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

RESPONDENT'S BRIEF

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

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RESPONDENT'S BRIEF

Nature of the Case

This is a declaratory judgment action brought by Appellant to determine whether a fire loss to a building he was constructing was covered by his policy of insurance with Respondent.

Disposition in the Lower Court

This case was tried to a jury, with the Honorable J. Harlan Burns presiding. At the conclusion of Appellant's case, the court granted Respondent's motion for directed verdict against Appellant, finding as a matter of law that the insurance policy in question was not ambiguous and that exclusions K(3) and (0) of the policy excluded Appellant's loss from coverage.

Relief Sought on Appeal

Respondent requests that the Judgment below be affirmed.

Statement of Facts

The facts of this case are simple and undisputed. Appellant's statement of facts is incomplete, however, and therefore, a complete recitation of the facts of this case follows.

On or about August 1, 1973, Appellant purchased a comprehensive general liability policy of insurance from Respondent (Tr. p. 3; Exhibit P-1). Said policy of insurance contained certain exclusions which excluded certain types of loss from coverage under the policy. Two of these exclusionary provisions were relied upon at trial by Respondent. (Tr. p.8). Said exclusions read as follows:

This insurance does not apply:

* * *

(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; (Exhibit P-1).

Neither the policy nor the exclusions were ever read by Appellant. (Tr. p. 8).

The instant action arises from a fire loss which occurred on September 3, 1973. (Tr. p. 4). The building that burned was a quonset-type steel building which was to be used for potato storage when completed. (Tr. pp. 10, 11; Ex. P-2). The owner of the real property upon which the building was situated was Triple "C" Farms of McCormack, Utah. (Tr. p. 4). At the time of the loss, Triple "C" Farms had not taken possession of the building. (Tr. p. 36).

The steel for the building, footings and foundations, electrical work and some interior ductwork were to be provided by Stephenson's, Inc., an implement dealer from Holden, Utah. (Tr. pp. 13-15). Appellant had contracted to provide the labor necessary to erect the building and to furnish and apply the foam insulation used therein. (Tr. pp. 13, 17, 20).

As of the date of loss, Appellant has no recollection as to whether any electrical work or work by persons other than him or his employees had been done on the building that burned. (Tr. p. 33). He did remember that others had poured the footings and foundations, but admitted that such work was completed six or eight weeks prior to the date of loss. (Tr. p. 34). On the date of loss, the only persons working on or about the building that burned were two employees of Appellant, Harold Helgesen and Billie VanDeVanter. (Tr. pp. 34, 35, 42, 54). On that day, Messrs. Helgesen and

VanDeVanter had been directed by Appellant to enlarge a vented louvre in the ends of the building. (Tr. p. 47). They proceeded to accomplish this task by removing one of the metal panels constituting part of the building end wall, cutting a larger hole in it, replacing the small louvre with a larger one and replacing the panel on the building. (Tr. pp. 49-51). They had removed the panel from the east end of the building without incident but when attempting to remove the panel from the west end of the building the threads on one of the connecting bolts stripped and it could not be removed conventionally. (Tr. p. 51). In an effort to remove the bolt, Mr. VanDeVanter obtained an acetelyne cutting torch from a nearby van and proceeded to cut the head off the stripped bolt. (Id.) Before the bolt was severed by the torch, the flame ignited the polyurethane foam insulation in the building and the building burned to the ground within minutes. (Tr. pp. 52, 54). The foam insulation was furnished and applied by Appellant. (Tr. pp. 17, 20).

Subsequent to the loss, a new building was erected on the site. (Tr. p. 29). Thereafter, Stephenson's, Inc. sued Appellant for the loss. (Tr. p. 30). Appellant tendered defense of that case to Respondent for defense but the tender was refused and coverage denied. (Tr. p. 30). The instant action was commenced in the District Court of Millard County on October 11, 1974. (R. p. A-1).

Argument

POINT I

THE COURT WAS CORRECT IN DIRECTING A VERDICT AT THE CLOSE OF APPELLANT'S CASE.

Pursuant to Rule 50(a) of the Utah Rules of Civil Procedure, the court may direct a verdict for the defendant at the close of the plaintiff's case. It is generally held that such a ruling is proper when there is no reasonable disagreement on the questions to be presented to the jury. Boskovich v. Utah Construction Co., 123 Utah 387, 259 P.2d 885 (1953).

In this case the facts concerning the incident are undisputed.

The only issues remaining were issues of contract interpretation. Those questions could only be decided by the trial judge. Pacific States Cast Iron Pipe Co. v. Haish Utah Corp., 5 Utah 2d 244, 300 P.2d 610 (1956). The general rule has been stated as follows:

Interpretation of a written contract is usually a question of law for the court. If its terms are clear and unambiguous, summary judgment is proper. Even where some ambiguity exists in the contract, resolution of the ambiguity is still a question of law for the court unless contradictory evidence is presented to clarify the ambiguity. Central Credit Collection Control Corp. v. Grayson, 7 Wash. App. 56, 499 P.2d 57 (1972).

Appellant indicates that because summary judgment had previously been denied there must have existed a fact

question. This court has recently held that such is not the case. Richardson v. Grand Central Corp., No. 14931, filed December 2, 1977. In that case, this court made it clear that preliminary rulings do not rise to the level of res judicata or stare decisis. Therefore, a directed verdict can be properly granted even where summary judgment has been denied.

POINT II

THE COURT WAS CORRECT IN HOLDING THE CLAUSES
OF THE INSURANCE POLICY TO BE CLEAR AND UN-
AMBIGUOUS.

A. Generally.

Appellant, in the abstract, claims the exclusionary clauses relied upon by Respondent are ambiguous. No specific ambiguity is claimed and no specific conflicting interpretation is advanced by Appellant as being his reading of these policy provisions; and indeed, no specifics can be advanced by Appellant because he didn't even read the policy. It is impossible for Appellant to rely on his interpretation of the policy for coverage when he had no interpretation of the policy to begin with. In essence, there is no evidence in this case of conflicting intent, and there being no such evidence, there can be no ambiguity as a matter of law. Clayman v. Goodman Properties, Inc., 518 F.2d 1026 (D.C. Cir. 1973).

B. Care, Custody or Control.

Courts have extensively interpreted the provision in

this policy of insurance excluding from coverage of damage to property in the care, custody or control of the insured. The clause has generally been found to be clear and unambiguous. 62 A.L.R. 2d 1242; Madden v. Vitamilk Dairy, Inc., 367 P.2d 127 (Wash. 1961); Hill v. United States Fidelity and Guaranty, 348 S.W. 2d 512 (Tenn. 1961). In Hill, supra, the court stated:

We think the exclusion clause of the policy which provides that said policy does not offer indemnity for damage to "property in the care, custody or control of property as to which the insured for any purpose is exercising control," is clear and unambiguous and, as has been stated in many cases, the courts will not create an ambiguity where none exists. 348 S.W. 2d at 515.

The case law has developed four rules for determining whether the property was within the care, custody or control of the insured. They are: First, that possessory, not proprietary, control is required; second, if the property damaged is only incidental to the work the insured may not have care, custody or control; third, the insured will likely have care, custody or control if he has the property under his immediate supervision; fourth, care, custody and control is more readily found where the property is a necessary element of the work as opposed to being merely incidental. 62 A.L.R. 2d 1242; Madden v. Vitamilk Dairy, Inc., supra; Hill v. United States Fidelity & Guaranty, supra.

In applying those tests to this case, the trier of fact

could only conclude that the plaintiff had care, custody or control of the building in question. Appellant had the building in his possessory control during its construction for a period of six to eight weeks before the fire. The building was not merely incidental to the work being done, but rather was the sole object of the work. Appellant had the building under his immediate supervision. Only his employees were working on the building on the day of the fire and no significant work had been done by any other person during the preceding six to eight weeks.

Finally, the building was a necessary element of the work, indeed it was the only element of the work.

This Court in American Casualty Co. v. Pearson, 7 Utah 2d 37, 317 P.2d 954 (1954), adopted the majority view that where the damaged property is under the supervision of the insured and is a necessary element of the work, the property is deemed to be in the care, custody or control of the insured. The insured's employee in Pearson, supra, while attaching a trailer hitch to a car in the regular course of business of the insured's garage, damaged the automobile when he put a welding torch to the gasoline tank. The customer-owner of the car was present, observing as well as assisting in the progress of the work. This court, nonetheless, held as a matter of law that the car was in the care, custody or control of the insured's employee; therefore, the insurer was not

liable under the terms of the policy.

As Appellant points out in his brief, some courts have held the care, custody or control exclusion to be ambiguous. In analyzing those cases it is apparent that rather than the language being ambiguous, the facts of the case present a close question when the above tests are applied. For example, in Arrigo's Fleet Service, Inc. v. Aetna Life & Casualty, 54 Mich. App. 482, 221 N.W. 2d 206 (1974) the plaintiff contracted to repair a broken axle on a large cargo trailer. This work did not require access to the cargo area. A fire started in the cargo area and the court had to decide whether this portion of the trailer was in the plaintiff's care, custody or control. Similarly, in Aetna Casualty & Surety Co. v. Haas, 422 S.W. 316 (Mo. 1968) the plaintiff was exterminating bugs when an explosion caused damage to the house. The court in that case seemed to recognize that in close fact situations it would be difficult to decide whether the property was in the case, custody or control of the plaintiff.

These cases indicate that the language of this clause is clear and unambiguous and only where the facts present a close question have courts resorted to labeling the clause ambiguous. In this case, the facts are clear: Appellant had the building under his care, custody and control. Indeed, it is anomalous for Appellant to claim that the policy was ambiguous when he has admitted never reading beyond the cover

page of the policy.

C. Damage "Arising Out Of" the Work or Materials.

The policy of insurance also excludes coverage for property damage arising out of the work or materials used. An excellent case on the subject is Engine Services, Inc. v. Reliance Insurance Co., 487 P.2d 474 (Wyo. 1971). In that case the plaintiff undertook to rebuild a heavy engine. In doing so, the plaintiff's employee improperly installed a bearing causing damage to the engine. The plaintiff sought coverage under its insurance policy, a policy containing language similar to clause (o) in this case. The court there denied the relief stating first that the language was ^{NOT} ambiguous and thus:

[I]t has uniformly been held that a liability policy with an exclusion clause such as the present does not insure any obligation of the policyholder to repair or replace his own defective work or defective product. Quoting, Vobill Homes, Inc. v. Hartford Accident & Indemnity Co., 179 So. 2d 496, 497-498 (La. 1965).

487 P.2d at 476.

In the instant case the loss falls squarely within the provisions of this unambiguous exclusion. The damage in question was property damage to work performed by the insured (erecting and insulating building) which arose out of work done by the insured's employees (cutting bolt and removing louvre) and materials supplied by the insured (foam

insulation). All of these facts are undisputed. There are no issues related to construction or application of this provision. Thus, even assuming arguendo that a fact issue did exist on the care, custody and control exclusion, application of this exclusion would still require a directed verdict against Appellant.

Under these circumstances the trial judge had no alternative but to direct a verdict for Respondent at the close of the Appellant's case.

D. Appellant Purchased the Wrong Insurance

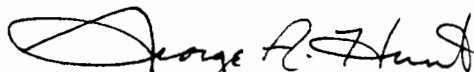
The very heart of this dispute over coverage is the fact that Appellant did not purchase the appropriate policy of insurance. The builders risk policy, purchased by contractors in similar situations, would have provided coverage for this incident. Having failed to purchase the necessary insurance he now attempts to obtain extended coverage under the liability policy previously purchased.

Conclusion

The trial court was correct in directing a verdict for Respondent at the close of Appellant's case. The facts surrounding the incident in question are undisputed. Applying the language of the policy to the facts of this case, only one conclusion could logically be reached. Appellant had no insurance coverage for the incident.

DATED this 12th day of April, 1978.

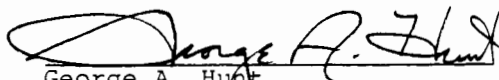
Respectfully submitted,



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Certificate of Service

I hereby certify that on the 12th day of April, 1978,
I personally delivered two (2) copies of the foregoing Brief
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