2001

Benjamin N. Ryan v. Allstate Insurance Company : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

BENJAMIN N. RYAN,

Third-Party Plaintiff - Respondent,

-vs.-

ALLSTATE INSURANCE COMPANY,

Third-Party Defendant - Appellant.

Case No. 14293

RESPONDENT'S BRIEF

Appeal From a Summary Judgment of the Third District Court, Salt Lake County
Hon. Bryant H. Croft, Judge

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CASES CITED

OTHER AUTHORITIES

IN THE SUPREME COURT

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BENJAMIN N. RYAN,	)	
Third-Party Plaintiff - Respondent,	)	
	)	*Case No. 14293*
-vs.-	)	
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Third-Party Defendant - Appellant.	)	

RESPONDENT'S BRIEF

NATURE OF THE CASE

This is an action for a judicial determination that third-party plaintiff was an insured person under the terms of third-party defendant's policy of liability insurance while driving the insured vehicle.

DISPOSITION IN THE LOWER COURT

The Honorable Bryant H. Croft, District Judge, granted third-party plaintiff's Motion for Summary Judgment, in so doing holding that third-party

plaintiff was an insured person under the terms of third-party defendant's policy of automobile liability insurance while driving the insured vehicle under the conditions which gave rise to this cause of action.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the Summary Judgment of the District Court affirmed.

STATEMENT OF FACTS

On the evening of December 22, 1972, Christopher Ryan, age 16, obtained the use of a 1969 Dodge Dart owned by his father, Earl F. Ryan, for the stated purpose of going out with some friends. At approximately 9:00 p.m., Christopher Ryan picked up Ronald Nez, age 18, Mike Edvalson, age 18, and third-party plaintiff Benjamin N. Ryan, age 18, (no relation). Christopher Ryan had permission from his father Earl F. Ryan to take the vehicle out for the evening as is shown by his affidavit in the form of a sworn statement which was taken by an insurance adjuster for third-party defendant Allstate in the presence of Earl F. Ryan shortly after the accident. The following appears in the sworn statement of Christopher Ryan, at page 4, line 3:

> *Q. And at that time did you ask your father's permission to use the car?*
> *A. Yes sir.*
> *Q. Can you describe for me how you did it? Can you describe what you said to him and what your father said to you when you asked him to use the car? Did he put any limitations on your use of the car?*
> *A. No.*

Q. (Mrs. Ryan): Well Christopher?
A. He said be back by 1:00.
Q. Did he say anything about who could drive the car?
A. Yes, just me.

And at page 4, line 15:

Q. Did he say anything about where you could go or where you could not go?
A. No.
Q. Did he put any limitations on you as to how far you could go, or anything like that?
A. No, as long as I paid for the gas.

At approximately midnight, the boys were at a bowling alley on South State Street and were preparing to leave for another bowling alley. At that time Benjamin N. Ryan asked if he could drive to the next bowling alley, and Christopher Ryan allowed him to do so. During the trip between the two bowling alleys, Benjamin Ryan was involved in an accident with another vehicle resulting in one death and serious injuries to an occupant of the other vehicle. Allstate Insurance Company denied coverage to Benjamin Ryan based upon the named insured's restriction that no one but Christopher was to drive the car.

The omnibus clause of the policy of liability insurance that was issued to Earl F. Ryan states as follows: "The following persons are insured under this part:"

1. *The named insured with respect to the owned or nonowned automobile;*

2. *Any resident of the named insured's household with respect to the owned automobile;*

3. *Any other person with respect to the owned automobile provided the actual use thereof is with the permission of the named insured;*

4. *Any relative with respect to a nonowned private passenger automobile or trailer not regularly furnished for the use of such relative; and,*

5. *Any other person or organization with respect to any automobile or trailer provided:*

   (a) The actual use is by a person who is an insured under any of the four preceeding paragraphs, with respect to such automobile or trailer, and

   (b) Such other person or organization is legally responsible for the use and except with respect to a temporary substitute automobile does not own or hire the automobile or trailer.

ARGUMENT

POINT I

THE PERMISSION GRANTED BY THE NAMED INSURED EARL F. RYAN, FOR USE OF THE INSURED AUTOMOBILE, ENCOMPASSED THE USE TO WHICH IT WAS BEING PUT AT THE TIME OF THE ACCIDENT, AND THUS BENJAMIN N. RYAN WAS COVERED UNDER THE PROVISIONS OF THE OMNIBUS CLAUSE AT THE TIME OF THE ACCIDENT.

It is generally held that although the named insured has prohibited the use of the vehicle by a third party, such prohibition shall not be held to preclude recovery under the omnibus clause where, (1) The original permittee is riding in the car with the second permittee at the time of the accident, or (2) The second permittee in using the vehicle is serving some purpose of the original permittee. The reasoning which the courts have adopted in arriving at these rulings is that the second permittee is, "operating" the car for the "use" of the first permittee and such "use" is within the coverage of the omnibus clause. 4 ALR3d 68, Section 12(b).

The Honorable Judge Croft points out in his memorandum decision granting third-party plaintiff's Motion for Summary Judgment that an omnibus clause such as the one involved in the case at bar speaks in terms of the "use" of the vehicle, not its "operation." As the Court states: "This provision of the policy does not limit coverage to only those persons who drive with the owner's permission but requires only that the use of the car be with the owner's permission." In Allstate Insurance Company vs. Fidelity and Casualty Company, 180 A2d 168 (N.J.), which presented a fact situation very similar to the instant case, the named insured knew that other young people would be in the vehicle and gave his son permission to use it to attend an evening basketball game. The named insured cautioned his son not to allow anyone else to drive; however, during a stop to pick up one of the passengers the son attempted to teach an unlicensed fifteen year-old companion how to operate the car and the companion lost control and struck a pedestrian. The court held that the named insured's injunction to his son against allowing anyone else to drive was not a significant factor and that the second permittee was entitled to coverage as an additional insured. The court further stated that the omnibus clause refers to the "use" of the car and not to its operation and that the original permittee's unrestricted permission to use the vehicle encompassed the very use to which he put it. In Loffler vs. Boston Insurance Company, 120 A2d 621 (D.C.), where the named insured's son with his father's permission obtained the car for use on a "date" but in violation of instructions permitted his date, an unlicensed operator, to drive, the court held that the car was still being used by the son for the very

purpose for which permission had been granted, namely for "dating" purposes. The court stated that if the insurer wished to avoid liability under such circumstances it should have inserted the word "operated" in the clause which provided coverage while the automobile was being "used" by the named insured or with his permission. And in National Farmers Union Property & Casualty Co. vs. State Farm Mut. Auto. Ins. Co., (D.C. Mont) 277 F.Supp. 542, (applying Montana law), the court found the insurer liable even though the named insured had expressly forbidden his daughter to permit others to drive the car, where the accident occurred while the daughter's friend was driving with the daughter's permission, because the friend's vehicle was attached to a trailer used to transport the daughter's horse to a parade. The court found that the insured's permission was implied since the car was being driven for the purpose, benefit and advantage of his daughter.

There is a substantial policy reason for construing the standard omnibus clause broadly in favor of the insured and injured. This is to effectuate the strong legislative policy of assuring financial protection for innocent victims of automobile accidents, reflected by statutory requirements in all states, including Utah, of adequate liability coverages for all vehicles operated on the highways. This policy underlies most of the decisions upholding coverage under circumstances such as these. For example, in Indemnity Insurance Company vs. Metropolitan Casualty Insurance Company, 166 A2d 355 (N.J.), the court made a broad construction for the purpose of effectuating the comprehensive scheme of the New Jersey Motor vehicle legislation, stating that the insurance

policy provision only called for permission to "use" not for the "operation" of the vehicle and that those words were not synonymous; the former being broader in denoting the employment of the car for some purpose of the user while the latter referred to the manipulation of the car's controls.

Other courts which have afforded protection to the second permittee under the omnibus clause, even though the named insured had prohibited the original permittee from allowing others to drive, have also done so when there was a finding that the first permittee was riding in the car or was benefited by its operation by the second permittee, and the use to which it was being used was within the scope of the initial permission. Hanover Ins. Co., vs. Miesmer, 249 NYS 87, (N.Y.); Pollard vs. Safeco Ins. Co., 376 SW2d 730 (Tenn); Brooks & Delta Fire & Casualty Co., 82 So. 2nd 55 (La); Metcalf vs. Hartford Acci. & Indem. Co., 126 NW2d 471 (Neb); State Farm Mut. Auto. Ins. Co. vs. Williamson, 331 F.2d 517 (applying Ariz. law); Schneck vs. Mutual Service Casualty Ins. Co., 119 NW2d 342 (Wis); Allstate Ins. Co. vs. Nationwide Mut. Ins. Co., 273 A2d 261 (Del); Strickland vs. Georgia Casualty & Surety Co., 162 SE2d 421 (Ga); Mullin vs. Fidelity & Casualty Co., 136 NW2d 612 (Minn); Uisintin vs. County Mutual Insurance Co., 222 NE2d 550 (Ill).

In the instant case the named insured granted permission to his son to use the vehicle for recreational purposes, which would include driving with his friends to various bowling alleys. At the time of the accident not only was the original permittee a passenger in the vehicle, but the vehicle was also being

used for his benefit. Therefore, it is clear that the requirements for extending coverage to the second permittee were met; namely, (1) that the use to which the vehicle was being put was within the scope of the original permission, (2) that the first permittee was a passenger in the vehicle and (3) that the vehicle was being used for the benefit of the first permittee.

POINT II

THERE WAS SUFFICIENT EVIDENCE ON FILE TO JUSTIFY THE LOWER COURT'S GRANT OF SUMMARY JUDGMENT ON THIS ISSUE.

The only issue presented by this third-party action and the hearing of third-party plaintiff's Motion for Summary Judgment was whether third-party defendant's liability insurance "omnibus" clause covered third-party plaintiff's liability at the time of the accident which gave rise to this cause of action. The only evidence needed to decide this issue was on record at the time of the hearing. That evidence consisted of (1) a copy of the applicable policy provisions, (2) a sworn affidavit in the form of a statement given by Christopher Ryan, the son of the named insured, in the named insured's presence on December 28, 1972; and (3) the uncontroverted fact that the accident which gave rise to this cause of action occurred after Christopher Ryan obtained permission from his father to take the vehicle and while the vehicle was being operated by third-party plaintiff Benjamin N. Ryan with Christopher Ryan as passenger.

The affidavit submitted by opposing counsel from Earl Ryan at the hearing of third-party plaintiff's Motion for Summary Judgment and approximately 2 1/2 years after Christopher Ryan's affidavit, does not raise any factual issues precluding resolution of the matter by summary judgment for the following reasons: First, Mr. Earl Ryan was in attendance at the taking of his son's sworn statement and made no comment, correction or objection when his son stated that he had permission to take the car for the evening; and second, Mr. Earl Ryan does not deny in his affidavit that he gave permission to his son Christopher to use the car.

Even if the affidavit of Earl Ryan raised a genuine issue as to any fact material to the court's decision, which it does not, consideration of the affidavit is precluded by Rule 56(c), which requires that opposing affidavits be served prior to the date of hearing.

The law, as capably outlined in Judge Croft's memorandum decision is clear that if Christopher Ryan was given permission to "use" the car and if, at the time of the accident Christopher Ryan was in the car or the car was being driven for some purpose or benefit of Christopher Ryan, the car was being "used" by him within the meaning of the "omnibus" clause and coverage would extend to the driver, in this case Benjamin Ryan.

CONCLUSION

Based upon the arguments and authorities as cited herein, respondent

respectfully requests the court to affirm the judgment of the trial court.

Respectfully submitted,

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