1982

Elizabeth A. Deschler v. Fireman's Fund American Life Insurance Co. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

ELIZABETH A. DESCHLER,

Plaintiff-Respondent,

vs.

FIREMAN'S FUND AMERICAN LIFE INSURANCE COMPANY, a corporation,

Case No. 18035

Defendant-Appellant.

BRIEF OF APPELLANT

Appeal from the Judgment of the Third District Court, Salt Lake County, The Honorable G. Hal Taylor, Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE

This is an action for recovery of insurance benefits under an accidental death policy that excludes coverage for death resulting from the use of a device for aerial navigation. The parties will be designated as they appeared below.

DISPOSITION IN THE LOWER COURT

Upon cross-motions for summary judgment, the lower court granted judgment in favor of the plaintiff-beneficiary holding as a matter of law that the insured, who fell to his death while flying in a kite being pulled by a motorboat, was not using a "device for aerial navigation." Judgment was entered in plaintiff's favor on September 23, 1981.

RELIEF SOUGHT ON APPEAL

Fireman's Fund American Life Insurance Company seeks a reversal of the judgment of the lower court and entry of judgment, as a matter of law, in its favor.

QUESTION ON APPEAL

Whether a kite designed and used as a recreational vehicle for controlled travel above the surface of water is a device for aerial navigation, within the meaning of an accidental death insurance policy exclusion.

STATEMENT OF FACTS

Plaintiff Elizabeth A. Deschler is the widow of Robert W. Deschler who died on July 26, 1980, from injuries suffered when he fell with a kite at Starvation Reservoir, Utah. Mr. Deschler was flying the 17-foot wingspan kite at a height of approximately forty to fifty feet above the surface of the water when the towrope connecting the kite to a motorboat disengaged. A gust of wind then carried the kite toward the beach. Mr. Deschler fell to the ground, causing the injuries which resulted in his death. [R. 17-18].

At the time of the accident, Mr. Deschler was insured under a group accidental death policy written by defendant Fireman's Fund American Life Insurance Company and issued to the Utah State Employees Credit Union, Master Policy Number

DVA 525-131. Plaintiff is the named beneficiary under the Accidental Death and Dismemberment Coverage of said policy. The policy provides benefits in the event of accidental death of the insured, subject to the following exclusion:

EXCLUSIONS

> The policy does not cover any loss, fatal or non-fatal, caused by or resulting from (1) injuries sustained in consequence of riding as a passenger or otherwise in any vehicle or device for aerial navigation, . . .

The sole issue presented to the lower court was whether the exclusion from coverage of any loss resulting from the use of a vehicle or device for aerial navigation bars the plaintiff's claim to the proceeds. [R. 23-30; 41-50].

The parties submitted affidavits from the manufacturer of the kite and experienced users of the device which are in substantial agreement as to the design, use and operation of the kite. [R. 31-33; 51-52; 54-55; 56-57]. The kite at issue in this case was constructed of aircraft aluminum and dacron sail cloth. It weighed 40 lbs. and had a wingspan of 17 feet. The operator sits in a seat made of seat-belt webbing equipped with a safety belt. The seat itself is attached to a control bar which is used to navigate the kite. [R. 32].

The kite and operator are lifted airborne behind a motorboat and are kept aloft by the airfoil design of the kite

which creates lift and retards downward motion. [R. 32]. While in flight, the operator controls and navigates the craft by pushing the control bar to the left or right to control lateral direction, or up and down to control the ascent or descent. [R. 33, 54, 56]. While being towed, the operator is not randomly drifting or descending through the air, but may fly in any direction he chooses to navigate, up or down, right or left and, to some extent, the operator may even control the speed of the craft. [R. 33, 54, 56]. The boat which tows the kite with a 250-300 foot rope simply dictates the general course of travel. [R. 33]. To terminate the flight, the operator releases the tow-rope and navigates to a landing spot on the water near the shoreline. [R. 33].

Mr. Deschler was an avid and proficient user of the craft and had gone "kiting" virtually every weekend for years prior to his death. [R. 51].

Flying the kite obviously carried an attendant risk of death or serious injury. [R. 52]. Like a hang-glider, the kite could stall on too steep a turn or maneuver. [R. 54-55; 56-57]. While airborne, the kite was also subject to wind gusts and air currents that can cause the operator to lose control and descend too rapidly. [R. 55; 56-57]. While airborne, Mr. Deschler encountered such a wind gust that caused

the craft to crash to the ground from a height of at least 40-50 feet. [R. 17].

On the basis of the affidavits, Answers to Interrogatories, photographs of the kite in flight, and stipulated terms of the insurance policy, both parties filed motions for summary judgment. The lower court granted plaintiff's motion and denied defendant's motion without discussion, impliedly holding that the kite the deceased was flying at the time of his death was not a device for aerial navigation. [R. 90-91].

ARGUMENT

AS A MATTER OF LAW, ROBERT W. DESCHLER'S DEATH WAS THE RESULT AN AN "INJURY SUSTAINED IN CONSEQUENCE OF RIDING AS A PASSENGER OR OTHERWISE IN A VEHICLE OR DEVICE FOR AERIAL NAVIGATION," AN EXCLUDED RISK UNDER THE INSURANCE CONTRACT.

The question of what constitutes a "vehicle or device for aerial navigation", within the meaning of an accidental death policy exclusion, is a matter of first impression in this jurisdiction. Other courts, however, under virtually identical circumstances have uniformly held that recreational use of any kite or glider-like device which travels by air is a hazardous activity intended to be covered by the exclusion.

In construing contracts of insurance, including coverage exclusions, normal rules of construction apply. Words are to be give their usual and ordinary accepted meaning and, unless there is some ambiguity or uncertainty in the language, the

policy is to be enforced according to its terms. St. Paul Fire and Marine Insurance v. Commercial Union Assurance, 606 P.2d 1206, 1208 (Utah 1980); Bergera v. Ideal National Life Insurance Company, 524 P.2d 599, 600 (Utah 1974).

The conclusion the courts have reached in prior cases is not only supported by the ordinarily accepted meaning of the policy language, but also by the clear logic of applying the exclusion, as it was intended, to conduct that experience has shown to be hazardous to life and limb.

In a case strikingly similar to the present action the Georgia Court of Appeals in Fireman's Fund American Life Insurance Company v. Long, 251 S.E.2d 133 (Ga.App. 1978) reversed a summary judgment for the beneficiary under an accidental death policy and directed that judgment be entered for the defendant insurer. In that case the decedent had died while operating a "hang-glider" designed to be towed behind a motor vehicle. Decedent hooked one end of the tow-rope to the bumper of a van and the other to the hand-release control of his glider. The van pulled out and decedent, while seated in a swing-like harness, ran with the kite until airborne. Upon reaching an altitude of 100 feet, the tow-rope disengaged, either accidentally or by means of the hand-release control, and the decedent nose-dived to the ground;

the fall resulting in the injuries from which he died several hours later.

The beneficiary under an accidental death policy insuring the deceased brought suit to recover policy benefits. The defendant insurer moved for summary judgment on the basis of a policy provision excluding coverage for "loss caused by or resulting from . . . [t]ravel or flight in any vehicle or device for aerial navigation . . . ." Id. at 134. The trial court denied defendant's motion and granted a cross-motion for summary judgment in favor of the beneficiary. The defendant appealed.

On appeal, the Georgia Court of Appeals held that the hang-glider was indeed a "vehicle or device for aerial navigation" within the policy exclusion. The court stated:

> Appellant contends that the glider constitutes a "vehicle or device for aerial navigation" within the purview of the policy's aviation exclusion. We agree with this contention. Navigation is defined as "the science or art of conducting ships or aircraft from one place to another." Webster's Third New International Dictionary, (1966), p. 1509.

251 S.E.2d at 134. The appeals court found that the hang-glider qualified as an "aircraft" and the policy exclusion was applicable. The court therefore entered judgment in favor of the insurance company. Accord Fielder v. Farmer's New World Life Insurance Company, 435 F.Supp. 912 (C.D. Cal.

1977) [operation of hang-glider falls within excluded risk of "travel or flight in an aircraft."]

In Wilson v. Insurance Company of North America, 453 F.Supp. 732 (N.D. Cal. 1978), the Federal Court for the Northern District of California, upon cross-motions for summary judgment, granted summary judgment in favor of the insurer in an action to recover accidental death benefits. In that case the court was asked to decide whether operation of a "hang-kite" constituted "travel or flight in any vehicle or device for aerial navigation", as those terms were used in an exclusion clause in a group accidental death policy.

The undisputed facts established that the operator of the "hang-kite" controls the direction of the flight by use of a control bar. By shifting his weight on the bar he can turn the vehicle to the right or left, and ascend or descend. In contrast to a glider which is designed like a wing, the "hang-kite" is structurally patterned after a parachute. Id. at 733.

The plaintiff sought to capitalize on this structural distinction between the devices, arguing that since the "hang-kite" is patterned after a parachute, it is not an "aircraft" and therefore not navigable, since the term "navigation" means "piloting an aircraft."

The court rejected plaintiff's argument and granted summary judgment for the defendant insurer emphasizing the logic of applying the exclusion to this type of activity:

> [I]n the instant case, the inquiry concerns not only the status of a hang-kite as an "aircraft", but also the act of operating it as "piloting" an aircraft. For this reason, the designer of decedent's hang-kite could swear in two separate statements given to plaintiff and defendant, respectfully, without contradicting himself that the hang-kite he designed for decedent was patterned after a parachute and that the means of control was such that the decedent could and did navigate his craft. Construing the exclusionary language in the brochure in its entirety rather than by its divisible parts, it is clear that the insured would reasonably expect that the operation of a hang-kite would constitute just the type of activity that the policy was not intended to cover. Defendant, Insurance Company of North American, has, therefore, met its burden of showing that the terms of its policy conform to the reasonable expectation of the insured, and, accordingly, is entitled to summary judgment as a matter of law.

453 F.Supp. at 735.

The most recent case dealing with a kite-like device and an "aerial navigation" exclusion is Cabell v. World Service Life Insurance Company, 599 S.W.2d 652 (Tex. Civ. App. 1980) where the Civil Court of Appeals for Texas affirmed a judgment for the insurer in a declaratory action upon a group life insurance policy.

The insured in Cabell died when the "para-plane" he was operating stalled in mid-air and nose-dived to the ground. The beneficiary made demand on the insurer for payment of

benefits whereupon the insurance company instituted a declaratory judgment action to determine its liability.

The "para-plane" device at issue in Cabell was controlled by the operator by means of "steering toggles." Like a kite or glider, the "para-plane" was highly and used the aerodynamic principles of an airfoil to allow the operator to fly in the direction he chooses. Although patterned after a parachute, the wing-type para-plane is used for sport jumping, unlike the conventional parachute used primarily for emergency exits from aircraft. Id. at 652.

Trial was to the court, without a jury. The insurer contended that the death was an excluded risk since it resulted from an injury sustained while "riding as a passenger or otherwise in any vehicle or device for aerial navigation," a specific coverage exclusion. The trial court agreed and entered judgment for the insurer.

On appeal, the Court of Civil Appeals for Texas affirmed. In doing so it brushed aside the appellant-beneficiary's proferred technical definitions of "aerial navigation," choosing instead to the follow the more common and ordinary definitions of those terms. The court stated:

> For example, appellant's own cited authority, Webster's Third New International Dictionary (unabridged), gives these definitions as preferred to those suggested by appellant:

> "Aerial - of, or belonging to the air or atmosphere."
>
> "To navigate - to direct one's course through any medium; specifically to operate an airplane or airship."

By these definitions, aerial navigation would simply mean to direct one's course through the air. We believe such a definition would be closer to the commonly understood and accepted meaning of the term aerial navigation than the narrow ones suggested by appellant. Moreover, that general interpretation has received the sanction of the courts. In Smith v. Mutual Benefit Health and Accident Association, supra, the Supreme Court of Kansas defined "participating in aeronautics or air travel" as "to share in sailing or floating in the air." The chute in question here more than meets the test of that definition. It did not merely float or drift uncontrollably through the air, but was maneuverable to the extent that its direction, speed and rate of descent could be controlled with a considerble degree of accuracy. The fact that it had no power, except for the air, or that it could not travel upward or horizontally for great distances, is not significant. It could be maneuvered or directed through the air, and we think that the insurance policy and the insured must have contemplated that any device capable of doing that was a device for aerial navigation.

599 S.W.2d at 654.

In a final attempt to find coverage, appellant argued that if the policy intended to exclude accidents involving para-planes it should have explicitly done so; the language of the policy exclusion is therefore ambiguous and must be construed against the drafter.

The appeals court rejected this argument as well, stating:

> Of course, the policy could have specifically named every known or conceivable type of device for aerial navigation had the company chosen to do so, but such

> specificity is not necessary when the general term, by its common and ordinary meaning, clearly includes the device in question.

599 S.W.2d at 654.

The foregoing discussion contains all reported cases dealing with kite or glider devices in the context of an insurance policy "aerial navigation" exclusion. The cases uniformly hold that such vehicles are devices for aerial navigation.

Several courts have examined the analogous question of whether a parachute is a "device for aerial navigation" for purposes of an insurance policy exclusion. While these cases are factually distinguishable (based on the nature and operation of a parachute vis-a-vis a kite or glider), they provide additional authority and analytical assistance for defendant's position in this case.

The most recent case dealing with a parachute and an "aerial navigation" exclusion is Edison v. Reliable Life Insurance Company, 495 F.Supp. 484 (W.D. Wash. 1980). In that case the plaintiff-beneficiary brought suit against the defendant insurer to recover policy benefits for the death of the insured who lost his life when his parachute failed to open during a sport parachuting event. The insured denied coverage and moved for summary judgment on the ground that the insured's cause of death was a result of his riding in a

"device for aerial navigation," an excluded risk under the policy. Plaintiff filed a cross-motion for summary judgment, arguing that since the exclusion did not mention sport parachutes specifically the language of the exclusion is ambiguous and should be interpreted in favor of the insured.

The court granted the defendant-insurer's motion for summary judgment stating:

> In my view, any parachute is "a device for aerial navigation." Webster defines "navigation" as "the act or practice of navigating." "Navigate" is defined as "to travel by ship." "Aerial navigation" therefore means "to travel by air." A parachute is clearly a device in which to travel by air.

495 F.Supp. at 496.

As further support for its position, the court made an important distinction based upon the purpose for which the device was being used at the time of the accident, a distinction equally applicable to the case at bar.

> There has been some discussion as to the distinction between parachutes as "safety devices" and parachutes for "sporting purposes." In my view the distinction lies not in the design or construction of the parachute, but rather the purposes for which it is used. If a person riding as a passenger in a certified aircraft is forced to use a parachute to save himself from disaster because of some crisis which affects him as a passenger, he might well be covered by the policy until he safely reaches the ground. But one who is riding as a passenger in a certified aircraft loses his status as such when he voluntarily leaves the plane, choosing an alternate means of returning to earth. In the former illustration, if the parachute fails to open, the insured dies as a consequence of having been riding as a passenger in a certified aircraft. In the later

> illustration, if the parachute fails to open, the insured dies as a consequence of riding in a device for aerial navigation which has been specifically excluded from the policy.
>
> There has also been much discussion about the maneuverability of various types of parachutes. Such discussion, in my view, is irrelevant since all parachutes are maneuverable to some degree. In any event, no such distinctions are relevant here since the device, a parachute package, in which the insured had chosen to ride and was riding at the time of his death was neither designed nor intended as a safety device, but was designed and intended to be maneuverable.

495 F.Supp at 486-87 [footnotes omitted].

Other courts have reached the same holding in parachute cases. See e.g., Smith v. Mutual Benefit Health & Accident Association, 258 P.2d 993 (Kan. 1953) ["participating in aeronautics", as used in insurance policy exclusion, means to "share in sailing or floating in air" and includes sport parachuting.] Contra Childress v. Continental Casualty Company, 461 F.Supp. 704 (E.D. La. 1978) [sport parachute is not "device for aerial navigation."]

Childress v. Continental Casualty Company, supra, is the only recent case holding that a parachute is not a "device for aerial navigation" within the meaning of an insurance policy exclusion. The Childress opinion was criticized by the federal district court in Edison v. Reliable Life Insurance Company, 495 F.Supp. 484, 487 (W.D. Wash. 1980) [discussed on prior page], and offers little assistance to the

court in deciding the case at bar. In Childress, the court properly reasoned that since the policy did not define "device for aerial navigation," the court must look to common and ordinary definitions. Inexplicably, the court then analyzed the common definition of "parachute" rather than the policy terms "aerial navigation." The court then stated, without offering any supporting reasoning, that a parachute is not a "device for aerial navigation."

CONCLUSION

By common dictionary definition, the terms "aerial navigation" mean "to direct one's course through the air." Each and every court which has considered the question of whether a kite or glider device is a "device for aerial navigation", within the meaning of an insurance policy exclusion, has held that it is. With limited exception, analogous authority dealing with parachutes is in accord.

Logic and reason compel a similar conclusion in this case. Mr. Deschler was not forced to use the kite he was piloting at the time of the accident; the kite was not an emergency device, but was purposefully used for recreational enjoyment. Mr. Deschler, as an experienced operator, did not simply drift through the air while piloting the kite, but was able to choose his course of travel. He could navigate in whichever direction he chose, up or down, right or left, and

could even control his rate of speed to some extent. Mr. Deschler was clearly able to travel or direct his course through the air in the same manner as the insureds in the cases discussed above.

The hazardous nature of this type of activity and its attendant risk of loss of life or limb is well-known. The exclusion at issue in this case is a modification of earlier aviation exclusions and is clearly targeted to deal with the new risks created by the spreading popularity of sport kiting, gliding and parachuting. Applying the usual and ordinary accepted meaning to the policy language, it is unequivocally clear that the exclusion was contemplated and designed to avoid the specific risk to which the deceased exposed himself when he left the surface of the water to travel by air behind the motor boat.

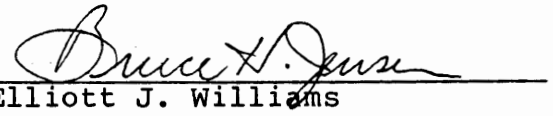
The judgment of the lower court, if affirmed, would make Utah a minority of one on this seemingly clear issue. The better reasoned, if not compelling, view is that devices of the type used by Robert Deschler are devices for "aerial navigation" and, no factual dispute remaining, the judgment

of the lower court should be reversed and judgment entered for defendant as a matter of law.

Dated this 13th day of January, 1982.

Respectfully submitted,

SNOW, CHRISTENSEN & MARTINEAU

By 

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CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand delivered two (2) true and correct copies of the foregoing Brief of Appellant to Henry S. Nygaard, Attorney for Plaintiff-Respondent, 1100 Boston Building, Salt Lake City, Utah 84111, on this 14th day of January, 1982.

Jill Robison