

1982

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

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Deschler v. Fireman's Fund*, No. 18035 (Utah Supreme Court, 1982).

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IN THE SUPREME COURT
OF THE STATE OF UTAH

ELIZABETH A. DESCHLER, :
Plaintiff-Respondent, :

vs. :

FIREMAN'S FUND AMERICAN LIFE : Case No. 18035
INSURANCE COMPANY, a corpor- :
ation, :

Defendant-Appellant. :

BRIEF OF RESPONDENT

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

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FILED

FEB 18 1982

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

This is an action by the Plaintiff to compel the Defendant to pay accidental death benefits pursuant to a group insurance policy on the life of the Plaintiff's deceased husband.

DISPOSITION OF THE LOWER COURT

The lower Court granted the Plaintiff's Motion for Summary Judgment on the grounds that the "water ski kite" is not a device for "aerial navigation" in that the skier "does not navigate" the device by use of air currents, but rather is controlled by the operator of the boat which pulls the kite. Judgment was entered on September 23, 1981.

RELIEF SOUGHT ON APPEAL

The Plaintiff seeks to have the lower Court's Judgment affirmed.

QUESTION ON APPEAL

Is a water ski kite "a device for aerial navigation" within the meaning of the accidental death insurance policy exclusion?

STATEMENT OF FACTS

Robert W. Deschler was an experienced boatman, water skier, and water ski kite participant. He was killed in an accident at Starvation Reservoir on July 26, 1980, after the tow rope was disconnected when gusts of wind carried him over the shore line where he landed and died. At the time of his death, he was insured under the Accidental Death Group Policy No. DVA 525-131, which had been issued to the State Employees Credit Union.

At the time of his death, Robert W. Deschler was using a water ski kite. This device is used by water skiers who are raised into the air when sufficient air resistance is created by the boat pulling the participant and the kite at the end of a tow rope. When the tow rope is disconnected from the boat, the skier and the water kite immediately descends into the water. Water ski kites can be used only in calm weather. These recreational kites cannot be directed or controlled by the skier in wind or natural air currents as are airplanes, aerial parachutes or hang gliders.

Darrel Brady, in his Affidavit (TR 54) stated:

" 4. That I have been using water ski kites for the last two years. In the course of my instruction and my experience, I have been made aware that water ski kites can be used only in connection with water skiing and being pulled by a boat. The only way that the water ski kite can be raised into the air is by the use of a rope two and the air resistance against the kite. "

Brady further stated under oath that any attempt to use gusts of wind or air currents would be dangerous (TR-55):

" 5. When the rope tow is disconnected from the boat, the water ski kite immediately begins to descend. It is dangerous to attempt to have the water ski kite go in an upward direction because it would stall and fall to the water. Therefore, it is very important that when the water ski kite is disconnected that one immediately find a good place to land in the water. Water ski kites cannot be used except on calm days because the kites cannot be controlled when there is a heavy breeze or gusty winds. The water ski kites cannot, on its own, be used to float in the air. If it were not for being pulled by a boat, water ski kites could not function at all."

The testimony of Brady is corroborated by Ken Yocum, a man very skilled and experienced in the use of water ski kites.

He said in his Affidavit:

" 3. That water ski kites cannot be used over land but must always be used in conjunction with water skiing and a motor boat.

4. That water ski kites cannot be operated on their own with the use of air currents. They must always be used in connection with a tow rope joined to a motor boat. Although the operator of a water ski kite can, with the use of the control bar and shifting body weight, cause the kite to move to the left or to the right, and up and down, to a limited degree, it becomes dangerous to have the water ski kite go too far to the left or to the right because it is easy to lose control of the kite.

5. When the rope tow is disconnected from the boat, the water ski kite immediately begins to descend. It is

dangerous to attempt to have the water ski kite go in an upward direction because it would stall and fall to the water. Therefore, it is very important that when the water ski kite is disconnected that one immediately find a good place to land in the water. Water ski kites cannot be used except on calm days because the kites cannot be controlled when there is a heavy breeze or gusty winds. The water ski kite cannot, on its own, be used to float in the air. It is if were not for being pulled by a boat, water ski kites could not function at all. "

The decedent was proficient in the use of water ski kites and was well aware that they could be used only when pulled by a water boat on calm days. His wife, Elizabeth Deschler stated in her affidavit:

" 5. In using the kite, it is essential that it be used in conjunction with a boat and a tow rope connecting the boat and the kite. Also, three persons are required to participate in this particular activity. One to drive the boat, one to serve as an observer and to hold the "quick release" which is used as a safety device to allow the kite to be disconnected from the boat in the event the person in the kite for some reason cannot disconnect the rope from the boat, and the third person is the person using the kite.

6. During the course of receiving instructions, it is has been carefully pointed out and from experience proved to be true that the kite cannot be used or operated under any circumstance when the weather is windy. Even if there is a strong breeze, the kite cannot be used because it is impossible to control. With no breeze or a little breeze, the one sitting in the kite, can hold the control bar with his hands and by shifting weight can move the kite to the right or the left. As long as the rope is connected, the kite can be controlled within the limits of the rope insofar as up and down movements are concerned. However, as soon as the rope is disconnected, the kite immediately begins to descend and the control of the flyer is limited to descending into the water. The one holding the kite cannot go up. Basically, the pressure against the wings created by the boat pulling the kite and the rider, give sufficient resistance to raise the kite and the rider into the air. Without the rope connected to the boat

and the kite, the kite functions like a parachute in that the one in the kite can, to a limited extent, control the downward descent. However, the flyer must always wear water skis and must land in the water. One of the reasons that you do not use the boat and kite in rough water or wind, is that the kite and the individual using the kite, may be blown onto the ground and be seriously injured and killed. "

Subsequent to the death of Robert W. Deschler, his widow made application for the death benefits payable under the group insurance policy. The Defendant denied the Plaintiff's claim on the grounds of an exclusionary clause which reads:

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

ARGUMENT

POINT I

INSURANCE CONTRACT MUST BE CONSTRUED IN FAVOR OF INSURED IN THE EVENT OF AN AMBIGUITY

Insurance carriers carefully prepare all of the provisions in their insurance policies. Historically, the companies draft the terms and conditions in a manner favorable to themselves. They use language that hopefully will give them the greatest protection in the event questionable claims are filed against them. In the instant case, broad language " a vehicle or device for aerial navigation" was used. Therefore, under their broad interpretation, virtually anything that is airborne in any manner is "a device for aerial navigation."

The Courts, realizing this propensity, have consistently

ruled that words and phrases used in insurance policies should be given their usual and ordinary meanings, and in the event of any ambiguity, the interpretation shall be in favor of the insured and against the insurer.

In Bergera vs. Ideal National Insurance Company, 524 P.2d 599, at page 600, the Court declared:

"The policy is merely a contract between the insured and the insurer. Its language should be construed pursuant to the same rules as are applied to other ordinary contracts, to-wit: What did the parties thereto intend by the language used? Of course, any ambiguities will be construed against the insured, since the policy was drawn by it. Words should be given their usual and ordinary accepted meaning."

The Trial Court ruled that a water ski kite was "not navigated" by a pilot in the ordinary and usual sense as in the case of an airplane or hang glider because the operator of the motor boat really controlled the movements of the water skier, whereas, the usual aerial device is "navigated" fully by the pilot of the device and without the benefit of any external force or help.

The following words and definitions were considered by the Trial Court in arriving at its decision:

1. The Federal Aviation Agency in CFR 14:1.1 defines kite and glider as follows:

KITE:

"A framework covered with papers, cloth, metal or other material, intended to be flown at the end of rope or

cable and having as its only support the force of the wind moving past its surface." (underlining for emphasis)

GLIDER:

"A heavier than air aircraft, that is supported in flight by the dynamic reaction of the air against its lifting surfaces and whose free flight does not depend principally on an engine." (underlining for emphasis)

Although kites and gliders are not regulated by the Federal Aviation Agency, the definitions clearly demonstrate that persons associated with "aircraft" make definite distinctions between self-operating devices which are actually navigated and devices that are directed or controlled by an external force such as a rope tow and boat. The use of the term "free flight" in the definition of a glider is significant. The definition goes on to further point out that the glider "is supported in flight by the dynamic reaction of the air against its lifting surface." It is plain that the distinction is made between a device using the natural air currents to lift up the craft such as a glider or airplane, and a kite at the end of a rope which relies upon wind moving past its surfaces to remain in the air.

2. "Aerial navigation" is defined in Blacks Law Dictionary as:

"A branch of aerostatics which treats a floating in or navigating in the air as if in an airship or airplane."

"Navigation" is defined in the American Heritage Dictionary as:

"The theory and practice of navigating, especially, the charting of a course for a ship or aircraft, . . . the plan, record, and control of a course of a ship or aircraft . . . to direct one towards a destination."

It is submitted that using the above words and definitions a water ski kite is not a "vehicle or device for aerial navigation." In particular, the water skier does not control his direction or destination; the movement of the kite does not depend upon any dynamic reaction or natural air currents against its lifting surfaces; and the kite cannot in any sense of the word be considered as being in "free flight".

On the contrary, a water ski kite is a recreational device never contemplated to be included within the insurance definition of "a device for aerial navigation." The water ski kite is simply a sporting device which has been developed for boat recreation and not intended for free flight navigation.

The intent that a kite is basically a water surface device is substantiated by the statements made in the Affidavits of Yocum and Brady where it is positively stated that:

"The kite cannot be used except on calm days . . . kites cannot be controlled when there is a heavy breeze or gusty winds. . . water ski kites cannot, on its own, be used to float in the air. If it were not for being pulled by a boat, water ski kites could not function at all." (Brady Affidavit TR 55)

The restricted control over a kite by the water ski is further explained by Brady when he swears:

"If one goes too far to the left or right, the kite will roll over causing a direct descent and possible injury.

Once the rope tow is disconnected, the kite descends directly downward. If there is any effort to cause the kite to go up after the rope has been released, the kite immediately stalls and falls directly to the water where one may be injured."

Yocum in his Affidavit (TR 56) confirms the fact that a kite is not a free flying device. He says:

" Although the operator of water ski kite can, with the use of the control bar and shifting body weight, cause the kite to move to the left or to the right, and up and down to a limited degree, it becomes dangerous to have the water ski kite go too far to the left or to the right because it is easy to lose control of the kite."

" 5. When the rope tow is disconnected from the boat, the water ski kite immediately begins to descend. It is dangerous to attempt to have the water ski kite go in an upward direction because it would stall and fall to the water."

In giving ordinary, usual interpretation to the words used in the insurance policy, there can be no doubt that the intent of the "exclusionary clause" is to cover free flight type aerial devices and not devices that are directed and controlled from the ground as in the case of a water ski kite. To stretch the interpretation as requested by the insurance company is inequitable and unreasonable. A water skier in using a kite would not in any way consider that he was not covered by an accidental insurance policy on the basis that a kite was an aircraft. Water skiers using kites recognize the limitations of the sporting device and govern their activity accordingly. In the instant case, unexpected and severe gusts of wind caught the kite when it was disconnected and caused the kite to be blown upon the shore

where Robert Deschler landed and was killed.

POINT II

PLAINTIFF IS ENTITLED TO ACCIDENTAL DEATH BENEFITS IN THAT THE DEATH WAS COVERED UNDER THE GROUP INSURANCE POLICY

There is no reported case involving a death claim arising out of a water ski kite accident. This is a case of first impression in Utah as perhaps all other jurisdictions. The Defendant-Appellant argues that the cases involving hang gliders, airplanes, and sport-type parachutes are analogous and therefore Court rulings in those cases are applicable. It is the contention of the Plaintiff-Respondent that the reported cases are not analogous in that they involve aerial devices that are all free flight type aircraft or device that rely entirely upon a pilot controlling the device by use of natural air currents and are not in any way directed, controlled, or navigated by an external force.

Mr. Deschler was an experienced water skier, who engaged in that activity with the use of a water ski kite. He had received extensive instruction from experts including Lynn Webb, a person who manufactured kites which the decedent himself used. In his Affidavit, the Defendant's primary witness, Webb, stated:

" 7. Water skis are used in conjunction with the kite. The operator of the kite is towed by a polyethylene rope of approximately 250 to 300 feet in length by a power boat to the speed of at least twenty miles per hour."

The Affidavit of Webb then goes on to point out that the general direction and destination of the water skier is

controlled by the motor boat operator.

The case of Childress vs. Continental Casualty Company, 461 Fed Supp 704 (D.C. La., 1978, affirmed, 578 Fed 2d 809, 1979) is one of the leading cases involving parachutes and air flight devices. The Court used the dictionary definitions to conclude that a parachute was not included in the aircraft exclusion of the insurance policy. That policy used language similar to the instant case:

"Injury sustained in consequence of riding, except as a passenger, and not as a pilot or crew member, in any vehicle or device for aerial navigation."

The Court determined that the decedent who died in a parachute fall was not acting as a pilot because it was a device incapable of being piloted. The basic issue raised was whether or not the parachute was a device for aerial navigation. The Court stated on page 705:

". . . the type of parachute being used by the decedent was designed so that its wearer could control his descent with a great deal of precision."

The insurance carrier argued that this parachute was a "device" for aerial navigation because it could by means of control, be turned, braked, stalled and directed by a user, and its rate of descent could be regulated. In the case now before the Court, it is established by the Affidavits of the Plaintiff, Elizabeth Deschler, Yocum and Brady, and the Affidavit of Lynn Webb in

behalf of the Defendant, that there was some control over which the user could direct the descent. However, it is also clear that the water ski kite could not function as a hang glider and fly up and down with the use of the natural air currents. The disconnection of the tow rope causes an immediate descent. Therefore, it would appear that the Childress case is very similar to the instant case because the same question is raised, namely; "What is an aerial device?"

Another important case relating to the use of parachutes is that of Fielder vs. Farmer's New World Life Insurance Company, 435 Fed Supp 912 (C.D. Cal., 1977). This particular case involved a hang glider. The exclusionary clause in this particular case provided that death resulting from descent from any kind of air craft or from travel or flight in any kind of aircraft in which the insured was acting as a pilot or member of a crew, would result in an exclusion. The decedent was determined by the Court to be a pilot. The Court, however, then went on to emphasize that the term "riding in" is not intended to include the use of a parachute. In other words, the Court distinguished the Childress case from the Fielder case by declaring that in the one instance, a hang glider operator was a pilot but with respect to the use of a parachute, the operator was not a pilot within the usual definition. Again, in the case now before the Court, it is the contention of the Plaintiff that an operator of a kite is not a pilot within the usual meaning of

a person who solely controls, navigates or directs a craft to a specific destination.

The case of Cabell vs. World Service Life Insurance Company, 599 S.W. 2d 652, involved the use of a device known as a para-plane which was designed in a specific way so as to allow air to flow through the para-plane and cause it to move forward through the air at 20 miles per hour by virtue of its own aerodynamics. The para-plane was so designed as to allow the user to control the device with great accuracy in free flight. On page 652, the Court states:

"A jumper could accurately steer the para-plane from his exit from an airplane to a designated point on the ground one to one and a half-miles away."

In the instant case, the user of the water ski kite could not exercise such control over a long distance or period of time. The kite is not a free flight device capable of floating through the air by application of aerodynamic principles. Mr. Deschler, as any other kite operator, upon being released from the tow rope, would descend directly from the forty or fifty feet height directly to the water, and the control bar would merely allow a limited control in the safe descent. A water ski kite is not designed or intended to be a device which makes possible free flight with the help of air currents during prolonged periods of time in the air.

In the case of Clark vs. Lone Star Life Insurance Company, 347 S.W. 2d (1980) the decedent was killed while sport

parachuting. In that particular case, the Court specifically ruled that a parachute could not be considered an aircraft and it stated:

"A device designed to safely retard descent from an aircraft, but that parachutes themselves cannot be considered aircraft.:

Although parachute cases are cited for the purposes of defining the meaning of "aerial devices and navigation", it is not to be concluded that kites are like or similar to parachutes. Kites are even more removed from "aircraft devices" than parachutes because they are basically controlled by boat operators and the use of tow ropes. There is no free flight or designed maneuverability as in the case of various types of parachutes. There is a split of authority as to whether or not a parachute in every case is or is not a "device for aerial navigation." Plaintiff submits that kites by their design, function and purpose are not and were never intended to be considered "aerial devices".

The Defendant relies heavily upon the case of Fireman Fund vs. Long, 251 S.E. 2d, 133. This case involves a hang glider. The decedent practiced with the hang glider by jumping off a small cliff. After the deceased felt he had mastered the hang glider, he decided to have the hang glider pulled by a rope attached to the rear bumper of a van. When the rope was released, the hang glider crashed killing the decedent.

Certainly, this hang glider accident is not similar to the use of a water ski kite that is designed to be pulled by a boat

and tow rope. There is no indication that the hang glider was designed to be pulled by a land vehicle. However, this case is important in pointing out the basic differences of various devices and the manner in which they are designed and used. The devices should not be used for purposes for which they are not designed. Water ski kites are not designed to be free flight devices; therefore, their recreational use is limited to water recreation.

CONCLUSION

It is submitted that the insurance carriers who had the exclusionsary clause prepared, at no time ever conceived of or concerned themselves with boats, water, water skis, or water ski kites. Common sense dictates that the intention was to exclude pilots of airplanes and devices that were intended to be flown in the skies relying upon air currents and atmospheric conditions. Should the Court come to the rescue or the aid of an insurance company for the purpose of granting it greater protection because it did not fully and completely insulate itself from having to pay every claim submitted to it unless the insurer by its own generous and beneficent inclinations provides for coverage?

The law is clear that ambiguities in insurance contracts should be construed in favor of the insured. The insured has paid th premium and is entitled to the benefits unless it is evident and clear that there is no coverage.

Traditionally, insurers have demanded narrow construction

with respect to benefits and broad construction with respect to payments. It is incumbent upon the insurers to insert appropriate modifications in their contracts in response to societal changes rather than rely upon the Courts to grant them favorable interpretations. In that fashion, the insured can rely upon the fact that he has insurance coverage for which he has paid.

In the instant case, there is no reasonable basis for the decedent or his beneficiaries to believe that there was not coverage while he was engaged in his water ski activities. The burden is upon the Defendant insurer to establish that the decedent was not covered. Ordinary and usual word usage and the application of the limited case law available are supportive of the Plaintiff's contention that the Defendant has wrongfully refused to pay the death benefits under the Accidental Death Group Policy, and the Plaintiff is entitled to prompt payment.

RESPECTULLY SUBMITTED this 17 day of February, 1982.

BEASLIN, NYGAARD, COKE & VINCENT



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CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing Brief of Respondent were mailed, postage prepaid, this

17 day of February, 1982 addressed to the following:

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