1997

Amy (Echard) Otto v. Thor Y. Wixom, State Farm Mutual Automobile Insurance Company : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS

AMY (ECHARD) OTTO, Plaintiff, vs. THOR Y. WIXOM and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendants.	Appeal No. 970584-CA
STATE FARM MUTUAL AUTO-MOBILE INSURANCE COMPANY, Cross-Plaintiff, vs. THOR Y. WIXOM, Cross-Defendant.	Second District Court Civil No. 940900473PI
STATE FARM MUTUAL AUTO-MOBILE INSURANCE COMPANY, Third-Party Plaintiff, vs. LAURA YANCEY, Third-Party Defendant.	
STATE FARM MUTUAL AUTO-MOBILE INSURANCE COMPANY, Third-Party Plaintiff/Appellee,	

vs.

METROPOLITAN PROPERTY & CASUALTY LIABILITY COMPANY,

Third-Party Defendant/Appellant.

REPLY BRIEF OF APPELLANT

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COURT, STATE OF UTAH
HONORABLE MICHAEL J. GLASMANN

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INTRODUCTION

This case turns on the interpretation of the Metropolitan insurance policy. State Farm has admitted that if this court finds no coverage under the Metropolitan policy, it will pay the damages to which Amy Echard Otto, the plaintiff in the underlying action, is entitled under the uninsured motorist provisions of its policy. If the court finds coverage under the Metropolitan policy, Metropolitan will respond to the plaintiff's claims.

Whether the Metropolitan policy covers the claim turns on an interpretation of the insuring agreement which provides, in pertinent part:

> **We** will pay **damages** for **bodily injury** and **property damage** to others for which the law holds an **insured** responsible because of an **occurrence** which results from the ownership, maintenance or use of a **covered automobile** or a **non-owned automobile.**

(R. 347-348, 360.) (Appellant's Brief, Tab 2.) Coverage in this case depends on two requirements of this insuring agreement. Thor Wixom would have to have been an (1) "insured" driving a (2) "non-owned automobile." The issue of whether he was an "insured" was covered in the opening briefs. This Reply Brief will concentrate on the issue of whether Thor Wixom was driving a "non-owned automobile."

Summary judgment for State Farm was improper. The record is clear that Thor Wixom was not driving a "non-owned automobile." At best for State Farm, the record shows that genuine issues of material fact remained to be determined, and that the District Court could not have entered summary judgment for State Farm without improperly adjudicating these facts.

ARGUMENT

A. THE TRIAL COURT INCORRECTLY RULED THAT THOR WIXOM MET POLICY REQUIREMENTS FOR DRIVING A "NON-OWNED AUTOMOBILE."

To find coverage under the Metropolitan policy, the trial court would necessarily have had to made a finding that the car Thor Wixom was driving in the accident qualified as a "non-owned automobile" as described in the Metropolitan policy. It was not. To the extent prior briefing has not fully developed this issue, this reply memorandum will explain why Thor Wixom did not meet the requirements for a "non-owned automobile" because he was driving a car that was available for his regular use.

1. THE CAR THOR WIXOM DROVE IN THE ACCIDENT WAS SO REGULARLY AVAILABLE THAT THIS COURT CAN DECIDE, AS A MATTER OF LAW, THAT THE CAR WAS AVAILABLE FOR HIS REGULAR USE AND THEREFORE DID NOT QUALIFY AS A "NON-OWNED AUTOMOBILE."

The car Thor Wixom was driving in this accident cannot meet the requirements as a non-owned automobile because it was regularly available for his use. The facts are so clear that reasonable minds can draw no other conclusion. Thor Wixom had parked his car at least two weeks before the accident and there is nothing in the record to show that he drove any other vehicle during this two-week period before the accident. (R. 380-381, 383.) Whenever he was in a car, this is the one he drove. The record shows no limitations on when he had the car available to him except for the times when its owner, his fiancé, was using it. (R. 380.) At one point in the record, he

remembered that he used the car about seven times in the two weeks before the accident. (R. 384.)

The policy language which must be met for the car Thor Wixom was driving to be "non-owned automobile" is clear:

> "**non-owned automobile**" means an **automobile** which is neither owned by, furnished to, nor made available for regular use to **you** or any resident in **your** household.

(R. 348, 368; Appellant's Brief, Tab 2.) Under this policy provision, Thor Wixom has no coverage if he was driving a car "made available for regular use" by him.

State Farm argues that the test under this policy language is actual use of the car. It is not. A more careful reading shows that the test is whether the car is "*available for regular use*" of the person seeking coverage. Actual use can prove availability because to be used, the car had to be available. The car can also be available on other occasions whether it is actually used or not.

Contrary to the erroneous finding of fact the trial court would have been required to reach, the car Thor Wixom was driving at the time this accident was available for his regular use. At the time of the accident, the car Thor Wixom was driving was garaged at the home where Thor Wixom was living. (R. 377.) Although Thor Wixom owned a car of his own, he had canceled his insurance and was not driving his car. (R. 380-81.) The record reveals no other car being available to Thor during the two-week period before the accident.

The only limitation to vehicle availability in the record is that the car was not available when Thor Wixom's fiancé was using it. (R. 378.) Even then, Thor often drove the car when the couple was together. (R. 382.) In his deposition, Thor Wixom recalled "maybe seven times" he had driven his fiancé's car in the two weeks before the accident. (R. 382.)

In short, the record reflects that the car made available to Thor Wixom on the date of the accident was the only car he had available to him in the two weeks before the accident. (R. 381-83.) Nothing indicates he was ever told he could not drive the car. (R. 381.) Thus, it was fully available for his regular use. (R. 381-83.) The only real limitation, according to the record, is when his fiancé was driving the car. (R. 380.) Even then, he testified that he sometimes drove. (R. 384.) The availability of Thor Wixom's fiancé's car was so regular that this court can find, as a matter of law, that the car Thor Wixom was driving at the time of the accident was available for his regular use. He used it regularly. Even during times he was not using it, it was available for his regular use.

2. GENUINE ISSUES OF MATERIAL FACT REMAINED REGARDING WHETHER THE CAR WAS A "NON-OWNED AUTOMOBILE."

Because this is an appeal from a grant of a motion for summary judgment, the existence of a factual dispute requires reversal. *Wilcox v Geneva Rock Corp.*, 911 P.2d 367, 368 (Utah 1996). This court need apply no deference to the trial court's conclusion that there were no issues of fact precluding summary judgment. *Id.*

In this case, the statements upon which State Farm relies came from a deposition taken before Metropolitan was made a party to this action. (R. 375.) Because Metropolitan was not a party, it had no counsel present at Thor Wixom's deposition. (R. 376.) In fact, the only counsel present at Thor Wixom's deposition were the two lawyers whose clients can benefit from coverage under the Metropolitan policy: State Farm's counsel Erik K. Davenport, and underlying plaintiff Amy Echard Otto's father and counsel Robert A. Echard. (R. 376.)

Under leading questioning, Thor Wixom at one point agreed with counsel's testimony that his use had not been "on a regular basis." (R. 329-330) State Farm's reliance on this isolated testimony is misplaced. As explained in the preceding subsection of this brief, *availability* for use is the issue, not the frequency that the use has exercised. In summary, the record, as a whole, supports Metropolitan's view that it was entitled to summary judgment because Thor Wixom was driving a car that was available for his regular use. Because it was available for his regular use, it does not meet the requirement for a non-owned automobile, as that term is used in the policy. If there is any question from the record on appeal, we have a factual determination which, at the very least, would mandate reversal of the summary judgment granted to State Farm Insurance.

B. UNDER THE FACTS OF THIS CASE, THE "AVAILABLE FOR REGULAR USE" LANGUAGE IN METROPOLITAN'S POLICY IS UNAMBIGUOUS.

State Farm cites *Metropolitan Property & Liability Insurance Co. v. Finlayson*, 751 P.2d 254 (Utah App. 1988), *vacated on rehearing, Metropolitan Property & Liability Insurance Co. v. Finlayson*, 766 P.2d 437 (Utah App. 1989), for the proposition that because language similar to Metropolitan's "available for regular use" language was ambiguous under one set of facts, it must be ambiguous here too. This is incorrect. First, *Finlayson* has been vacated. Second, ambiguity must be determined in light of the facts of the case. A provision found to be ambiguous under one set of facts can be unambiguous under another.

In *Overson v. United States Fidelity and Guaranty*, 587 P.2d 149 (Utah 1978), the court considered a claim that an insurance provision was ambiguous and therefore required coverage. The party seeking coverage cited a number of cases, all finding ambiguity in a policy provision similar to that at issue in the case. *Id.* at 150. The court ruled that these cases were not controlling because they were decided under different facts. The court found it important that "each case cited addresses close factual questions, not present here." *Id. See also, Jacobson v Kansas City Life Ins. Co.*, 652 P.2d 909, 911 (Utah 1982) (facts of case made ambiguity a non-issue).

This rule applies to the case before this court. A finding of ambiguity under the facts of *Finlayson* does not translate to a finding of ambiguity of similar language under the facts of this case. *Finlayson* loses any vitality it had when State Farm attempts to stretch it beyond its facts. As was more

fully briefed in Metropolitan's initial brief, under either of the claimed definitions of regular use availability discussed in *Finlayson*, there would be no coverage under the facts of Thor Wixom's use of his fiancé's car. Under the facts of Thor Wixom's case, the policy is unambiguous.

CONCLUSION

In conclusion, there is no coverage under the Metropolitan policy without a showing that Thor Wixom comes within the insuring agreement of that policy. That insuring agreement requires that: 1) Thor Wixom be an insured; and 2) that he be driving a vehicle which qualifies as a non-owned automobile. The car Thor Wixom was driving cannot be a non-owned automobile because it was available for Thor Wixom's regular use. Because reasonable minds could not differ on this, this court should be able to find that there was no coverage under Metropolitan's policy. If there is a factual dispute, it will at very least mandate reversal of the summary judgment granted to State Farm Insurance.

DATED this 10th day of June, 1998.

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** was hand-delivered, this 10th day of June, 1998, to the following:

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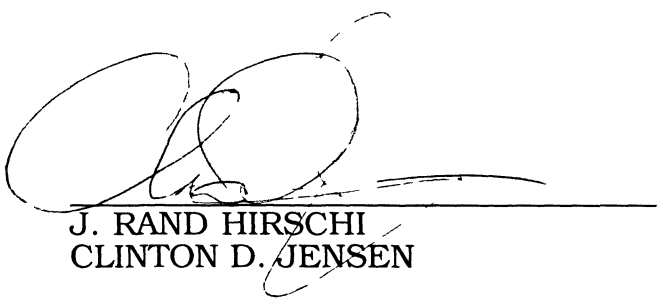

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