.2d 690 (1969), and *Hamm vs. Camerota*, 48 Wash.2d 34, 290 P.2d 713 (1955).

Even if we assume for the sake of argument that Steven did have the power to change the permission, Rick Allison exceeded that permission as well as the permission of James Maddox. At the time Steven gave the jeep back to Dan he told him, "Take the girls home with it." (Steven Maddox deposition, p. 27, ln. 10). At the time the accident occurred Rick had taken the girls home and was "approximately 25 miles east of Heber City." (Apellant's Brief at 4). Thus, the location of the accident was clearly beyond the scope of permission given to Rick by Mr. Maddox since the initial permission only included a distance of one mile. (Steven Maddox deposition, p. 18, ln. 1). Of course, the permission had also been exceeded in regard to time. Rick's job did not begin until 5:00 a.m. the morning of May 19, 1968 (Dan Allison deposition, p. 20) and yet the accident occurred approximately at 1:20 a.m. that morning (Trooper Joseph Giles deposition, p. 6, lns. 12-19).

Because the accident in question occurred outside the scope of permission given to Rick Allison by James Maddox, Western had no obligation to defend the estate of Rick Allison against any claims brought against it. Likewise, Western had no obligation to de-

fend Dan Allison for any claims brought against him. Before liability can be imputed to Mr. Allison under the terms of the policy, the condition of "express or implied permission of the owner" must be met by the permittee. Because this condition was not met by Rick Allison, the policy cannot be extended to cover Dan Allison. The cases cited by appellant are readily distinguishable since in each instance there was no question that the permittee was within the permission granted to him. (See Appellant's Brief at 18).

POINT III

THE LOWER COURT'S INTERPRETATION OF THE PERMISSION REQUIRED IS JUSTIFIED BY THE LANGUAGE IN THE INSURANCE POLICIES AND AGREES WITH THE PURPOSES OF THE FINANCIAL RESPONSIBILITY LAWS.

The appellant argues that requiring "scope of permission" to be read into "permission" serves no useful purpose "except to enhance the coffers of the insurance company." (Appellant's Brief at 19). The courts have held that this interpretation serves a very useful purpose.

> In these days when reduced premiums are being offered to those who maintain a low level of accident liability, the abiilty of the insured owner to impose effective restrictions on permitted use by another becomes important to the insured as well as to the insurer. *Savage vs. American Mutual Liability Ins. Co.*, 182 A.2d 669, 671 (Maine 1962).

In addition, the "scope" requirement makes an owner

more careful as to who he will lend his car to. If an owner knows that a permittee is likely to go beyond the scope of permission which he gives him, the owner is much less likely to entrust the car to this permittee if he knows that the insurance will not cover any accident which occurs outside the "scope." It is highly probable that most car owners equate "permission" and "scope" together when they loan their car to a permittee. If, for example, a car owner is asked by a police officer whether a permittee had permission to use his car at a particular time or place, the owner must automatically think of both deviation in time and distance in arriving at his answer. When a permittee goes beyond his permission, he has gone beyond the desire of the owner to protect him.

The appellant also argues that Rick Allison should have been allowed to deviate from his permission because of an "emergency." Examples are proposed where a permittee comes upon the scene of a serious accident or upon stranded accident victims. A deviation from the scope of permission in such cases could perhaps be justified. However, in the case at bar we are not confronted with an "emergency." Rather, we are confronted with a situation where two boys take a jeep they should not have had at the time, use it for purposes completely contrary to the wishes of the owner, and take it upon themselves to assist strange motorists who have run out of gas some 25 miles away. In such a case it can hardly be

said that an "emergency" existed which justified a deviation from the permissive use.

CONCLUSION

Because Rick Allison did not have the "express or implied permission of the owner" to use the jeep at the time of the accident, there was no coverage under Western's policy for appellant or the estate of his deceased son. For this reason the judgment of the lower court should be affirmed.

Respectfully submitted,

STRONG & HANNI
GLENN C. HANNI
Attorney for Respondent, Western Casulty and Surety Company
604 Boston Building
Salt Lake City, Utah 84111