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Kirt Overson v. United States Fidelity And Guaranty Company Aka Usf&G, An Insurance Company : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

KIRT OVERSON,)

Plaintiff-Appellant,)

vs.)

No. 15470

UNITED STATES FIDELITY and)

GUARANTY COMPANY aka)

USF&G, an insurance company,)

Defendant-Respondent.)

APPELLANT'S BRIEF

Appeal from the Judgment of the
Fifth Judicial District Court, Millard County,
The Honorable J. Harlan Burns, Judge

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Defendant-Respondent.)

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is a declaratory judgment action filed by plaintiff insured against defendant insurer to determine the effect of coverage provisions of an insurance policy.

DISPOSITION IN THE LOWER COURT

This case was tried to a jury, The Honorable J. Harlan Burns presiding. At the conclusion of the plaintiff's case, the court, upon a motion for dismissal by the defendant, dismissed the plaintiff's action with prejudice. From the dismissal order, the plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff-appellant seeks reversal of the dismissal order and remand to the District Court for a trial on the merits to the jury.

STATEMENT OF FACTS

This is a declaratory judgment action filed by plaintiff against defendant insurance company. Plaintiff seeks to compel defendant insurance company to fulfill its obligation under an insurance policy to defend plaintiff in an action brought against plaintiff by Stephenson's, Inc., a Utah corporation, and pay any judgment which may be rendered against the plaintiff therein up to the policy limits.

Stephenson's, Inc. (hereafter referred to as Stephenson's) is an implement dealer in Holden, Utah. Stephenson's entered into a contract with Triple "C" Farms to construct two quonset type metal buildings. Stephenson's was to furnish both the materials and the labor for the project. Upon completion, the metal structures were to be used by Triple "C" Farms as potato storage facilities. Pursuant to its contract with Triple "C" Farms, Stephenson's hired Kirt Overson as the subcontractor to do the actual erecting and insulating of the metal structures. Stephenson's furnished the prefabricated metal (Trial Court Transcript, p. 12) and Overson put it together at the job site. (Trial Court Transcript, p. 13).

Other subcontractors were also hired--some by Stephenson's and some apparently by Triple "C" Farms. One subcontractor did the excavation work; another formed and poured the cement footings; another subcontractor did the interior carpentry work; another did the electrical wiring; and a different one did the ventilation system. (Trial Court Transcript, pp. 13-15).

The construction process was supervised at each stage by Stephenson's and Triple "C" Farms. (Trial Court Transcript, pp. 24-26, 54-55). After the buildings had been erected and insulated, Stephenson's directed Overson to enlarge the size of the ventilation louvers in the ends of the buildings. (Trial Court Transcript, pp. 24-25). While two of Overson's employees were cutting off the head of a bolt with an acetylene torch so they could enlarge the air vent, the insulation suddenly ignited. The fire spread rapidly, completely destroying the building within minutes.

Stephenson's filed a suit against Overson to recover for damages sustained by reason of the fire. Overson tendered the defense to his insurer, the United States Fidelity & Guaranty Company. The insurer refused to defend, claiming an exclusion in the policy precluded Overson's coverage. The policy provisions in question read as follows:

This insurance does not apply:

- (a) To liability assumed by the insured under any contract or agreement except an incidental contract; but this exclusion does not apply to a warranty of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner;
* * *
- (k) to property damage to
* * *
- (3) property in the care, custody, or control of the insured or as to which the insured is for any purpose exercising physical control.
* * *

- (o) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith;

The refusal by USF&G, the defendant insurance company, to defend plaintiff in the suit filed by Stephenson's spawned this present action. Plaintiff is seeking a declaration of defendant's duty to defend and to pay any judgment up to the policy limits which may be rendered.

ARGUMENT

THE COURT ERRED IN DIRECTING A JUDGMENT FOR DEFENDANT, THEREBY DEPRIVING PLAINTIFF OF HIS RIGHT TO A JURY TRIAL, SINCE FACTS AND ISSUES UPON WHICH REASONABLE MINDS COULD DIFFER WERE RAISED AND REMAIN UNRESOLVED.

Rule 50(a) of the Utah Rules of Civil Procedure allows a party to move for a directed verdict at the close of the evidence proffered by his opponent. It was under this rule that the motion was made in the trial court.

The motion for a directed verdict should be granted only cautiously, since it deprives the party of a determination of the facts by a jury. Wright & Miller, Federal Practice and Procedure, Civil, §2524, and cases cited therein. Citing from the Wright & Miller treatise:

In determining whether the evidence is sufficient, the court is not free to weigh the evidence or to pass upon the credibility of witnesses or to substitute its judgment of the facts for that of the jury. Instead it must view the evidence most favorable to the party against whom the motion is made

and give that party the benefit of all reasonable inferences from the evidence. (See cases cited therein.)

Perhaps the most concise statement of the test was stated by the Second Circuit in Simblest v. Maynard, C.A.2d, 1970, 427 F.2d 1,4:

Simply stated, it is whether the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached.

Utah follows the formulation for the test for a directed verdict that has developed in the federal courts, since Utah's Rule 50(a) is identical to the Federal Rule 50(a). In the case of Boskovich v. Utah Construction Company, 123 Utah 387, 259 P.2d 885 (1953), the Utah Supreme Court reviewed a case on appeal following a directed verdict for the defendant. The question was whether the trial court erred in directing a verdict for the defendant. The court said:

. . .In deciding a motion for a directed verdict, the court must consider the evidence in the light most favorable to the party against whom the motion is directed and must resolve every controverted fact in his favor. /Cites./ The inquiry, then, must be directed toward whether reasonable minds could disagree in the case on the evidence presented so as to provide a question for the jury.

Also see Finlayson v. Brady, 121 Utah 204, 240 P.2d 491 (1952).

Remembering that all the evidence must be viewed most favorable to the party against whom the motion is made, the question comes down to the reasonable man test--whether the minds of

reasonable men could differ. The appellant maintains that reasonable men could differ on the particulars of this case as presented at trial because (A) the contract provisions are ambiguous and (B) several fact issues were raised needing jury determination.

A. THE INSURANCE POLICY PROVISIONS RELIED UPON BY THE DEFENDANT ARE AMBIGUOUS AND THEREBY REQUIRE JURY INTERPRETATION.

The phrases of the insurance policy upon which the defendant insurance company rely are not clear. They are ambiguous. The phrase "care, custody or control" is not defined anywhere in the policy. Rather, it is boiler-plate language found in almost all industrial liability insurance policies. These words, part of the form contract written exclusively by the insurance company, are purposefully kept general in nature in an attempt to exclude coverage in a myriad of situations. Numerous cases dealing with identical or similar "care, custody or control" clauses have been held to be ambiguous. Arrigo's Fleet Service, Inc. v. Aetna Life & Casualty Company, 54 Mich. App. 482, 221 N.W.2d 206 (1974); Employer's Mutual Liability Insurance Company of Wisconsin v. Puyear Wood Products Company, 247 Ark. 673, 447 S.W.2d 139 (1969); Aetna Casualty & Surety Company v. Haas, 422 S.W.2d 316 (Mo. 1968); Fall's Sheet Metal Work v. United States Fidelity & Guaranty Company, 17 Ohio App.2d 209, 245 N.E.2d 733 (1969).

Clause (c) of the insurance policy, cited supra, is equally general and devoid of specific meaning. Several courts have held that the phrase is ambiguous. The Arizona Supreme Court, in Federal Insurance Company v. P. A. T. Homes, Inc., 113 Ariz. 136,

547 P.2d 1050 (1976), held that an insurance policy containing language identical to that in clause (a) and clause (o), cited supra, was ambiguous when compared to each other. The Arizona court said:

The policy must be read as a whole in order to give reasonable and harmonious meaning and effect to all of its provisions.

Reading the clauses together, the court pointed out that more than one construction of the provisions was possible. It went on to hold the clauses to be ambiguous and construed them most strongly against the insurer and in favor of the insured.

A Louisiana court, in Hendricks Electrical Company, Inc. v. Casualty Reciprocal Exchange, La. App., 1974, 297 So.2d 470, construed a general liability insurance clause identical to clause (o) as excluding only the damage to the property actually being worked on by the contractor (an electrical switch). It did not exclude coverage for the entire building which was damaged by a fire caused by the negligence of the contractor in working on the switch. See also Roland Construction Co. v. St. Paul Fire & Marine Insurance Co., 72 Wash.2d 682, 434 P.2d 725 (1967).

Admittedly, some courts have found the language of clause (k) and clause (o), cited supra, to be clear and unambiguous. However, the logic of Employer's Mutual Liability Insurance Company of Wisconsin v. Puyear Wood Products Company, Supra, appears irrebuttable:

The very fact that courts of similar jurisdictions have arrived at different construction as to the meaning of the words under discussion, and even in some instances have gone so far as to take

almost opposite views, is certainly some indication that the terms in the context used are ambiguous.

See also Federal Insurance Company v. P. A. T. Homes, Inc., Supra at 1052.

Ambiguity in an insurance contract results in strict construction against the insurer. This rule of strict construction is no different when the "care, custody and control" or clause of exclusions are involved. Federal Insurance Company v. P. A. T. Homes, Inc., Supra; United State Fire Insurance Company v. Schnabel, 504 P.2d 847 (Alas. 1972); Boswell v. Travelers Indemnity Company, 38 N.J.Super. 599, 120 A.2d 250 (1956); Innis v. McDonald, 77 Ohio L.Abs. 417, 150 N.E.2d 441 (1956).

Ambiguity in a written insurance contract also creates an interpretive question within the exclusive purview of the jury. 75 Am. Jur.2d, Trials, §411, states the rule in these words:

While it is true as a general rule that the construction of written contracts belongs to the court and not the jury, there are nevertheless cases in which the ambiguous nature of the words used or an obscure reference to unexplained circumstances requires that the interpretation of the language be left to the consideration of the jury for the purpose of carrying into effect the real intention of the parties. It is for the jury to determine what is the agreement of the parties, where there is uncertainty in a written contract because of ambiguity or incompleteness or technical words or terms of art.

Certainly in this case there is uncertainty in the written contract because of ambiguities. Therefore, it is proper that the jury decide what the contract was to mean in light of the particular circumstances of the case.

- B. THE QUESTION OF FACT AS TO WHO HAD CARE, CUSTODY OR CONTROL OF THE BUILDING PREMISES WAS RAISED BY THE PLAINTIFF'S CASE, AND, THEREFORE, THE JURY SHOULD HAVE BEEN GIVEN THE OPPORTUNITY TO RESOLVE THE ISSUE.

Overson was hired by Stephenson's to essentially be the erection and installation subcontractor. (Trial Court Transcript, pp. 12, 13). Other parties were hired, either by Stephenson's or Triple "C" Farms, to carry out the other necessary functions in construction. (Trial Court Transcript, pp. 13-15, 23). Stephenson's oversaw the entire project, apparently serving as the general contractor. (Trial Court Transcript, pp. 25,26). Stephenson, Stephenson's employees, and all the various subcontractors were on and off the job site from the beginning of construction until the day of the fire. (Trial Court Transcript, pp. 38-40). Also, other interested parties outside the general and subcontractors, were at the job site on a regular basis. (Trial Court Transcript, p. 40).

It is apparent that the job site was not the exclusive domain of Overson and his employees. Rather, a number of different parties had unrestricted access to the building site during the entire construction period. Triple "C" Farms was the record land owner of the job site. Certainly they had possessory "custody and control". Stephenson's, apparently acting as the general contractor of the project, had the physical "custody and control" of the job site. Each subcontractor as he came on to the job site had the same "custody and control" as Overson.

In light of all the various parties participating, which one or ones had the "care, custody or control" spoken of in the

insurance policy provisions? If more than one party had "care, custody or control", does it negate any "care, custody or control" that Overson might have had? The insurance policy provisions relied upon by the insurance company leave these questions and many others unanswered. Therefore, a factual question for the jury in light of the particular facts of this case, exists as to whether Overson had the requisite "care, custody or control" to trigger the claim's policy exclusions. This issue was clearly raised by the examination and cross-examination of plaintiff's witnesses in the trial court.

It is the province of the jury to make factual determinations. The trial court erred in denying the plaintiff his right to have the jury make the determinations of the facts in this case.

That a fact issue for the jury existed was demonstrated by the trial judge himself. Two motions for summary judgments by the defendant before trial were denied. (Trial Record, pp. 60,95). The reason that the court ruled against summary judgment was that an issue of fact was presented which required jury resolution. It seems a paradox that after two summary judgment denials, the trial judge would take the case away from the jury and preclude their determination of the issues.

That factual issues for the jury are present in this case can be illustrated by two cases that are factually indistinguishable from this one. First, General Mutual Insurance Company v. Wright, 7 Misc.2d 331, 161 N.Y.Supp.2d 974 (1957), involved a contractor that had erected a metal framed school building. During a violent storm the frame was blown over, causing extensive

damage to the steel and masonry piers which supported it. General Mutual, which had insured the contractor from liability, denied coverage on the basis of a policy clause excluding coverage for damage to property in the "care, custody or control" of the insured. Ruling that the insurance company's position was without merit, the court stated:

This /plaintiff's/ argument is specious. It assumes that in order to work on something, you must have custody of it. This is certainly not true of a large steel frame furnished by someone else, and being erected on still another party's property.

The facts of the instant case are almost identical to those of Wright. Wright was constructing a steel frame furnished by someone else on a third party's land. In our case, Overson was erecting a steel building from metal furnished by Stephenson's on Triple "C" Farms' land. The question of custody is just the same in our case as it was in the Wright case.

In another case, Anderson v. Brown, 21 Mich.App. 699, 176 N.W.2d 457 (1970), a house on which a contractor was doing carpentry work and which was 75 percent completed, was destroyed by fire, allegedly caused by the contractor's negligence in using a dangerous heating arrangement. The contractor brought suit against his liability insurer for a declaratory judgment regarding insurance coverage. The trial court directed a verdict for the defendant-insurer, holding that the "care, custody or control" exclusion absolved the insurer of liability. On appeal, the trial court's decision was reversed and remanded for two reasons. One, the appellate court stated that the meaning of the "care, custody

or control" exclusion required a jury interpretation. Two, the court held that where evidence established that the house was nearing completion and that the owners themselves had subcontracted out some of the work, a jury could have reasonably concluded that the house was not under the "care, custody or control" of the contractor.

In the instant case, the two quonset huts were also nearing completion, and both the owner, Triple "C" Farms, and Stephenson's had independently contracted out some of the work.

CONCLUSION

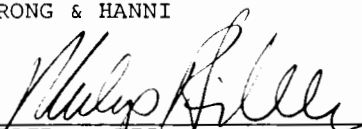
The trial court erred in directing a judgment for the defendant. A directed verdict is only appropriate when viewing the evidence most favorable to the party against whom the motion is made and giving that party the benefit of all reasonable inferences the minds of reasonable men could not differ. In our case the minds of reasonable men could differ as to the outcome for two reasons. One, the insurance exclusion is ambiguous and subject to many interpretations; therefore, the responsibility of its interpretation falls upon the jury. Two, a factual issue exists as to the amount of control Overson exerted over the building, since he was but one of the many parties involved in the construction process.

For the foregoing reasons, the Supreme Court should reverse the judgment and remand it for a new trial to the jury on the merits.

Respectfully submitted this 28 day of February, 1978.

STRONG & HANNI

By

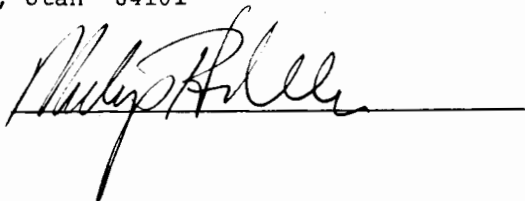

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MAILING CERTIFICATE

Mailed two copies of the foregoing Appellant's Brief to
the following counsel this 28 day of February, 1978:

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A handwritten signature in dark ink, appearing to read "Philip H. Lee", is written over a horizontal line.