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

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.

FILED

MAR 15 1971

Clerk, Supreme Court, Utah

REPLY BRIEF OF APPELLANT

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

INDEX

	Page
CORRECTION	2

ARGUMENTS:

I. WESTERN'S POLICY ATTEMPTS TO IMPOSE AN ADDITIONAL BURDEN OF CONSENT NOT PERMITTED BY LAW	2
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II. THE APPELLANT HAS COMPLIED WITH ALL OBLIGATIONS UNDER WESTERN'S POLICY AND IS AN INSURED ENTITLED TO PRO- TECTION UNDER ITS TERMS.	3
---	---

CONCLUSION	14
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CASES CITED

Dickinson v. Maryland Casualty Company 101 Conn. 369, 125 A 866	4, 11
Masser v. American Mutual Liability and Insurance Company (1951), 241 SW 2d 856.	6
Stovall v. New York Indemnity Company, 157 Tenn. 391, 8 SW 2d 473	6, 7, 11
Grella v. Reynolds, 151 Ohio State 147, 85 NE 2d 116 (1969).	7
Hartford Accident and Indemnity Company v. Peach, 193 Va. 206, 68 SE 2d 520.	7
Schmidt v. Utility Insurance Company, (1944), 182 SW 2d 181.	7

Rikowski v. Fidelity and Company, 117 NJL 407, 189 A 102, 116 NJL 503, 185 A 473	8
Costanzo v. Penn Threshermen and Farmers Mutual Casualty Insurance Company (1959) 30 NJ 262, 152 A 2d 589, 592	9
Matits v. Nationwide Mutual Insurance Company, 33 N.J. 488, 166 A 2d 345, 349.	10
United States Fidelity and Guaranty Company v. DeCuers, (1940; DCLA), 125 A 866.	10
Jefson v. London Guaranty and Accident Company, 293 Ill. App. 97, 11 NE 2d 933.	11
Fireman's Fund Indemnity Company v. Freeport Insurance Company, 30 Ill. App. 2d 69, 173 NE 2d 534	11
Parks v. Hall, 189 La. 849, 181 So. 191.	11
Small v. Schuncke, 42 N.J. 407, 201 A 2d 56	11
Holly v. Indemnity Insurance Company, 257 N.C. 381, 126 SE 2d 161.	11
Arnold v. State Farm Mutual Auto Insurance Company, (CA 7 Ind.), 260 F. 2d 161.	11
Jones v. New York Casualty Company, (DC 1938), 23 F. Supp 932.	11

STATUTES CITED

Utah Code Annotated 1953, 41-12-21 . . .	2
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AUTHORITIES CITED

72 ALR 1398, 1405.	11
106 ALR 1251, 1262	11
126 ALR 544, 553	11
5 ALR 2d 600, 629.	11

of the
STATE OF UTAH

Defendant and Appellant.

Case No. 12265

REPLY BRIEF OF APPELLANT

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

CORRECTION

Appellant's brief erroneously quote the policy of Western Casualty and Surety on page 17. The correct language is as follows:

". . . (a) the unqualified word insured includes, (1) such named insured and spouse, (2) any relative of such named insured or spouse, . . ."

ARGUMENT I

WESTERN'S POLICY ATTEMPTS TO IMPOSE AN ADDITIONAL BURDEN OF CONSENT NOT PERMITTED BY LAW.

The Safety Responsibility Act specifies the person whose consent must be given to the use of other vehicles. Section 41-12-21, Utah Code Annotated 1953 reads as follows:

". . . (b) such owners policy of liability insurance: (1) shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted; and (2) shall

insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, and against loss from liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicles with the United States of America or the Dominion of Canada,. . ."

(emphasis added)

Western's policy provides for permission of the owner rather than the named insured. There is no question in the facts that the named insured, to-wit: Dan Allison, gave his consent to Rick Lee Allison to use the vehicle of James Maddox, the owner. There is no evidence that the named insured in any manner restricted the permission of Rick Allison.

ARGUMENT II

THE APPELLANT HAS COMPLIED WITH ALL OBLIGATIONS UNDER WESTERN'S POLICY AND IS AN INSURED ENTITLED TO PROTECTION UNDER ITS TERMS.

Western's policy specifically insured Rick Lee Allison and Dan Allison in the use of other vehicles when the use is with the express or implied permission of the owner. That permission to use the vehicle was given is not in question. The respondent, however, urges upon the Court that the Court should read into the policy a provision requiring, not merely use by permission, but use within the scope of permission. Few provisions in the law have created more conflicting results. Several cases, however, have faced the issue squarely. *Dickinson v. Maryland Casualty Company*, 101 Conn. 369, 125 A 866, set forth the common rules of interpretation. The clause involved in the insurance policy under consideration was as follows:

". . . provided such use or operation is with the permission of the named insured." The

court, in discussing the issue, stated,

"Does this language mean the permission to use the car or the permission to use the car in a specified manner and for a specified purpose? These are the two constructions which confront us and we are to determine which is the correct one. . . Let us see how the law construes a provision of a contract of insurance which invites two constructions. . . Construing this provision in the light of settled rules of construction, we must adopt, between the two claimed constructions, that which is most favorable to the insured. . . In the presence of a reasonable doubt we must resolve it in favor of the insured. Between two interpretations we are required by the rules of legal construction to adopt that which will sustain this claim."

The Court went on to state:

"In place of a certain provision in the policy of definite meaning it would insert a provision breeding uncertainty, inviting litigation, and making the defense of a departure from the permission an available and often used defense. This is exactly what the courts and the legislature have frowned upon --

uncertainty and ambiguous provisions in contracts of insurance under which insurers seek an escape from the obligation of paying the insurance indemnity contracted for. The fact that the insurer in this case did not so restrict the term 'permission' is strong evidence that it did not, by this provision, intend this; to justify the strict construction claimed by the defendant would convert all cases of this character into a contest as to the exact words spoken when permission was secured, and to an attempt upon the court to convert by refinement any use of the car into a departure sufficient to annul the permission granted. If the departure were from the place permitted, be it near or far, or from the purpose named, be it substantial or otherwise, the insured must fail in his recovery. A defense of that character by an insurer is not favored in law. . . ."

The Tennessee Court faced a similar problem in the case of *Masser v. American Mutual Liability and Insurance Company* (1951), 241 SW 2d 856. The court there distinguished a previous case of *Stovall v. New York Indemnity Company*, 157 Tenn. 391, 8 SW 2d 473. The

Stovall case had constructed a provision of a policy, to-wit: ". . . provided such use or operation is with the permission of the named insured." The policy in the Masser case contained a provision requiring permission for the "actual use" of the vehicle. The court interpreted the provision to mean ". . . use to which the vehicle is being put at the time of the accident rather than use by 'permission'." See also: Grella v. Reynolds, 151 Ohio State 147, 85 NE 2d 116 (1969); Hartford Accident and Indemnity Company v. Peach, 193 Va. 206, 68 SE 2d 520.

Similarly in the case of Schmidt v. Utility Insurance Company, (1944), 182 SW 2d 181, the court declared the rules of interpretation of insurance policies wherein the language is susceptible to two interpretations.

"Keeping in mind, however, the established rules for the construction of insurance contracts, to-wit: that a policy must be liberally constructed in favor of the insured so as not to defeat, without a plain necessity, his claim for indemnity which in making the insurance it was his object to secure; and that when words are susceptible to two interpretations, that which will sustain insured's claim must be adopted, since the language employed in the policy is that of the insurer. . ." (page 183)

Also in the case of *Rikowski v. Fidelity and Company*, 117 NJL 407, 189 A 102, 116 NJL 503, 185 A 473, the court declared:

"It is within the field of general knowledge that the usual indemnity policy is, except where a statute intervenes, framed by the company whose product it is and that the person to whom a policy is issued accepts it in the form offered and pays for it that which is asked, else he does not get it. The named insured may accept the contract or he may reject it. But he does not write it. So the defendant company chose the phraseology in which its obligation is set forth. It could, by the

contract, have narrowed its obligation but one would expect that if, in the light of the public policy and the general public attitude . . . , it proposed so to do, it would have phrased its contract in words more restricted than those now before us."

The New Jersey Court has also declared the rules of interpretation, to-wit: "The generally recognized approach of the courts is to give an omnibus clause in an automobile liability policy a liberal interpretation, to effectuate the public policy of affording injured persons protection. *Costanzo v. Penn Threshermen and Farmers Mutual Casualty Insurance Company* (1959), 30 NJ 262, 152 A 2d 589, 592.

There has been a strong tendency of the courts and legislatures to adopt the "initial permission rule." This rule has been defined as:

" . . . if a person is given permission to use a motor vehicle in the first instance, any subsequent use short of theft or the like while it remains in his possession, though not within the contemplation of the parties, is a permissive use within the terms of an omnibus clause. . ." *Matits v. Nationwide Mutual Insurance Company*, 33 N. J. 488, 166 A 2d 345, 349.

New Jersey, in the *Matits* case, put its finger on the precise problem:

" . . . It is our view that these later rules making coverage turn on the scope of permission given in the first instance renders coverage uncertain in many cases, foster litigation as to the existence or extent of any alleged deviations, and ultimately inhibit achievement of the legislative goals. We think that the 'initial permission' rule best effectuates the legislative policy of providing certain and maximum coverage and is consistent with the language of the standard omnibus clause in automobile insurance policies."

See also: *United States Fidelity and Guaranty Company v. DeCuers*, (1940; DCLA), 125

A 866; Jefson v. London Guaranty and Accident Company, 293 Ill. App. 97, 11 NE 2d 993; Fireman's Fund Indemnity Company v. Freeport Insurance Company, 30 Ill. App. 2d 69, 173 NE 2d 534; Parks v. Hall, 189 La. 849, 181 So. 191; Small v. Schuncke, 42 N.J. 407, 201 A 2d 56; Holly v. Indemnity Insurance Company, 257 N.C. 381, 126 SE 2d 161; Dickinson v. Great American Indemnity Company, 296 Mass. 368, 6 NE 2d 439; Stoveall v. New York Indemnity Company, Supra.; Arnold v. State Farm Mutual Auto Insurance Company, (CA 7 Ind.), 260 F 2d 161; Jones v. New York Casualty Company, (DC 1938), 23 F. Supp 932; 72 ALR 1398, 1405; 106 ALR 1251, 1262; 126 ALR 544, 553; 5 ALR 2d 600, 629.

The issue is before the Court for the first time in Utah so far as can be determined by the author. It is urged upon the court that

a strict interpretation of the permission required serves a public purpose. It is even intimated that in the event a driver goes beyond the scope of his permission that the owner does not then desire to extend protection to the driver. It seems most unlikely that with imputed liability that either Dan Allison or James Maddox would intend that the policy not provide coverage in such case. It is further suggested that such a rule may in some manner reward the insured by obtaining for him reduced premiums as a result of the alleged resultant low level of accidents. The obvious conclusion, however, is that such a rule completely removes the coverage from the control of these persons who are imputedly liable for any injuries that occur, and further, leaves the injured without recourse in many cases.

To suggest to this court that it is good for the insured that the court rule that he is not covered by his insurance policy that he bought and paid for seems to require no response.

Transamerica's policy designates the insured as follows:

" . . . (b) with respect to an unowned automobile, . . . (2) any relative, but only with respect to a private passenger automobile or trailer, provided its actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission, and (3) any other person or organization not owning or hiring the automobile, but only with respect to his or its liability because of acts or of missions of an insured under (b) (1) or (2) above.

Since the issue of an emergency (stranded motorist) was never discussed, did the driver (16 year-old Rick Allison) reasonably believe

that he was forbidden by James Maddox or Dan Allison from assisting the stranted motorist? The scope of permission is a question of fact for the jury. *Stowe v. Hawkeye Casualty Company of DesMoines, Iowa*, 193 F 2d 255. Both James Maddox and Dan Allison are available to testify. Such testimony would show a consistent pattern and history, all of which the driver was exposed to, of assistance and accommodation to parties in need.

CONCLUSION

The Court should not read into a policy language that defeats the public policy or that leads to uncertainty and confusion. If the policy of Western's had intended that scope of permission be a part thereof, it would have so provided. In any event, Utah should adopt the "initial permission" rule. The facts in the

case are without dispute; permission was given. Certainly the clear language of Western Casualty's policy imposed no greater burden upon the appellant. The issue of the stranted motorist was never discussed. There is sufficient evidence that this driver could have reasonably believed that such assistance was permitted. The decision of the trial court on the Motion for Summary Judgment of the respondents should be reversed. The appellant's Motion for Summary Judgment should be granted.

Respectfully submitted,

John L. Chidester
Attorney for Appellant
Dan Allison
51 West Center Street
Heber City, Utah 84032