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Verne J. Oberhansly v. Travelers Insurance Co. : Reply Brief of Appellant

Utah Supreme Court

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Case No. 8450

IN THE SUPREME COURT
of the
STATE OF UTAH

VERNE J. OBERHANSLY,
Plaintiff and Respondent,

vs.

TRAVELERS INSURANCE COMPANY,
a corporation,
Defendant and Appellant.

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

Appellant considers it advisable to file a reply brief in answer to respondent's brief on Point Two in which the trial court found "that insured did not fail to cooperate with the defendant insurance company nor did he fail to comply with the terms of said insurance contract."

Since the preparation of our original brief our attention is called to a case just recently published:

Penn Insurance Company vs. Horner 281 SW
2nd 44

The facts are Penn Insurance Company issued its comprehensive public liability policy to one Horner. He was driving his insured car. Kerr, a postal employee parked a government owned mail truck near the curb. He was sorting mail in the truck. Horner struck the truck a

glancing blow and then failed to stop. His identity was later discovered and he was charged with hit and run driving, whereupon Horner fearing federal prosecution, signed a statement admitting liability and agreeing to pay the damage to the truck. About five months after the accident Kerr filed suit against Horner claiming he sustained personal injuries. The insurance company was not advised of the accident until the suit was filed, whereupon it began an investigation under a reservation of rights agreement. After doing so, the insurance company filed suit for a declaratory judgment claiming the policy void for failure to notify the company of the accident and for failure to cooperate as required by the policy. The Chancellor found in favor of the insurance company. The court of appeals found that the company was not prejudiced by the failure to give notice. On appeal the Supreme Court of Tennessee stated the question was whether failure of insurer to notify the company and his admission of liability relieved the insurance company of liability under the terms of its policy. The court says:

“A provision requiring assistance and co-operation is a condition precedent, failure to perform which in the absence of waiver or estoppel constitutes a defense on the policy.”

The appellant court reversed the court of appeals and affirmed the Chancellor.

Counsel for respondent contends that the question of diligence and good faith on the part of the insured is somehow tied into the question of lack of cooperation and that when the court made a simple finding that

"the insured did not fail to cooperate with the defendant insurance company, nor did he fail to comply with the terms of said insurance contract" that there is implicit in this finding the question of whether or not the insurance company exercised good faith and due diligence in its dealings with the insured. We question the accuracy of this statement. The finding is directed solely and wholly to the insured and nothing is said about the insuror. Had the court believed from the evidence that the insuror was lacking in good faith or diligence, it would of necessity of had to find such to be the case and the failure so to find renders that subject moot and leaves for consideration the only question as to whether or not the insured under the admitted facts in this case breached the terms and provisions of the policy.

If we are in error in our position we nevertheless state emphatically that the evidence in this case shows a deliberate intent on the part of the insured, from the time he left the State of Utah knowing that a suit was pending, to conceal his whereabouts and to refuse any further cooperation is clearly and conclusively established. When he left the State of Utah knowing that this suit had been filed against him, he not only failed to notify the company of his changed address but attempted to conceal the same by going so far as to pledge his own attorney not to reveal to anyone his whereabouts. When the attorney for the defendant finally learned his address and sent him the registered letter copied in our opening brief, he did not answer

the same. He merely contented himself with telephoning his father and telling him to tell Young that he would not appear because of his job. After that, both his father and his attorney requested him to appear at the trial. He did not reply to his attorney's letter nor did he write the company or its attorney explaining his position or advising why he could not come. It would have been an easy matter for him to have written the company or its attorney explaining his situation. In fact it must be remembered that the insured at no time after receiving the letter from defendant's attorney and later his own attorney ever advised assured directly that he would not appear for the trial on the date set.

The insured claims that at the time of the trial he was in line for a promotion and because of this fact it was difficult for him to leave his work. He does not contend that he ever communicated this fact to the company or its attorney. He merely told his father to tell Young he would not come because of his work. Had he in good faith wanted to appear, it would have been a very simple matter for him to have written explaining the fact that he was expecting a promotion; that if a continuance could be had that he would come at a later date. The attorneys for the defendant might then have been in a position to ask for a continuance, but his only comment conveyed through his father was that he wouldn't appear, not that he would appear at some future time.

We have read the cases cited by respondent and most of these cases deal with a situation where the insured was not notified of the date of trial and the question would

naturally arise as to whether or not the insured had exercised due diligence in attempting to locate him. However, that is not this case. In this case the assured admits that he received the notice of the date of trial by registered letter. He admits that he never attempted to contact either the insurance company or its attorney. He was advised of the necessity for his appearance in court and the consequences which would result if he failed to attend, yet in the face of this he made no effort whatsoever to cooperate either in procuring a continuance or in attending the trial. While nothing was said in the first letter concerning expenses, he was told by his own attorney that he was sure the company would take care of this matter but this is immaterial anyway because in his deposition the assured states that that was not the reason he did not appear. In other words, he would not have come had his expenses been tendered him.

Counsel talks about the necessity for the insurance company to act in good faith. We agree. We say that the insurance company at all times acted in the utmost good faith. If a request by the company through its attorney, the request of his own father and of his own attorney would not bring him here, we know of no other efforts which could have produced the desired result.

The policy does not require the insured to force the insurer to attend hearings. The promise is that of the insured that when requested he will attend. Counsel quotes copiously from the case of,

wherein the court makes reference to the apparent desire of the insurance company to avoid the policy. However, on appeal to the Circuit Court, 202 Fed. 2nd., 599, the court affirmed the decision on the sole grounds that

“from a consideration of the entire record in the cause it is the opinion of this court that Mrs. Campbell was not given reasonably timely notice of the trial date, assuming that she received any notice after the case had been set for trial some ten days previously with the approval of the attorney for the appellant.”

The court, however, states that all references to the insurance company only looking for an excuse to abandon its insurance case and made no effort to take any step for the benefit of the defendant's insured was not supported by the evidence. However, that might be, in this case the insurer not only did not abandon the case but, recognizing its responsibility, it represented the defendant under a reservation of rights agreement to the very best of its ability without aid of the defendant.

Respectfully submitted,

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