1982

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

Utah Supreme Court

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Henry S. Nygaard; Beaslin, Nygaard, Coke & Vincent; Attorneys for Plaintiff-Respondent;

IN THE SUPREME COURT

OF THE STATE OF UTAH

ELIZABETH A. DESCHLER,

Plaintiff-Respondent,

vs.

Case No. 18035

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

Defendant-Appellant.

REPLY 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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ARGUMENT

POINT I

THE UNAMBIGUOUS LANGUAGE OF THE POLICY EXCLUSION WAS INTENDED TO ELIMINATE COVERAGE FOR THIS RISK.

The principal argument posed in respondent's brief is that the plaintiff is entitled to recover policy benefits because the aerial navigation exclusion is ambiguous in its intent and must therefore be construed against the defendant insurer. Brief of Respondent, pp. 8-9, 15.

There is nothing in the record suggesting Judge Taylor found that the exclusion is ambiguous. The Summary Judgment does not specify the basis for the lower court's ruling, nor any supporting reasoning. The plaintiff's repeated

references to alleged grounds and reasons for the judgment notwithstanding, the most that can be implied from the decision of the lower court is that Judge Taylor found the water ski kite was not a "device for aerial navigation." Brief of Respondent, pp. 1, 6.

The exclusion is not ambiguous. The plaintiff's argument attempts to obscure the clear and specific intent of this type of exclusion under the guise of interpretation. General rules of construction dictate that in the case of ambiguity, the language is to be construed against the draftsman. However, ambiguity is not to be presumed and the rule is not applied simply because one party contends an alternative construction is reasonable.

> [T]hat rule has no application unless there is some genuine ambiguity or uncertainty in the language upon which reasonable minds may differ as to the meaning. That requirement is not satisfied because a party may get a different meaning by placing a forced or strained construction on it in accordance with his interest. The test to be applied is: would the meaning be plain to a person of ordinary intelligence and understanding, viewing the matter fairly and reasonably, in accordance with the usual and natural meaning of the words[1], and in the light of existing circumstances, including the purpose of the policy. If so, a special rule of construction is obviously unnecessary.

Auto Lease Company v. Central Mutual Ins. Co., 7 Utah 2d 336, 325 P.2d 264, 266 (1958) [Citations omitted]. Accord, Prudential Ins. Co. of America v. Barnes, 285 F.2d 299, 301 (9th Cir. 1960).

Aviation and aerial navigation exclusions are commonly used throughout the insurance industry. They are drafted with the specific intent of limiting the insurer's liability for those extra risks of death ordinarily associated with the dangers of aerial flight. Green v. Mutual Benefit Life Ins. Co., 144 F.2d 55, 57 (1st Cir. 1944).

> It is no secret that insurance companies generally seek to limit their liability under life insurance policies for injuries or deaths resulting from the insured's connection with certain enumerated activities. The common risks which accident and death policies exclude are death by suicide, Couch on Insurance Second §§ 40:4, 41:195; death or disability caused by certain diseases or infections, Id. § 41:398; death or injury suffered during war or military service, Id. § 41:696; and death or injury connected with aviation, Id. § 41:541; Annotations at 155 A.L.R. 1026 and 17 A.L.R. 2d 1041. The average individual should not be surprised, therefore, to find that these very same exclusions do in fact exist in the accident coverage portion of the certificate issued to Dan Ayres [the deceased]. Included among these common exclusions is the aviation clause at issue in this case.
>
> These types of provisos, which exclude aviation-related risks from coverage, are not only common, but their usual and ordinary purpose has been characterized by the courts. . . . "[the insurance company] intended to insure most people who fly but not those whose profession or hobby is connected with the actual flying of planes and who are therefore normally subject to more repeated risks and risks more directly within their own control." Prudential Ins. Co. of America v. Barnes, 285 F.2d at 300. . . .

Ayres v. Prudential Ins. Co. of America, 602 F.2d 1309, 1313 (9th Cir. 1979) [Emphasis added].

The clear intent of the provision at issue in this case is to exclude the dangerous risks associated with all air travel except commercial passenger transportation.

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, except as a passenger for transportation only, and not as a pilot or crew member, in any aircraft which has been certified as airworthy by the appropriate authority of the country of its registry and which is not owned, leased or operated by the Policyholder; . . .

The exclusion is, admittedly, broad in scope. It is intended to cover all hobby or recreational airborne travel. The exclusion could have specifically named every type of device for aerial navigation known to man including water ski kites. The lack of that sort of specificity does not equate with ambiguity. This same argument was considered and rejected by the Texas Court of Civil Appeals in Cabell v. World Service Ins. Co., 599 S.W.2d 652, 654 (Tex.Civ.App. 1980). In Cabell, the appellate court affirmed the lower court's judgment in favor of the defendant insurer, finding that a wing-type para-plane was a "vehicle or device for aerial navigation," an excluded risk. As to the plaintiff's argument that the exclusion was ambiguous because it failed to specifically exclude accidents involving para-planes the court stated:

> 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.

559 S.W.2d at 654.[1]

Other appellate courts which have examined the exclusionary language at issue have uniformly held it to be nonambiguous. The most recent decision in point is Edison v. Reliable Life Ins. Co., 664 F.2d 1130 (9th Cir. 1981), in which the Ninth Circuit Court of Appeals affirmed the decision of the United States District Court for the Western District of Washington, 495 F.Supp. 484, (discussed in appellant's opening brief at pp. 12-14). On appeal the Ninth Circuit held that the exclusionary language was clear and unambiguous, and that the defendant insurer was entitled to summary judgment since the deceased had died as a consequence of riding in a "device for aerial navigation," a parachute. 664 F.2d at 1132. In finding the death was specifically excluded from coverage by the policy terms the court of appeals declined

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[1]The test requires that the words be given their usual and natural meanings. The plaintiff's argument, however, relies on technical definitions from the Federal Aviation Agency and other sources which, even if accepted, do not illustrate any ambiguity. Brief of Respondent, pp. 7-8.

to "obscure the intentions of the parties to the policy under the guise of interpretation." Id. at 1133.

POINT II

A WATER SKI KITE IS NOT DISTINGUISHABLE IN OPERATION FROM PARACHUTES, HANG GLIDERS, AND SIMILAR DEVICES SO AS TO REMOVE IT FROM THE PURPOSE AND SCOPE OF THE POLICY EXCLUSION.

The plaintiff admits the water ski kite is used for recreational purposes, can be very dangerous to fly, and is controlled as to its movement in the air by the operator. Brief of Respondent, pp. 2-5. Nevertheless, the plaintiff contends the water ski kite is distinguishable from similar aerial devices such as hang gliders and parachutes.

The plaintiff's attempts to distinguish the operation of the water ski kite from other similar devices rely on inconsistent analysis. In the lower court, the plaintiff analogized the water ski kite to a parachute in purpose and function; the plaintiff's own affidavit likens the kite to a parachute. [R. 49, 52]. On appeal, the plaintiff now argues that a water ski kite is not like a parachute, but is a "water surface device".[2] Brief of Respondent, p. 8.

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[2]The plaintiff makes no attempt to explain or justify this sudden change of face. Apparently, the plaintiff now realizes that parachute cases are regularly cited to define "aerial devices" and "navigation" (Brief of Respondent, p. 14), and that the broad scope of the exclusionary language forces her to take to the water to prevail.

The plaintiff also contends that the kite is distinguishable from other similar devices on the basis that its movement does not depend upon the reaction of air currents or its lifting surfaces. Brief of Respondent, p. 8. That statement is not supported in the record, and is contrary to the affidavit of Lynn Webb, manufacturer of the kite, which is a part of the record. [R. 31-33].

The operation of the water ski kite is not distinguishable from parachutes, hang gliders and similar devices in any meaningful way which would justify placing the kite outside the parameters of the policy exclusion and its intended purpose. The risk sought to be excluded, recreational airborne travel, is the same for all of these devices. Notwithstanding the plaintiff's appellation, the kite does not operate on the water surface but in the air. The kite has no fins or vertical sail. Its user must contend with birds, air currents and low-lying clouds, not fish, whitecaps and motorboat wakes. The kite is a "water surface device" used 50 feet above the water surface. Its operation is identical to a parachute or glider once the tow rope is disconnected. The boat does not control the kite's maneuverability in the air, but simply extends its speed and range of travel.

The dangers associated with sport kiting, hang gliding, parachuting and similar activities are well known. The insurance risk attendant upon such activities is the same. It is not reasonable that an average person familiar with these sports would view them as so distinguishable that the exclusionary language affects risks attendant upon one activity but not another, nor that the exclusionary language was intended to apply only to mechanical contrivances such as privately piloted airplanes and not to these non-mechanized devices. The clear purpose and intent of the policy language is otherwise.

CONCLUSION

There is not a single reported decision anywhere in the country supporting the plaintiff's argument that the policy exclusion at issue is ambiguous. Similarly, no basis or authority exists for distinguishing the operation of the water ski kite from parachutes, hang gliders and similar devices, with respect to the intended coverage and purpose of the aerial navigation exclusion.

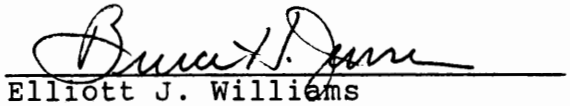
The intent of the policy exclusion is to eliminate from coverage the extra risks of death normally associated with the dangers of all aerial flight other than commercial transportation. The scope of the exclusion is, intentionally,

very broad. That fact, however, has no bearing on this case. A broad exclusion is permissible so long as it is not ambiguous. The exclusionary language in question has been uniformly upheld as non-ambiguous by the courts. In addition, all courts which have considered the issue have uniformly held that devices of this type fall within the parameters of the exclusionary language.

DATED this 23rd day of September, 1982.

Respectfully submitted,

SNOW, CHRISTENSEN & MARTINEAU

By 

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CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) true and correct copies of the foregoing Reply Brief of Appellant to Henry S. Nygaard, Attorney for Plaintiff-Respondent, 1100 Boston Building, Salt Lake City, Utah 84111, on the 24th day of September, 1982.

Jill Robison