

1988

Gordeon J. Swenson v. Chrysler Corporation, et al. v. Prudential General Insurance Company : Reply to Brief in Opposition

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GORDON J. SWENSON, :
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Plaintiff and Appellant, :
 :
vs. :
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CHRYSLER CORPORATION, et al., : Certiorari Docket No.
 : 880191
Defendants, :
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PRUDENTIAL GENERAL :
INSURANCE COMPANY, :
 :
Defendant and Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

Appeal from the Judgment of the
Third Judicial District Court
In and for Salt Lake County, State of Utah,
The Honorable Judith M. Billings, Presiding

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PARTIES TO THE PROCEEDING

Plaintiff and Appellant:

Gordon J. Swenson

Defendant and Respondent:

Prudential General Insurance Company

Other Defendants, not parties to this appeal:

Chrysler Corporation

Hinckley's Incorporated

Universal Underwriters Insurance Company

Gordon T. Glenn

Western Surety Company

Nationwide Mutual Insurance Company

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| INSURANCE COMPANY, | : | Certiorari Docket No. |
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| Defendant and Respondent. | : | |

ARGUMENT

POINT I -- THE DISTINCTIONS BETWEEN GAGON AND THE PRESENT ACTION HAVE NOTHING TO DO WITH THE ISSUE IN THE PLAINTIFF'S APPEAL.

Prudential attempts to distinguish Gagon v. State Farm Mutual Automobile Insurance Company, 746 P.2d 1194 (Utah App. 1987), on the basis that Gagon involved collision damage, whereas the present action does not. Such a distinction is of no significance, because the mechanical breakdown provision in the policy in Gagon was an exclusion from collision coverage, just as the mechanical breakdown provision in the policy which is the subject of this action is an exclusion, not only from the collision coverage but also from the so-called "comprehensive" coverage on which the plaintiff relies. This case is not concerned with the definition of "collision", but with the definition of "mechanical".

Prudential also attempts to explain Gagon away by saying that the appeal in Gagon only involved the plaintiff's bad

faith claim. Prudential's argument overlooks the fact that if the damages in Gagon had been excludable under the mechanical breakdown clause, the bad faith issue could not have been reached because, in that event, denial of coverage would have been permissible.

The differences between the present action and Gagon have nothing to do with the "mechanical breakdown" issue. The fact remains that in Gagon, the plaintiff was allowed to take his case to the jury for a determination of whether the breakdown was "mechanical", but in the present action the plaintiff was not.

POINT II -- PRUDENTIAL CONCEDES THE VALIDITY
OF THE APPLICABLE PRINCIPLES OF CONTRACT
INTERPRETATION, WHICH HAVE NOT BEEN FOLLOWED
BY THE DISTRICT COURT OR THE COURT OF
APPEALS.

Prudential does not dispute the correctness of any of the three principles of contract construction and proof relied upon by the plaintiff, but merely makes unsupported, and unsupportable, conclusory assertions that the principles have been followed.

1. Construction of ambiguous provision against insurer.

Prudential concedes that "if there is some ambiguity in the insurance policy, that ambiguity is construed against the insurer." (Prudential's Brief in Opposition, page 3.) The District Court admitted that the policy in this action was ambiguous, saying:

The Court is persuaded, even though the language is somewhat confusing, [etc.].

(Tr. 3; Appendix III to Petition for Writ of Certiorari.) The

District Court's statement that the language is "confusing" is presently the law of this case. The confusion should have been resolved against the insurer, especially for purposes of the insurer's motion for summary judgment. Utah Farm Bureau Mutual Insurance Company v. Orville Andrews & Sons, 665 P.2d 1308 (Utah 1983); Christensen v. Farmers Insurance Exchange, 21 Utah 2d 194, 443 P.2d 385 (1968); P. E. Ashton Company v. Joyner, 17 Utah 2d 162, 406 P.2d 306 (1965); Stout v. Washington Fire and Marine Insurance Company, 14 Utah 2d 414, 385 P.2d 608 (1963).

2. Construction to give effect to all provisions of agreement.

Prudential does not dispute the rule that "a contract is to be interpreted so as to give effect to the entire agreement, without ignoring or rendering meaningless any part thereof." (Prudential's Brief in Opposition, page 4.) Prudential merely argues that the plaintiff's damages were "excluded by the contract when read as a whole." (Prudential's Brief in Opposition, page 4.) Prudential does not even attempt to explain how a paragraph providing "comprehensive coverage" for "a car" can mean anything, if the excluded mechanical unit is the entire "automobile", as stated by the Court of Appeals. (Memorandum Decision, page 3; Appendix I to Petition for Writ of Certiorari.)

Under the Court of Appeals' interpretation, the exclusion swallows the inclusion. The so-called "comprehensive coverage" paragraph is read entirely out of the policy and does not "cover" anything under any possible set of facts. Under the consistent decisions of this Court, the policy should have been

read so as to give some meaning to the coverage paragraph if possible. Larrabee v. Royal Dairy Products Co., 614 P.2d 160 (Utah 1980); Jones v. Hinkle, 611 P.2d 733 (Utah 1980); Minshew v. Chevron Oil Company, 575 P.2d 192 (Utah 1978).

3. Burden of Proof.

Prudential also seems to concede that "the burden of proof is on the insurer to prove facts that would avoid liability because of a policy exclusion." (Prudential's Brief in Opposition, page 4.) Prudential merely argues, without citing authorities, that "Swenson had a mechanical problem with his car. [This is the question at issue.] His car was never stolen or involved in a collision of any sort. [These facts, though correct, are irrelevant to a definition of "mechanical breakdown".] Therefore, a simple reading of the policy was all that was required." (Prudential's Brief in Opposition, page 4.) To the contrary, as noted above, the District Court found that "the language [of the policy] is somewhat confusing". (Tr. 3; Appendix III to Petition for Writ of Certiorari.)

Prudential also makes the astonishing statement that "the Court of Appeals based their [sic] decision on the facts that the respondent (... Prudential) put forth in meeting their [sic] burden of proof." Prudential does not state with specificity what "facts" it "put forth" or when, nor could it, since it was granted summary judgment without filing so much as a supporting affidavit.


To the extent, if any, that any portion of the original damages to plaintiff's automobile were "mechanical", the burden

of proof should have been placed on Prudential, at trial, to separate those from the damages as a whole. Whitlock v. Old American Insurance Company, 21 Utah 2d 131, 442 P.2d 26 (1968). Otherwise, Prudential having apparently conceded the accuracy of the plaintiff's statement of the facts, the District Court and the Court of Appeals should have held for the plaintiff as a matter of law.

CONCLUSION

Prudential describes the plaintiff's interpretation of the subject policy as "ludicrous". However, a necessary corollary to the Court of Appeals' interpretation is that the paragraph entitled "comprehensive coverage" in Prudential's self-proclaimed "easy reading" policy covers nothing under any possible set of facts. The Court of Appeals has reached a result inconsistent with the decision of another panel of the Court of Appeals, and contrary to firmly established principles of contract construction and proof as previously decided and reaffirmed by the Utah Supreme Court. This Court should bring an end to the growing confusion by defining the test to determine what is "mechanical breakdown" and what is not.

RESPECTFULLY SUBMITTED this 21st day of June, 1988.


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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 1988, I hand-delivered four (4) true and correct copies of the foregoing Petition for Writ of Certiorari to Terry M. Plant, HANSON, EPPERSON & SMITH, 175 South West Temple, #650, Salt Lake City, Utah 84101.

Gordon Swenson