

1950

# Virgin Redmond v. Petty Motor Co. : Brief of Appellant

Utah Supreme Court

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Horace J. Knowlton; Attorney for Appellant;

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## Recommended Citation

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7562

FILED

NOV 27 1950

IN THE SUPREME COURT  
OF THE STATE OF UTAH

Clerk, Supreme Court, Utah

VIRGIL REDMOND,

Appellant,

-vs-

PETTY MOTOR COMPANY,  
a corporation,

Respondent.

Case No.  
7562

BRIEF OF APPELLANT

HORACE J. KNOWLTON,

Attorney for Appellant.

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B R I E F   O F   A P P E L L A N T

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STATEMENT OF FACTS

This is an action in three causes. The third cause of action was admitted at the trial so we are concerned here with only the first and second causes of action.

The case grows out of an automobile transaction between the appellant, the plaintiff herein, and the respondent, hereinafter referred to as the defendant, involving a purchase by the plaintiff of a 1946 Stake Body Ford Truck for the

agreed price of \$1831.92, as a part of which transaction it was required by the defendant to pay for insurance, \$417.00 having been added to the contract for that purpose, and was agreed by the defendant that the defendant would insure the truck against fire, theft, and personal property damage in the case of collision or accident on the one hundred dollars deductable plan, and it was <sup>REPRESENTED</sup> ~~reported~~ by the defendant that the truck was in good condition of repair and that the mechanical condition was so guaranteed for a period of 90 days by the defendant.

The plaintiff turned in his old truck which constituted the down payment for the agreed price of \$1340.00, leaving a balance of \$1231.92 to be paid in monthly installments.

The plaintiff took possession of the truck on or about the 28th day of March, 1928 and drove it to Boise, Idaho (R. 100) when it was discovered that the truck was using oil

and water. The next day engine trouble developed and it was necessary to pull into Pasco, Washington, where a new motor was substituted (R. 102). With the new motor the trip to Seattle was completed and on the way back, approaching Boise, Idaho, the truck went off the road and tipped over, causing substantially \$665.00 damage to the truck (R. 109).

The plaintiff left the truck at Boise, Idaho and came on to Salt Lake City to determine from the defendant the proper disposition to be made of it with reference to the insurance against the loss of \$665.00, having been so advised, returned to Boise the next day and brought the truck to the defendant's place of business at Sugarhouse, from whence he was instructed almost every day that the insurance would take care of the truck's repair (R. 112). Finally, after 60 days had expired he was informed that the insurance had never been obtained until after the accident had happened (R. 111.).

The plaintiff, at the time of the accident, was using the truck on a contract haul from which he obtained \$22.00 a day for its use.

The first cause of action is for the damage to the truck less \$100.00 deducted, for the loss of the use of the truck (R. 16), and for the unused portion of the insurance premium. The second cause of action is for the cost of the motor replacement. The court took the questions raised by the second cause of action from the jury in its Instruction No. 2 (R. 267), and submitted the first cause of action to the jury on instructions together with the defendant's counterclaim. The jury returned a verdict in favor of the plaintiff in his first cause of action for the sum of \$2231.49 and \$23.40 in his third cause of action as instructed by the court and returned a verdict for the defendant in its cross complaint for the sum of \$1231.92 (R. 76-7).



## ASSIGNMENTS OF ERROR

The plaintiff assigns as error:

1. The ruling of the court directing the verdict in favor of the defendant and against the plaintiff in the plaintiff's first cause of action.

2. The ruling of the court taking from the jury the plaintiff's second cause of action.

## ARGUMENT

### FIRST ASSIGNMENT OF ERROR

The ruling of the court directing the verdict in favor of the defendant and against the plaintiff in the plaintiff's first cause of action.

The plaintiff's first cause of action grows out of the defendant's failure to obtain insurance against loss by accident as the defendant had agreed to do. (R. 98).

Q. Well, did he insist on the insurance?

A. Yes, he insisted that I have insurance

Q. And that was figured in the contract  
and put in the purchase order?

A. Yes.

The loss complained of occurred on or about the 8th day of April, 1949. The defendant produced and placed into evidence (Defendant's Exhibit No. 4) an insurance policy countersigned April 12, 1949, four days after the loss occurred, the policy period of which was dated back to March 28, 1949, the date of the contract for the purchase of the truck. The policy was cancelled June 15, 1949 (Plaintiff's Exhibit D). The question of whether or not the defendant ordered the insurance prior to the time of the loss was properly submitted to the jury in the Court's Instruction No. 11 (R. 273) of the defendant's own instruction. The court's subsequent directed verdict was made on the theory that there was not sufficient evidence of the defendant's failure to fulfill its contract to furnish insurance at the time of the loss to go to the jury.

On the question of whether or not application had been made for insurance prior to the time of the loss, Mr. Imhoff, the insurance

adjuster, testified that no application for insurance had been made prior to the loss (R. 217).

Q. Mr. Imhoff, we have a question here with reference to a policy of insurance on a truck which was dated the 12th day of April, 1949 and which was, as Mr. Petty has said in his testimony here, ordered on the 30th day of March, 1949. I am going to show you the policy which has been marked 'Defendant's Exhibit No. 4' and ask you if you will examine it and tell us whether or not you have ever seen it?

A. I can't say that I have actually seen this policy. I have seen lots like them.

Q. Well, has the matter that that policy involves ever come in your office or come to your attention?

A. My recollection at this time is when they came in my office it was April 14, by my records here I can tell you exactly in the afternoon.

Q. That was Mr. Redmond and Mr. Neuman Petty, was it?

A. Yes.

Q. Who came to your office?

A. Yes.

Q. Now tell us what you were going to tell.

A. And as I recall at that time, Mr. Redmond had his policy of insurance, one that was just similar to this, it could have been this one.

Q. And what was said by the parties?

A. Mr. Petty told me that there would be a loss on a policy of insurance that I had adjusted; namely the American Aviation and Insurance Company for Virgil Redmond. He asked that I go with him while we looked at the truck for Mr. Redmond.

Q. Now was that the first time that the loss was reported by Mr. Petty, if you know?

A. That was the first time it was reported to me.

. . . .

Q. And did you have any subsequent conversation with Mr. Petty and Mr. Charles Vander when they were both present?

A. I don't follow what you mean.

Q. Well, did you ever have a meeting with Mr. Neuman Petty and Mr. Charles Vander, Mr. Vander being a representative of the Insurance Company?

A. Yes.

Q. Now, where did that take place?

A. In Mr. Vander's office?

Q. Now when was that?

A. That I can't answer. It was subsequent, approximately 30 days after April 14, 1949.

Q. And will you give us the substance of that conversation?

A. Well, it was quite a long conversation and I don't think I could give you the exact text of it.

Q. Well, do as well as you can about the insurance.

A. Well, Mr. Vander stated that there was

no insurance asked for that was valid and Mr. Petty said that there was, then they argued back and forth and that was about all I can remember. I can't give you the exact wording from there on. . . . Then Mr. Vander stated that their records showed that after the accident that Mr. Redmond had with his truck that Mr. Petty called and asked for the policy to be written as of March 28, 1949.

Q. Yes, asked to have it dated back, in other words?

A. Yes.

. . . . (R. 224)

Q. The question was whether or not the loss was ultimately approved or denied?

A. The loss was denied.

Q. The loss was denied?

A. Yes.

Q. And I will ask the question in this way, do you know why the loss was denied and answer that Yes or No.

A. Yes.

A. Because the company believed from the investigation that there was no policy of insurance, any valid policy of insurance at the time of this loss.

On cross examination with reference to the same conversation Mr. Imhoff said (R. 228):

A. Mr. Petty stated that he had called the Ensign Insurance Agency prior to the loss and Mr. Vander stated that he had not, that's right. (R. 231)

Q. Did Mr. Redmond sign the proof of loss in this case?

A. He signed a proof of loss which was torn up and thrown away when I found out there was no coverage.

With reference to this matter Mr. Redmond, the plaintiff, testifies as follows: (R. 111-12)

Q. Is John Imhoff the man Mr. Petty took you to in the first place?

A. Yes, he is the insurance adjuster.

Q. And did he tell you anything about who

John Imhoff was?



Q. And this is the same John Imhoff that you are now quoting as speaking.

A. Yes. Well, he told us that the insurance policy wasn't written up until after I had wrecked my truck so he said he didn't know. He said you would just have to wait, whether they would pay it or not. They wouldn't tell us. We couldn't do anything. He wouldn't commit himself whether they would pay it or whether they wouldn't. When we left Neuman said, "I am sure they will pay it. They have got the policy. They will have to pay it." Somehow it was backdated before the truck was wrecked and after it was written up and backdated and they denied they would have to pay it. They just kept putting it off till finally about two months later they sent me a notice of cancellation.

Q. What was the date of that notice of cancellation, do you know?

A. About June 15th, I think.

identification has been marked as Plaintiff's Exhibit D, and ask you if this is the notice of cancellation that you received?

A. Yes.

Q. And what date is that?

A. June 15th.

On the redirect (R. 186).

A. Imhoff told us when he got back he found out it wasn't dated so he had to send back there and let them decide whether they would pay us or not because the policy wasn't written up until about a week after I had wrecked the truck and it had been backdated before I wrecked the truck and on those dates he wouldn't commit himself one way or the other whether they would pay it.

With reference to which conversation Mr. Neuman Petty, the defendant's president testified as follows: (R. 234)

Q. Now, Mr. Petty, with reference to this insurance dispute you heard Mr. Imhoff testify

about a conversation you had and he had, Mr.

Redmond being there, and I will ask you to give us your version of what happened and what transpired at that time with reference to this application for insurance that I asked Mr. Imhoff about which had a date stamp on it?

A. We had talked with Mr. Vander and I had talked with Mr. Imhoff prior to the meeting in Mr. Vander's office at the Ensign Insurance Agency. Mr. Vander and Mr. Imhoff contended at that time that I had not made application for insurance until after the accident had occurred and my records definitely showed otherwise. Without the file on the case in Mr. Vander's office, and upon examination the application for insurance was stamped with their rubber stamp, time stamp, dated April 5, 1949, which was prior to the accident.

This testimony presents a factual question for the jury as to whether or not the insurance was in fact applied for prior to the reported

loss.

The question was squarely presented by the court to the jury by the Court's Instructions No. 7, No. 8, and No. 11 as follows:

Instruction No. 7

"If you find from the evidence that the defendant promised and agreed with the plaintiff to obtain insurance on the truck in question covering the loss and collecting from the plaintiff the premium therefore or charged him for the said amount in the sum of \$417.00, but that the defendant failed and neglected to obtain the said insurance and a loss occurred on or about the 6th day of April, 1949, then you will find that the plaintiff is entitled to recover from the defendant in the amount of the insurance paid less the amount of the earned premium from March 28th, 1949, to April 6th, 1949, together with the amount of \$644.35, less the amount of \$100.00, or the sum of \$544.53."

Instruction No. 8

"If you find that the defendant failed to obtain an insurance policy as it had agreed, and if you find that the plaintiff was damaged by such failure, you are instructed that the plaintiff had the duty to exert himself reasonable to limit the amount of his damage, and the plaintiff cannot, under such circumstances, sit idly by while his damages mount. You are therefore instructed, under such circumstances, that if you find that the plaintiff could have, with reasonable effort, had his truck repaired within a two week period, his recovery for loss of use of his truck should not exceed such a reasonable period."

Instruction No. 11

"If you find that the defendant agreed to obtain a policy of insurance insuring the truck in this case against loss due to fire, theft or collision under a \$100.00 deductible plan, you are instructed that such an agreement imposed upon the defendant duty to use reasonable and ordinary diligence to obtain such a policy in accordance with the usual practices of persons and corporations engaged in a business similar to the defendant."

"If you find that the defendant ordered such insurance from an authorized insurance agent in Salt Lake City, and if you further find that the defendant was informed by such insurance agent that the coverage was in force as of the date of the sale of this truck, and if you further find that thereafter a policy of insurance was issued by an insurance company in favor of the plaintiff, and if you further find that said policy was thereafter, some two and one half months later, cancelled by the insurance company, you are instructed that the defendant did not breach its contract with the plaintiff and are instructed to return a verdict in such event for the defendant of no cause of action on the first cause of action."

Instruction No. 7 having been requested by the plaintiff and Instruction No. 8 being the defendant's Request No. 9, and Instruction No. 11 being the defendant's Request No. 5, verbatim.

The law is stated from 26 Am. Jur. page 439, as follows:

"The view accepted generally is that an applicant for insurance must use due diligence to disclose to the insurer all facts materially affecting the risks which arise or are discovered after his application has been made and before the contract has been consummated, but is not bound to use extraordinary means to do so. If, while the insurer deliberates, the applicant discovers facts which make portions of his application no longer true, the most elementary spirit of fair dealing calls for a full disclosure."

"Stipcich v. Metropolitan L. Ins. Co. 277 US 311, 72 L ed 895, 48 S Ct 512 (holding that this rule is not affected by a statutory provision that the policy must set forth the entire contract between the parties; Piedmont & A. L. Ins. Co. v. Ewing, 92 US 377, 23 L ed 610; Springfield F. & M. Ins. Co. v. National F. Ins. Co. (CCA 8th) 51 F (2d) 714, 76 ALR 1287; Carleton v. Patrons' Androscoggin, Mut. F. Ins. Co. 109 Me 79, 82 A 649, 39 LRA (NS) 951 (holding that a representation as to the existence of other insurance must be true when the application is accepted, and if untrue then, its truthfulness when made is immaterial); Harris v. Security Mut. L. Ins. Co. 130 Tenn 325, 170 SW 474, LRA 1915C 153, Ann Cas 1916B 380 (wherein the insured was seized with an attack of renal colic between the date of the application and issuance of the policy, and had answered "no" in the application to the question whether he had ever been afflicted with renal colic).  
"Anno: 8 LRA(NS) 983, s. 39 LRA(NS) 951; 15 Ann Cas 126, s. Ann Cas 1916B 381.

"Where a party orders insurance and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent as soon as

it can be communicated with due and reasonable diligence for the purpose of countermanding the order or laying the circumstances before the underwriter. If he omits so to do and by due and reasonable diligence the information might have been communicated so as to have countermanded the insurance, the policy is void. M'Lanahan v. Universal Ins. Co. 1 Pet. (US) 170, 7 L ed 98."

Stipcich v. Metropolitan L. Ins. Co. 277 US 311, 72 L ed 895, 48 S. Ct. 512."

This point of law is further treated by Paragraph 261 of American Digest System under the heading of Insurance.

"Insured's failure to disclose changes materially affecting risk, after application and before delivery of policy, renders contract voidable.--Stipcich v. Metropolitan Life Ins. Co., 48 S. Ct. 512, 277 U. S. 311, 72 L. Ed. 892, reversing (D.C.) 8F (2d) 285."

"C.C.A. Ohio 1932. Insured's failure to disclose conditions affecting risk or which he is aware makes contract voidable at insurer's option.--New York Life Ins. Co. v. Cohen, 57 F. (2d) 494, reversing (D.C.) 48 F. (2d) 903."

"C.C.A. Ohio 1933. Landlord's concealment of tenant's default, in negotiations with surety on tenant's bond for execution of continuation certificate to cover period during which tenant had already defaulted, held in invalidating certificate.--Anton Zerina Realty Co. v. Maryland Casualty Co., 67 F. (2d) 292.

"C.C.A. Cal. 1926. Knowledge of loss before issuance of policy and failure to

notify insurer will preclude recovery on policy.—Eagle Star & British Dominions Ins. Co. v. George A. Moore & Co., 9 F. (2d), affirming (D.C.) George A. Moore & Co. v. Eagle Star & British Dominions Ins. Co., 5 F. (2d) 358."

"N.Y. Sup. 1939. Insured's failure to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at insurer's option.—First Nat. Bank & Trust Co. of Port Chester v. New York Title Ins. Co., 12 N.Y.S. 2d. 703, 171 Misc. 854."

Further and ~~on~~<sup>to</sup> the same effect;

"On the other hand, insured's failure to disclose to insurer knowledge, acquired between the time of the application and the delivery of the policy, of a fact materially affecting the risk has been held to void the policy." 45 CJS page 394, paragraph 594.

It is respectfully submitted that there was competent evidence to go to the jury on the question of whether or not the insurance had been applied for before the loss was incurred. Mr. Petty said that the memorandum by his employee indicated that it had, and further John Imhoff said in the conversation with himself, Mr. Petty and Mr. Charles Vander that Mr. Vander said that it had not been.

Considering the case from this aspect alone



it was properly submitted and by the jury decided under Instruction No. 11 that the insurance policy had not been ordered prior to the reported loss.

On the other hand, however, if the case is viewed from the defendant's position that the policy had been ordered prior to the happening of the loss but had not been issued until six days after the loss had been reported, the happening of the loss being April 6th, the report of the loss being April 7th, the writing of the insurance policy being April 12th, and that the defendant had failed to report the happening of the loss between the time that the insurance was applied for the issuance of the policy, this failure to reasonably report the happening of the loss by the defendant would also have voided the policy. The policy was, therefore, voidable by the insurance company in either construction taken unless it should be admitted that the insurance company agreed that the policy should become effective on the 30th day of March,

1949, or before the happening of the loss and if that is the contention of the defendant, that question was also submitted to the jury on competent evidence by proper instructions and it was answered by the jury's verdict in the negative.

It is respectfully submitted, therefore, that the defendant's motion for a directed verdict should have been denied and that the defendant's motion for a new trial ~~on~~ the alternative should have been denied.

#### SECOND ASSIGNMENT OF ERROR

The ruling of the court taking from the jury the plaintiff's second cause of action.

The plaintiff's second cause of action is for the replacement of the motor which became defective, blew up, and had to be replaced before the truck had traveled 1000 miles or before it had reached Pasco, Washington. (R. 101)

Q. How could you tell there was water in the oil?

was little bubbles and it was way full of water  
and you could tell there was something wrong

there. So my brother pulled me into Dayton and we thought we had blowed a head gasket. So we had a new head gasket put on in the garage and had the oil filter taken out and a new one put in, and we started out and it seemed to run all right for a while and we got two or three hundred miles farther and it started missing and sputtering again. And at that time I pulled to one side and my wife and baby was in there, and I pulled off to one side and it just blew up like there was some dynamite in it and it scared us. My brother he stopped, he was in front of me, and he came back and we thought then it was ruined for sure and we pulled it into Pasco, Washington, behind my brother's truck and we reached there just at closing time but they checked it. We pulled the head off there and checked it and we could see that the piston was broke. There was two pistons broke and the head was broke and everything and they told us right then

MR. SNOW: I object to that. You can't tell about what was said there.

Q. You can't tell what was said. You can tell what you observed and what you did.

A. Well, the mechanics told us what was--

MR. SNOW: Just a moment.

A. Well, I saw it myself and we decided that it had to have a new engine and we had to wait until morning because there was no place I could get a new engine that night.

Q. And did you wait until morning?

A. And so we went over and stopped and waited until the next morning and took it back to the garage and so we had to have a new engine and I had to wire home to my dad to send me some money. It came to \$350.00 to put a brand new engine in and the other one, I have got it out there. It is no good for anything. It is still broken. So after we put the new engine in we went to Seattle. We got to Seattle and unloaded our loads and then went and loaded back with our other load and then headed back. . .

Q. Did they take the pan of the truck?

A. Yes.

Q. And did they find anything in the pan?

A. Yes, they found a little wrench in the pan.

This truck was sold by the defendant to the plaintiff under express representations that it was in good condition of repair. (R. 95)

A. Well, they said the truck had gone out to the other lot, where they had put a new motor in it and it hadn't gone 2,000 miles. It had been used for carrying things around the Petty Motor Company lot and things like that, and if I would go out there he was sure it was a good truck and would suit my purpose and that one of the salesmen would show it to me when I went out.

This by the president of the defendant:

A. He said the engine was a new one and hadn't gone maybe 2,000 miles. . .

These representations were confirmed by the plaintiff's brother Guy Redmond. (R. 139)

A. Well, we went there to buy this truck and we talked to Joe Brown first. We went out

and looked the truck over and told him what it was we was going to use it for and he figured it would be a very good truck for that and he turned us over to Mr. Petty to sell it to us.

Q. Yes?

A. So we went and looked at it again and he told us about the same thing, and we started it up and listened to it and the brakes was out on it and we drove it and he said that was from sitting around and the truck had approximately 2,000 miles on it.

Carl I. Lake, called as an expert, testified, (R. 156)

A. I would say that it was damn well wore out.

Carl E. Moulten also called as an expert testified as follows: (R. 168-170)

Q. I will ask, have you examined the inside of the motor of this truck?

A. Yes sir.

Q. When did you examine it?

A. Oh, about two or three days ago.

Q. And will you tell us what your<sup>or</sup> observations were with reference to its condition,  
~~of~~ the condition that you found?

A. Yes sir. It was two cylinders on the left bank were burnt up.

Q. Do <sup>you</sup> know which they were?

A. Yes sir. No. 1 and No. 3 on the left side.

Q. And how were the cylinders on the right bank?

A. Perfect, and the two in between on the left bank was okeh, no scratches or anything.

Q. With reference to any breakage in the cylinder walls did you find anything?

A. Yes, there was one cracked through the intake valve on No. 3, through the cylinder wall down as far as you could see on the piston wall.

Q. Would it have permitted the water to go into the cylinder?

A. It sure would have.

Q. And what did you notice with reference to scoring of the cylinders, if anything?

A. Well, ~~more~~ the crack was there was a



bad score.

Q. Did you notice anything with reference to cylinder No. 1 on the left side with reference to scoring?

A. I couldn't see any scoring on that cylinder at all.

Q. Now do you have an opinion from the examination that you made of this engine as to the approximate number of miles it would have been run to have been in that condition?

A. Yes.

Q. What is that opinion?

A. Well, my opinion is that it has been run quite a bit over the 2,000. You can't just look at a motor and feel the ridge in the top of the cylinder and say the motor has been 50,000 miles. You can make an estimate and that is as good as you can do.

Q. Do you have an estimate as to the approximate number of miles it has run, in thousands?

A. Well, I would say 20,000 approximately.

John M. Carey, also called as an expert

Q. Would a motor that has 2,000 miles on it under the custom of this community have any warranty on it as to time and conditions?

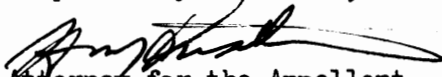
A. If it was a new motor and had 2,000 miles guarantee it was sold with the understanding on it by the company that installed the motor, whether it was Cummings or Mack Motor Company, the company that sold the motor and installed the motor and knew that it had 2,000 miles on it the purchasing buyer would have a continued 2,000 or a 3,000, or thirty days of use.

Mr. Arza Redmond was called as a witness for the plaintiff and testified that he talked with defendant's president as he was about to send the \$350.00 for the new engine and was instructed by him to go ahead and that "they would make it right when the boys got back." (R. 130)

It is the position of the plaintiff that his proposed instructions numbers 3, 4, 5, 6, and 7 should have been given and that the

plaintiff's second cause of action should have  
been submitted to the jury.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'H. Knowlton', with a long, sweeping horizontal flourish extending to the right.

Attorney for the Appellant  
Horace J. Knowlton