

1977

American Casualty Company of Redding
Pennsylvania And Larry Richards Silver,
Administrator of The Estate of Lynn Richards
Silver, Deceased v. Eagle Star Insurance Company,
Ltd. : Respondents' Petition For Rehearing And
Brief

Utah Supreme Court

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Glenn C. Hanni, ROGER H. BULLOCK; ATTORNEYS FOR DEFENDANT AND APPELLANT. WAYNE WADSWORTH; ATTORNEY FOR PLAINTIFFS AND RESPONDENT

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IN THE SUPREME COURT OF THE STATE OF UTAH

AMERICAN CASUALTY COMPANY :
OF REDDING PENNSYLVANIA, :
and LARRY RICHARDS SILVER, :
Administrator of the :
Estate of LYNN RICHARDS :
SILVER, deceased, :
:
Plaintiffs and :
Respondents, : Case No. 14800

v. :

EAGLE STAR INSURANCE :
COMPANY, LTD., :
:
Defendant and :
Appellant. :

RESPONDENTS' PETITION FOR REHEARING AND BRIEF ,

H. WAYNE WADSWORTH of and for
HANSON, WADSWORTH & RUSSON
702 Kearns Building
Salt Lake City, Utah 84101

Attorneys for Plaintiffs
and Respondents.

GLENN C. HANNI
ROGER H. BULLOCK
STRONG & HANNI
604 Boston Building
Salt Lake City, Utah 84111

Attorneys for Defendant
and Appellant.

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AUG 29 1977

Clerk, Supreme Court, Utah

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H. WAYNE WADSWORTH of and for
HANSON, WADSWORTH & RUSSON
702 Kearns Building
Salt Lake City, Utah 84101

Attorneys for Plaintiffs
and Respondents.

GLENN C. HANNI
ROGER H. BULLOCK
STRONG & HANNI
604 Boston Building
Salt Lake City, Utah 84111

Attorneys for Defendant
and Appellant.

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RESPONDENTS' PETITION FOR REHEARING AND BRIEF

NATURE OF CASE

This is a petition for rehearing in the above entitled action in which this Court reversed the decision of the lower Court which held in favor of the plaintiffs and respondents and against the defendant and appellant.

DISPOSITION

This Court, on the 8th of August, 1977, reversed the judgment of the District Court which had entered summary judgment in favor of respondents American Casualty Company and the Estate of Lynn Richards Silver. This Court further entered a declaratory judgment in favor of the appellant, Eagle Star Insurance Company.

RELIEF SOUGHT

Respondent seeks reversal of this Court's opinion of August 8, 1977 and reinstatement of the judgment awarded in the lower court; or alternatively, a remand to the lower court for trial on the issue of whether or not the flight in question was for "remuneration".

STATEMENT OF FACTS

A Cessna 310 aircraft, owned by Silco Corporation, of Salt Lake City, Utah, crashed on June 22, 1972 killing the pilot, Lynn Richards Silver, his wife and two other passengers. Various liability claims have been filed and this action has been brought to determine which insurance company is obligated to defend the Estate of Lynn Richards Silver and pay claims for which the estate may be found liable.

Eagle Star's "Hull and Liability Policy" was written on the specific aircraft which crashed. This policy provided primary insurance coverage to the aircraft.

American Casualty Company's insurance is secondary in that it insured Silco Corporation under an umbrella policy which provided that it would indemnify the insured for loss in excess of the total applicable limits of the underlying insurance. This umbrella policy specifically acknowledged underlying coverage for "aircraft liability" through the insurer, Eagle Star Insurance Company, in the sum of \$1,000,000.

Eagle Star has primary coverage for all losses arising from the plane crash unless it is found that the insurance contract excludes coverage because of "remuneration"

having been paid for the use of the aircraft.

Respondent, American Casualty Company, filed a brief citing cases from six jurisdictions which have construed or inferred "remuneration" as requiring a profit incentive, or something in addition to the reimbursement of normal operating costs or expenses.

This Court interpreted the term "remuneration" as follows:

But it is also sometimes used in the broader sense of simply paying something for such service, loss or expense. (Emphasis added).

and cited for authority a dictionary definition and one Louisiana case.

The Court went on in its opinion to recognize that in a dispute between an insured and its carrier, ambiguities of terminology should be resolved in favor of coverage and against the drafter of the document by stated:

. . . we recognize the validity of the rule that if an insurance policy is ambiguous or uncertain, so that it is fairly susceptible of different interpretations, any doubt should be resolved in favor of insurance coverage.

However, the Court found no ambiguity in the meaning of "remuneration" and reversed the lower court's judgment for respondent and in effect granted declaratory judgment in favor of appellant.

POINT I

"REMUNERATION" IS AN AMBIGUOUS TERM WHICH IS FAIRLY SUSCEPTIBLE OF DIFFERENT INTERPRETATIONS.

This Court, in its opinion, stated:

A primary meaning of the term "remuneration" is to

pay an equivalent for, i.e., in the sense of reimbursing for a service loss or expense . . . But this does not mean that a profit must be realized.

The term "remuneration" or to "remunerate" does, in fact have different meanings; an equivalent in the sense of reimbursing for a service loss or expense, OR a profit, that is, compensation over and above expenses.

Webster's New Twentieth Century Dictionary, Unabridged, Second Edition defines "remunerative" as: "Yielding a sufficient return; affording ample remuneration; profitable; as a remunerative position". (Emphasis added).

The following cases which were cited in Respondents' Brief, clearly stand for the proposition that "remuneration" requires a profit or compensation over and above expenses:

Remuneration should include a fair profit on the performance of any service, and compensation for any service should also include such profit although strictly speaking, it may have a narrower meaning. Anchor Coal Company v. Public Service Commission, 15 S.E. 2d 406.

The earnings of the (taxidab) drivers over and above the \$3.00 and cost of the gasoline constitute the remuneration or wages for their services and it is not necessary that they be paid directly by appellee. Kaus v. Unemployment Compensation Commission, 299 N.W. 715 (Iowa 1971)

These cases and the above definition evidence the true meaning of the term "remuneration", and inasmuch as this term was not defined in Eagle Star's Hull and Liability policy of insurance, it should, because of its ambiguity, be construed against Eagle Star in favor of coverage, at least to the retail limit interest of its insured, the Estate of Lynn Richards Sil

POINT II

THERE WAS NOT COMPLETE REIMBURSEMENT OF EXPENSES TO SATISFY COURT'S DEFINITION OF REMUNERATION.

The Court in its decision accepted as a definition of remuneration "in the sense of reimbursing for a service, loss or expense" and then stated:

Our conclusion is this: that if "remuneration" be understood as merely an equivalent, there is no question whatsoever but that the use of the plane was so "remunerated".

This Court may have failed to take note that not even an "equivalent" amount was received by Silco Corporation for the planes use. It is a well settled business principle that the cost of operating any business machine or vehicle includes such intangibles as depreciation and loss of use.

In the instant case there was no agreement of any kind that purported to reimburse Silco Corporation for its depreciation expense or for the expense of loss of use. "Reimbursement" means to pay back that which has been expended. Woenz v. Schumacher, 56 NE 72, (New York). Since there was no agreement of any kind that provided for reimbursement of depreciation or loss of use of the airplane, under the Court's own definition there was no sufficient reimbursement or equivalence paid to constitute "remuneration".

It is significant to note that not even the appellant contended that "remuneration" meant nothing more than reimbursement for expenses, but contended that under the facts of the case in question, there was more than reimbursement for expenses. Respondents deny that under the facts there was anything more

than reimbursement for normal operating expenses. The lower Court ruled as a matter of law that under the facts of the case there was nothing more than reimbursement for operating expenses. If this Court cannot affirm that ruling as a matter of law, the case should be remanded for a trial by jury to determine that fact.

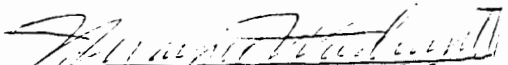
SUMMARY

Since this Court's opinion of August 8, 1977 recognized that respondents cited cases in its principal brief which considered "remuneration" as requiring a profit motive, it cannot cite authorities to the contrary and then say, with consistency, that there is no ambiguity in the meaning of the term as it was used in appellant policy, which did not define its meaning. And, since the Court has recognized that if there is an ambiguity in the meaning of language in an insurance policy it should be resolved in favor of coverage, it cannot overlook such admitted different meanings as are mentioned in the Court's decision and then deny coverage.

WHEREFORE, respondents pray for a rehearing of the Court opinion which has been entered in this action and, therefore, a reversal of said opinion to reinstate the judgment for respondents entered before, or in the alternative, for a remand to the trial court for a jury trial on the issue of whether or not under the facts of this case the flight in question was or was not for remuneration.

RESPECTFULLY SUBMITTED this 29th day of August, 1977.

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H. WAYNE WADSWORTH of and for
HANSON, WADSWORTH & RUSSON
Attorneys for Respondents

607 Kearns Building
Salt Lake City, Utah 84101

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed a copy of the foregoing Respondents' Petition for Rehearing and Brief, postage prepaid, to Glenn C. Hanni, attorney for appellant, 604 Boston Building Salt Lake City, Utah 84111 this 29th day of August, 1977.


Raymond J. Smith
Attorney for Respondents