1978

National Farmers Union Property and Casualty Company v. Wesern Casualty and Surety Company : Reply Brief of Appellant

Utah Supreme Court

D. Gary Christian, James R. Blakesley; Attorney for Appellant and PlaintiffGlenn C. Hanni; Attorney for Respondent and Defendant

IN THE SUPREME COURT

OF THE

STATE OF UTAH

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NATIONAL FARMERS UNION
PROPERTY AND CASUALTY
COMPANY,

Appellant - Plaintiff,

vs. Case No. 15317

WESTERN CASUALTY AND
SURETY COMPANY,

Respondent - Defendant.

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REPLY BRIEF OF APPELLANT

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Appeal from a Judgment of the District Court
of Salt Lake County
Honorable Dean E. Conder, Judge

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WESTERN CASUALTY AND
SURETY COMPANY,

Respondent - Defendant.

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REPLY BRIEF OF APPELLANT

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NATURE OF THE CASE

This is an action by the plaintiff - appellant, National Farmers Union Property and Casualty Company, against the defendant - respondent, Western Casualty and Surety Company, under a theory of equitable and conventional subrogation and/or contribution, to recover proportionate share of monies paid in settlement of a tort claim.

DISPOSITION IN THE LOWER COURT

There being no real dispute as to the facts of this case, both parties made Motions for Summary Judgment and filed

Memorandums of Points and Authorities with respect thereto. Both Motions were heard by Judge Dean E. Conder on the 9th day of June, 1977. Based upon the written and oral arguments, the Court ordered that appellant's Motion for Summary Judgment be denied and that respondent's Motion for Summary Judgment be granted.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the Order granting respondent's Motion for Summary Judgment and denying appellant's Motion for Summary Judgment set aside and further seeks a Judgment in its favor and against the respondent.

STATEMENT OF FACTS

All facts are as recited in appellant's Brief except for the following:

It was appellant's understnding that the terms of the settlement were agreeable to all concerned and that for purposes of the settlement the liability on the part of the Sheriff's Mounted Posse and Brent G. Story, along with that of Afton LeRoy Cheney, was conceded, and that the only disagreement was whether the respondent's Homeowner's policy applied to this incident. Consistent with that understanding, appellant has never asserted any sort of subrogation or contribution right directly against Brent G. Story, nor have they named him as a defendant in this action. There has never been any question but that the settlement was reasonable.

ARGUMENTS AND AUTHORITIES

POINT I

LEGAL THEORY NOT RAISED IN LOWER COURT CANNOT BE CONSIDERED FOR FIRST TIME ON APPEAL

Respondent argues for the first time in Point I of its Brief filed with this Court that appellant is not entitled to recover any amount from respondent under a theory of subrogation or contribution because an insurer may not recover from its own insured or co-insured citing the Utah case of Board of Education of Jordan School District v. Hales, 566 P. 2d 1246 (Utah, 1977) as authority. Respondent did not raise that particular legal theory in the lower Courts. In fact, the argument has its genesis at a time subsequent to the final lower court decision. Both parties' Motions for Summary Judgment were heard by the Honorable Dean E. Conder, Judge, on June 9, 1977. Shortly thereafter he ruled in favor of the respondent. The case of Board of Education of Jordan School District v. Hales, supra, was handed down by this Court not only after the parties had filed their Motions for Summary Judgment, submitted written Memorandums in support thereof, made oral arguments but after the lower court made its final decision.

This Court has reiterated on numerous occasions that it cannot pass on matters raised for the first time on appeal. For example, in the case of Simpson v. General Motors Corp., 24 Utah 2d 301, 470 P. 2d 399, 401 (1970), Chief Justice Crockett, writing for the majority,

stated:

> The contention relating to strict liability is an attempt to inject that doctrine into this case for the first time on appeal. It was dealt with neither in the plaintiff's complaint, nor in the pretrial conference, nor at the trial. It is therefore not appropriate to address such a contention to this court. Orderly procedure, whose proper purpose is the final settlement of controversies, requires that a party must present his entire case and his theory or theories of recovery to the trial court; and having done so, he cannot thereafter change to some different theory and thus attempt to keep in motion a merry-go-round of litigation. [Emphasis added.]

For similar holdings see: Thompson Ditch Company v. Jackson, 29 Utah 2d 259, 508 P. 2d 528 (1973); State of Utah, by and through Road Commission v. Larkin, 27 Utah 2d 295, 495 P. 2d 817 (1972); and Wagner v. Olsen, 25 Utah 2d 366, 482 P. 2d 702 (1971).

Regardless of the merit of respondent's position, respondent, having failed to make the argument previously, may not claim that appellant is now entitled to recover any amount from respondent under a theory of subrogation or contribution because an insurer may not recover from its own insured or co-insured.

POINT II

COVERAGE OF THE PARTICULAR RISK INVOLVED IN THIS CASE IS NOT EXCLUDED BY SPECIFIC EXCLUSION 1(e) OF RESPONDENT'S HOMEOWNER'S INSURANCE POLICY

The question of insurance coverage has its genesis in the

meaning of the phrase "arising out of any premises." Precisely stated, the issue is whether, for purposes of excluding insurance coverage, the injury arose out of a particular premise because a horse bolted off the same and ran through an open gate onto the highway where it collided with an automobile.

The specific language of Exclusion 1(e) of respondent's Homeowner's Insurance Policy reads:

> This policy does not apply:
>
> e. to bodily injury or property damage arising out of any premises, other than an insured premises, owned, rented or controlled by any Insured; . . .

This Court, in the case of Bergera v. Ideal National Life Ins. Co., 524 P. 2d 599 (Utah, 1974), held that an insurance policy is simply a contract between the insured and the insurer and that its language should be construed pursuant to the same rules applied to other ordinary contracts, and that words used should be given their usual and ordinarily accepted meaning. It is also generally recognized that exceptions, limitations and exclusions to the insurance agreement require a narrow construction in favor of the insured. Furthermore, this Court recognized the doctrine of "reasonable expectations" in the case of Jorgensen v. Hartford Fire Ins. Co., 13 Utah 2d 303, 373 P. 2d 580, 581 (1962), wherein it stated that:

> . . . the plaintiffs are thus entitled to the

> broadest protection that they could reasonably believe the commonly understood meaning of its terms afforded them; . . .

Similarly, the Supreme Court of California in the case of State Farm Mutual Automobile Ins. Co. v. Partridge, 109 Cal. Rptr. 811, 514 P. 2d 123, 128 (1973), stated:

> . . . Whereas coverage clauses are interpreted broadly so as to afford the greatest possible protection to the insured, . . . exclusionary clauses are interpreted narrowly against the insurer. . . .

See also, King v. Travelers Ins. Co., 84 N. M. 550, 505 P. 2d 1226 (1973); Upland Mutual Ins., Inc. v. Noel, Kan., 519 P. 2d 737 (1974); and Fassio v. Montana Physicians' Service, 553 P. 2d 998 (Mont., 1976).

We have been unable to uncover any case law interpreting the meaning of "arising out of any premises" as that term of art is used in a homeowners insurance policy. However, the words "arising out of" used in an automobile liability insurance policy have been interpreted to mean "originating from," "having its origin in," "growing out of," or "flowing from." See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Brnecks, 179 Neb. 642, 139 N. W. 2d 821, 826 (1966). The word "premises" has been defined by lexicographers in The Random House Dictionary of the English Language, The Unabridged Edition, 1967, to mean "a tract of land including its building," "a building together with its grounds or other appurtenances," or "the property forming the

subject of a conveyance or bequest." See also, Lunceford v. State National Securities, Inc., 124 Ga. App. 804, 186 S.E. 2d 320, 321 (1971). In other words, to say the accident arose out of any premises means the accident had its origin in, grew out of, or flowed from any tract of land, its buildings or other appurtenances.

It is appellant's position that for the injury to "arise out of any premises" it must (1) occur on the premises, and (2) be caused by a condition, natural or artificial, of said premises. For instance, an accident arises out of a natural condition of the premises when an individual is injured by falling in an open ditch, drowning in a pond or slipping on a rock situated thereon. Similarly, an accident would arise out of an artificial condition of the premises where an individual is injured while sitting on a gate when it collapses, by falling through a trap door, or stumbling over a tree stump, the gate, trap door and stump all being located on the property. In short, the accident must occur on the property, and a conditon of the property must be the source or fountainhead of the injury.

Appellant disagrees with respondent's position that "arising out of any premises" means "connected with the premises" in the sense there must only be some causal connection between the property and the accident. Appellant contends that the property must be more than a mere contributing factor or a link in the chain leading up to the accident. Just as it is wrong to conclude that Exclusion 1(e) of respondent's Homeowner's Insurance Policy would apply to the explosion of a hot air balloon 2,000

feet in the air because it "arose out of the premises" or because it was "causally connected" with the premises in the sense that but for the hot air balloon leaving the ground the accident would not have occurred, there is a gap in the argument that because the horse ran through the open gate located on the property the accident "arose out of the premises."

As previously indicated, respondent claims that the term of art "arising out of" and the term of art "connected with" are treated by many cases as being snonymous and, among others, cites the Louisiana case of Jackson v. Lajaunie, 253 So. 2d 540 (La. App., 1971) as authority. In that case, a service station owner shot a customer with a gun he thought was loaded with blanks. The garage owner had a garage liability insurance policy with the United States Fidelity & Guaranty Company and a homeowner's insurance policy with the Continental Insurance Company. An exclusion of the homeowner's insurance policy provided that there would be no coverage for "any act or omission in connection with the premises which are owned, rented or controlled by an insured." The contested issue was whether the shooting was "an act or omission in connection with the service station premises." The intermediate Louisiana Court held that the accident did not occur "in connection with the premises;" that the exclusion did not apply; and that the garage owner was covered under his homeowner's policy.

The Louisiana Supreme Court in Jackson v. Lajaunie, 264 La. 181, 270 So. 2d 859 (1973) reversed the Louisiana Court of Appeal

ruling that the accident did occur in connection with the premises and that the homeowner's policy excluded coverage. Of significance is the Louisiana Supreme Court's analysis of the meaning of the phrase "in connection with" wherein it stated that it is a "broader term" than "arising out of."

In Duggan v. The Travelers Indemnity Co., 383 F. 2d 871 (1967), a husband and wife held a $10,000.00 premises liability policy which contained an exclusion for "any act or omission in connection with [business] premises." Their dog, left in the wife's beauty parlor while the husband went on an errand, bit one of his wife's customers. The court held that the premises liability insurance policy covered the accident in question and that the exclusion did not apply because the injury did not occur "in connection with" the premises even though the accident occurred on the premises. Other courts have held that the phrase "in connection with" used with the word "premises" means at the very least "on the premises." See, 29 A. L. R. 3d 847 wherein the cases of Dueder Watch Co. v. Young, 155 Ill. 226 and Gurney v. Atlantic Ry., 58 N. Y. 358 are cited as authority. In spite of that authority, the First Circuit Court held that the exclusion did not apply because even though the accident occurred on the premises it was not caused by the condition, operation or neglect of the premises.

In our case the accident did not even occur on the premises. Assuming, as respondent contends, that the phrase "arising out of" and

the phrase "in connection with" are synonymous and that either phrase used with the word "premises" means at least "on the premises," then, the condition precedent failing, the exclusionary clause in respondent's homeowner's insurance policy would not apply, the accident having occurred on a public highway adjacent to the "premises" in question.

Appellant's construction of the policy is bolstered by the fact that respondent neglected to include in its policy language commonly found in similar homeowner's policies extending the exclusion to include "sidewalks, ways or property immediately adjacent thereto." However, several courts, even with the language extending the exclusion to adjoining or adjacent property, have still required that the incident occur on the premises described and defined in the policy.

In General Accident Fire & Life Ins. Corp. v. Woeffel, 7 Misc. 2d 952, 161 N.Y.S. 2d 794 (1967) the Court rendered a judgment for the insurer on the ground that the accident did not happen at a point included within the area covered by the policy. It was the insurer's action for a declaratory judgment determining the question of its duty to defend the insured under a policy covering liability because of injuries sustained by a person caused by accident, arising out of the ownership, maintenance, or use of the designated premises, including buildings and structures thereon and the ways immediately adjoining, with respect to injuries sustained in a collision by a third person who was in an automobile standing parked at the curb in front of a poultry market which

was next door to the insured's service station, it appearing that the rear of the automobile was between 20 to 25 feet north of the northerly boundary line of the service station when it was hit by an automobile which was driven out of the service station by an employee of the insured. The court reasoned that the phrase "ways immediately adjoining" must be defined to include "that area and only that area contained within the geometrical figure formed by the intersections of the building line of any premises in question, the extension (from each end of that building line) of the lot lines of such premises and either the curved or the building line across the street from the premises in question." [Emphasis added.] In our case the geometrical area in question would be even more restricted, the policy exclusion not extending itself to adjoining or adjacent premises.

In Long v. Lundon & L. Indem. Co., 119 F. 2d 628 (Ohio, 1941) where a motorcycle police officer was thrown off his cycle onto the pavement and was injured at a point approximately 60 feet east of the nearest portion of the insured's property immediately adjacent to the street on which the accident occurred, as the result of a collision between a dog which ran out of the insured's driveway and the motorcycle, the court held that the place where the accident and resulting injury occurred determined liability under the policy and that the locus in quo of the accident was not on a way immediately adjacent to the premises of the insured, and, therefore, there was no policy coverage.

Exclusion 1(e) of respondent's homeowner's policy does not apply because construing the clause narrowly, against the insurer and in favor of the insured, the phrase "arising out of any premises" requires that the accident occur on the property and be caused by a condition, operation or neglect of the same, and, in our case, the accident occurred off the premises on a public highway.

POINT III

THE ISSUE BEFORE THE COURT IS NOT WHETHER THE AUTOMOBILE INSURANCE OF A NON-DRIVER OWNER OR THAT OF A NON-OWNER DRIVER IS PRIMARY

Respondents reliance upon the cases of National Farmers Union Property and Casualty Co. v. Farmers Ins. Group, 14 Utah 2d 89, 377 P. 2d 786 (1963) and Christensen v. Farmers Ins. Exchange, 21 Utah 2d 194, 443 P. 2d 385 (1968) is perplexing. The cases are inapposite to the issues at hand. Admittedly, it is the law in Utah that the automobile insurance of a non-driver owner is primary and that of the non-owner driver secondary. In fact, the standard automobile liability insurance policy will state in its "other insurance" clause something to the effect that the particular insurance with respect to a non-owned automobile shall be excess over any other collectible insurance. This case does not involve a non-owner driver, non-driver owner, nor conflicting automobile liability insurance policies. We are dealing with a homeowner's insurance policy, concurrent coverage, different "other insurance" clauses and the problem of apportionment.

Accordingly, those automobile liability cases are not particularly helpful in resolving this dispute.

Our question is one of overlapping primary coverage. Concededly, appellant's general liability insurance policy expressly provides primary insurance. It is our position that respondent's homeowner's policy similarly provides primary protection. We concur with the Colorado Supreme Court in the case of State Automobile and Casualty Underwriters v. Beeson, Colo., 516 P. 2d 623, 626 (1973) where it said:

> . . . as here, an insured is engaged in an activity covered by one policy while at the same time engaged in acts covered by another, the coincidental overlapping cannot defeat the coverage of either or both of the policies where they would otherwise both cover the accident.

That case involved duplicate coverage under two homeowner's insurance policies.

In short, the cases of National Farmers Union Property and Casualty Co. v. Farmers Ins. Group, supra, and Christensen v. Farmers Ins. Exchange, supra, are not legitimate authority for the proposition that appellant's coverage is primary and that of respondent secondary. Equity and justice require that where there is concurrent primary coverage and both policies contain pro rata "other insurance" provisions that the insurers pro rate the loss.

. . . . .

. . . . .

CONCLUSION

Based upon the foregoing and appellant's original Brief, the dénouement seems to be that:

1. Brent G. Story was covered by respondent's homeowner's insurance policy;

2. Exclusion 1(e) of respondent's homeowner's insurance policy does not exclude coverage of this loss; and

3. Respondent and appellant having provided concurrent overlapping and duplicate coverage of the same loss on the same primary basis, they should pro rate the loss consonant with the proportionate amount each insured bears to the whole insurance covering the loss.

Therefore, appellant seeks to have the Order granting respondent's Motion for Summary Judgment and denying appellant's Motion for Summary Judgment and further seeks a judgment in its favor and against the respondent.

Dated this 17 day of January, 1978.

Respectfully submitted,

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D. GARY CHRISTIAN

JAMES R. BLAKESLEY

MAILING CERTIFICATE

I hereby certify that I mailed three (3) copies of REPLY BRIEF OF APPELLANT to Glenn C. Hanni of Strong and Hanni, attorneys for defendant and respondent, Western Casualty and Surety Company, 604 Boston Building, Salt Lake City, Utah 84111, this 24th day of January, 1978.

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