1986

Shelter America Corporation v. Ohio Casualty & Insurance Company : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

SHELTER AMERICA CORPORATION,
a Colorado corporation,

Plaintiff-Appellant,

860174-CA

No. 860104

vs.

OHIO CASUALTY & INSURANCE
COMPANY, an Ohio corporation,

Defendant-Cross-Appellant/
Respondent.

REPLY BRIEF OF CROSS-APPELLANT

Appeal from a Judgment of the Third Judicial
District Court in and for Salt Lake County

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ARGUMENT

POINT I

OHIO CASUALTY DID NOT VOLUNTEER TO INDEMNIFY AGAINST ANY FRAUD, ONLY FRAUD INVOLVING MOTOR VEHICLES

Shelter America has advanced the absurd proposition that the motor vehicle dealer's bond covers any fraud committed by Dewey & Bob's. Shelter America suggests that the meaning of "motor vehicle" is therefore irrelevant. According to this logic, if Dewey & Bob's had fraudulently sold real estate or issued fraudulent checks, the loss would be covered. Ohio Casualty supposedly volunteered to provide such coverage.

To support this argument, Shelter America omits part of the controlling clause, disregards the remainder of the controlling

sentence and ignores the entire context of the bond. Even strict construction against the surety does not require the bond to be rewritten to give it a meaning that was plainly not intended. When the bond is viewed as a whole, the only rational interpretation is that the bond only covers fraud involving motor vehicles.

Rather than quoting the precise language of the bond, Shelter America rephrases that language to suit its argument. On page 4 of Respondent's Brief, Shelter America contends that the bond covers "any loss suffered by reason of fraud or fraudulent representation." This is not what the bond says. The bond says that there is indemnification for "any loss suffered by reason of the fraud or fraudulent representations made." The words deleted by Shelter America give the clause a different meaning. These words connect the clause to the rest of the sentence by referring to the fraud, not just any fraud.

When the entire clause is put in the context of the remainder of the sentence, it becomes clear that the fraud referred to is fraud involving motor vehicles. The sentence requires the principal to conduct his business as a motor vehicle dealer in compliance with the Motor Vehicle Business Act. The statute required that Ohio Casualty specifically mention fraud or fraudulent representation in its bond. See Utah Code Ann. § 40-3-16 (1981). The remainder of the bond

also confirms that the fraud referred to is fraud involving motor vehicles. The title of the bond is "Bond of Motor Vehicle Dealer or Salesman" and the preamble to the bond is that the principal has applied for a license to do business as a motor vehicle dealer.

To give the bond the meaning argued for by Shelter America is to disregard the context in which fraud is mentioned. This is contrary to the rules of contract interpretation. See Utah Valley Bank v. Tanner, 626 P.2d 1060, 1061-62 (Utah 1981). The interpretation advanced by Shelter America also requires an actual deletion of some of the language of the bond. Strict construction against the surety aside, the principles of contract interpretation require that all words of a contract be given some meaning. Presumably the drafter did not include words which were intended to be ignored.

The language of the bond simply does not support Shelter America's contention that Ohio Casualty volunteered to cover any fraud. Under all of the applicable rules of interpretation, Ohio Casualty's bond should be interpreted to cover the fraud or fraudulent representations made by the principal in his business as a motor vehicle dealer, but the bond should not be interpreted to include all other kinds of fraud the principal may have committed.

POINT II

THE PRIMARY INTENDED USE OF A MOBILE HOME IS FOR RESIDENCE, NOT FOR TRAVEL ON THE PUBLIC HIGHWAY

The parties agree that a mobile home does not fall within the statutory definition of motor vehicle unless a mobile home is "a vehicle intended primarily for operation on the public highways." Utah Code Ann. § 41-3-16. Shelter America argues that a mobile home satisfies this definition because it is equipped with a trailer hitch, wheelbases and taillights and is therefore intended to be drawn on the public highways by a motor vehicle. Ohio Casualty does not dispute that a mobile home is designed to be drawn on the public highways; but, that is not the test set forth by the statute. The question is whether that is the primary intended use.

The fallacy of Shelter America's argument is demonstrated by its own reference to automobiles. Shelter America submits that many automobiles spend little time on the public highways and might therefore not be considered intended primarily for operation on the public highways. Shelter America points out that many automobiles spend a great deal of time simply parked in garages. Herein lies the fallacy. When an automobile is off the public highways it is not being used. Hence, its primary use remains operation on the public highways. By contrast, a mobile home is being used when it is parked. In fact

that is when it is being used most fully. An automobile sits cold and dark when not on the highways, whereas, a mobile home is used by its residents as a shelter. Shelter is the primary intended use of a mobile home. The mobile home is intended to travel on the public highways, but only so that the mobile home can be transported from one location to another. This transportation is not the primary use of a mobile home.

Thorp Finance Corp. v. Wright, 16 Utah 2d 267, 399 P.2d 206 (1965) demonstrates the proper analytic approach notwithstanding any difference between the mobile homes in this case and the dwellings in Thorp. Although the dwellings in Thorp may have been somewhat more permanent in their design, design was not the touchstone of the Court's decision. The Court affirmed the lower court's judgment for the following reason:

> We think the trial court took the only reasonable and realistic interpretive approach by saying that the primary purpose of the movement of these units was not to use our highways but to plant the units terra firma wise to accommodate two small families, with two separate entrances and facilities.

Id. at 207-08 (emphasis in the original). The same is true here. The purpose of moving modern-day mobile homes is not to use the highways, but to relocate the mobile homes for use as a shelter in another location. Shelter, not transportation, remains the primary intended use of a mobile home. For this reason, this Court should conclude that the mobile homes are

not "motor vehicles" as that term is defined in the Motor Vehicle Business Act, Utah Code Ann. § 41-3-7(1) (1981).

This Court's decision in Consolidated Finance Corp. v. Moulton, 25 Utah 2d 416, 483 P.2d 450 (1971), did not reach the question now before the Court. There the action against the surety was dismissed because the plaintiff's claim was for breach of contract, not for fraud. This Court only assumed and did not decide whether the house trailer involved in that case was a motor vehicle.

POINT III

PUBLIC POLICY DOES NOT REQUIRE THIS COURT TO MODIFY THE STATUTORY DEFINITION OF MOTOR VEHICLES TO INCLUDE MOBILE HOMES

Shelter America argues that even if mobile homes are not technically within the definition of motor vehicles, this Court should include them within that definition for public policy reasons. Such an amendment of the statute is not dictated by public policy, nor is it an appropriate exercise of judicial power.

Shelter America relies on the fact that two state agencies have treated mobile home as motor vehicles; however, that is not an appropriate public policy consideration. In Thorp v. Wright, supra, this Court rejected the very same argument. There the plaintiff argued that the house trailers involved in

that case should be treated as motor vehicles. This Court declined to give the Tax Commission's interpretation any import. Id. at 208. By doing so, this Court put the Tax Commission and other state agencies on notice that, contrary to agency interpretation, house trailers do not fall within the definition of motor vehicle. Had those agencies or the legislature itself wanted to change that definition to include mobile homes, there were many opportunities to do so between the 1965 decision in Thorp and 1977 when Ohio Casualty's bond was issued.

In truth, the Utah Code treats mobile homes separately. They are subject to the Mobile Homes and Recreational Vehicles Act, Utah Code Ann. §§ 41-20-1 through 7 (1981). That Act requires mobile homes to be certified as in compliance with the applicable plumbing, heating, electrical and fire prevention standards. Had the legislature chosen to make mobile home sales subject to the protections against fraud, it could have easily done so. It is not the role of this Court to make the determination for the legislature.

Shelter America further contends that it is unworkable for this Court to ask state agencies as well as the public to make a distinction between mobile homes and motor vehicles. In reality the difference is not all that difficult. Most consumers know whether they are shopping for something to transport them on the highways or for something to provide them with

shelter and a place to live. Motor homes and recreational vehicles might provide a closer call; however, these classifications have already been made by the Motor Vehicle Administration as is demonstrated by the various license classifications. Further, if the state agencies did not change their practice after this Court's decision in Thorp, there is no reason to believe they will find it necessary to change their practices if this Court affirms Thorp by concluding that modern-day mobile homes are also not motor vehicles.

POINT IV

WHETHER THE MOBILE HOME FRAUD WAS SUFFICIENTLY RELATED TO DEWEY & BOB'S MOTOR VEHICLE BUSINESS TO FALL WITHIN THE SCOPE OF COVERAGE WAS NOT RAISED BELOW.

In Point I, Part C of Shelter America's Respondent's Brief, Shelter America argues that its claim is sufficiently related to Dewey & Bob's motor vehicle business to be covered even if mobile homes are not motor vehicles. As will be argued, Ohio Casualty considers this argument to misconstrue Betenson v. Call Auto & Equipment Sales, Inc., 645 P.2d 684 (1982); however, this argument should not even be considered by the court because it was not raised in the lower court.

Below Shelter America opposed Ohio Casualty's motion for summary judgment below for all the reasons stated in Point I, Parts A and B of its Respondent's Brief. Even the headings of

the arguments are identical. See Memorandum in Opposition to Defendant's Motion for Summary Judgment, Table of Contents. However, the related activity argument was not raised in any other memoranda submitted by Shelter America nor was it raised in oral argument. Shelter America's failure to raise this argument below precludes this Court's consideration of it for the first time on appeal. See Berger v. Minnesota Mutual Life Ins. Co., 723 P.2d 388 (Utah 1986); Villeneuve v. Schamanek, 639 P.2d 214 (Utah 1981).

Further, even if this court considers Shelter America's argument, the argument should be rejected. The fraud either involved motor vehicles or it did not. Shelter America misconstrues Betenson v. Call Auto, 645 P.2d 684 (Utah 1982). Betenson found that "coverage under the bond exists only for activities constituting the conduct of the dealer's business 'as a dealer,' or for activities which the dealer has represented as part of his business 'as a dealer.'" Id. at 687 (emphasis added). Hence, the activities must actually constitute part of the dealer's motor vehicle business, not simply be related to that business. Under Shelter America's analysis, Ohio Casualty would be liable if Dewey & Bob's had sold fake diamonds from a counter at its place of business. The rule proposed by Shelter America unnecessarily blurs the line between motor vehicle activities and other activities of the

motor vehicle dealer. The bond is only required and was only written to cover the dealer's motor vehicle business.

CONCLUSION

For these reasons as well as those stated in Ohio Casualty's initial brief, Ohio Casualty respectfully requests that this Court reverse the ruling of the lower court and rule that Ohio Casualty is not liable to Shelter America in any amount.

DATED this 22nd day of December, 1986.

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CERTIFICATE OF MAILING

I hereby certify that I did cause to be mailed, postage prepaid, four copies of the foregoing Reply Brief of Cross-Appellant/Respondent to:

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DATED this 22nd day of December, 1986.

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