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# American Casualty Company of Reading Pennsylvania v. Marden D. Pearson, Edward A. Crofts and Dwain J. Pearson : Brief of Appellants

Utah Supreme Court


Olsen, Chamberlain and L. E. Midgley; Attorneys for Defendants and Appellants;

# IN THE SUPREME COURT
## OF THE
# STATE OF UTAH



AMERICAN CASUALTY COMPANY OF READING PENNSYLVANIA, a Corporation,

Plaintiff and Respondent,

vs.

MARDEN D. PEARSON, EDWARD A. CROFTS, and DWAIN J. PEARSON, d/b/a PEARSON and CROFTS, and ROBERT CORPORON,

Defendants and Appellants.

Case No. 8664

# BRIEF OF APPELLANTS

Appeal from the District Court of the Third Judicial District in and for the County of Salt Lake,

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## STATEMENT OF FACTS

This is an appeal from a declaratory judgment holding that the Respondent, American Casualty Company, was not liable under their contract of insurance for loss to an automobile damaged by fire in the garage of the assured, Pearson and Crofts, a partnership, three of the Appellants.

The Record will be referred to hereinafter as "R." and the Deposition of Robert Corporon as "D.".

On October 4, 1955, the Defendant Corporon purchased a Cadillac automobile from the co-defendant partnership, Pearson and Crofts (D. 3). The sale to Corporon was complete and the purchase price fully paid on October 4, 1955, (D. 10).

Corporon took delivery of the car at that time and drove it until he returned on October 8, 1955, for installation of a trailer hitch (D. 10, 11 and 5) when work was commenced but further postponed until October 10, 1955, (D. 5).

Corporon desired a specific result involving a peculiar manner for fastening the hitch (R. 11 and 12). When he came for completion of the work on October 10, 1955, Corporon himself drove his car into and all the time it was in the garage, even though it became necessary to move the vehicle to another part of the shop (R. 11, 12, and 14). No employee of Pearson and Crofts, at any time, drove or had physical contact with the car (R. 12).

Corporon not only supervised the remodeling and design of the trailer hitch itself after it had been taken from the old vehicle (R. 13), but also supervised, directed and managed the installation on the new car (R. 13, D. 6 and 7).

A fire occurred while the trailer hitch was being welded doing extensive damage to the car (D. 8).

Corporon commenced an action against Pearson and Crofts to recover the damage to the automobile, whereupon demand was made by both Pearson and Crofts and Corporon upon the Plaintiff, American Casualty Insurance Company, for a settlement of the claim under their contract of insurance with Pearson and Crofts styled "Comprehensive Liability Policy", attached to the Complaint as Exhibit "A".

The Plaintiff insurance company thereupon filed an action against both Corporon and Pearson and Crofts for a declaratory judgment claiming that Plaintiff's policy, excluding coverage for injury to property in the "care, custody or control of the insured", did not cover the fire incident.

The trial court ruled that the vehicle was in the care, custody, and control of the insured, Pearson and Crofts, and therefore the Plaintiff had no liability on its insurance policy and this appeal is taken from that decision.

## STATEMENT OF POINTS

### POINT I

THE TRIAL COURT ERRED IN FINDING THAT THE AUTOMOBILE WAS IN THE CARE, CUSTODY, AND CONTROL OF THE DEFENDANT AND APPELLANT PEARSON AND CROFTS.

### POINT II

THE GARAGE MUST HAVE DOMINION OVER THE VEHICLE IN ORDER TO HAVE CARE, CUSTODY, AND CONTROL.

## ARGUMENT

### POINT I

### THE TRIAL COURT ERRED IN FINDING THAT THE AUTOMOBILE WAS IN THE CARE, CUSTODY, AND CONTROL OF THE DEFENDANT AND APPELLANT PEARSON AND CROFTS.

Corporon never transferred to Pearson and Crofts care, custody, or control of the automobile.

The cases are uniform in holding both that the mere working on property does not establish care, control, or custody in the repairman or garage keeper, (Boswell vs. The Travelers 36 NJ Sup. Ct. 599, 120 A2d 250. Haerens vs. Commercial Casualty 279 P2d 211, 120 CA2d, Supp. 892), and that the fact that property is within a building owned and controlled by one does not give him care or custody of property within it (Cohen and Powell vs. Great American Indemnity Company, 127 Conn. 257, 16 A2d 354, 131 ALR 1102, Hanrahan vs State 57 Ind., 527).

The Plaintiff can show no more than that the Defendants Pearson and Crofts own the building where, and one of their workmen was employed in working on the vehicle when, the loss occurred.

We submit, therefore, that if either care, custody, or control attaches here, then there are no conceivable situations which would expose the insurer to any risk under their garagekeeper's liability clause. The insurer would be excused where an explosion occurred in a service station if the station employee was filling the car with gas, replacing a fan belt, or filling the tires. No liability would attach if an oil plug were not replaced, a tire were over-pressured, or

a fan belt faultily replaced, all causing subsequent damage due to the negligence of the attendant, for the reason that his master had assumed care, custody or control when he conferred any service upon the vehicle.

A. T. Morris and Company vs. Lumbermans Mutual 298 NYS 227, holds that " 'control' and 'care' indicate possession exclusive of that of anyone else." In this case the owner of the vehicle continued complete dominion and control of his car at all times to the exclusion of Pearson and Crofts.

Examining the meaning of each of the words in the phrase which, as said in the Boswell case (Supra), are inherently ambiguous words of art and should be construed against the insurer who wrote the contract, we see the following:

Care: Care implies safekeeping, preservation, or security. Words and Phrases Vol 6, p. 140 et. seq. Certainly the vehicle here was in no sense "entrusted" to Pearson and Crofts for safekeeping, preservation or security.

Control: To exercise a directing, restraining, or governing influence. Words and Phrases Vol. 9, p. 427. Certainly the complete supervision, dominion, control, and surveillance exercised by Corporon vitiates the possibility of a transfer of 'control' to the Defendant Pearson and Crofts.

Custody: Custody means a keeping, guarding, care, watch, preservation or security of a thing within the immediate personal care of the person to whose custody it is subjected. Turner vs Coffin, 73 Pac. 952, 9 Idaho 338. Brierman-Danzie Corp. vs. Firemens Fund Insurance Company (115 NYS 2d 706) holds that "custody implies temporary physical control and assumption of responsibility for the

property". Webster's Unabridged Dictionary states that custody derives from the latin "custos", meaning a guard or watchman.

Where the facts are, as here, that the owner of an automibile drives it into a garage, drives it on to a hoist, provides the garagekeeper with a prefabricated, peculiarly designed device for attachment thereto, instructs the garagekeeper as to all installation, remains with his property at all times, superintends all the work which is done at his direction and under his supervision and instruction, and when the vehicle is moved always with the owner at the wheel, there is never any relinquishment by the owner, or transfer to the garagekeeper, of any of the incidents of care, control, or custody.

## POINT II

### THE GARAGE MUST HAVE DOMINION OVER THE VEHICLE IN ORDER TO HAVE CARE, CUSTODY, OR CONTROL.

Black's Law Dictionary defines "dominion" as follows: "Ownership, or right to property. Title to an article of property which arises from the power of disposition and the right of claiming it."

In Blashfield Encyclopedia of Automotive Law and Practice, Section 4154, Pg 413, the text states: "Under an exception appearing in such policies (garage), as to property owned by the insured or property of others in his custody, the insurer is not liable for injury to property in which the insured . . . . . has either a general or a special interest."

It is respectfully submitted that in the ordinary situation where an owner of a vehicle takes his car to a garage

for any type of repair, the moment the garage starts work upon the vehicle the garage automatically secures a Mechanic's Lien upon the vehicle. This lien can, and often does, develop into an ownership right, including the right of disposing of the vehicle and certainly the right of claiming ownership to the extent of selling the vehicle.

In the case at Bar, the garage had previously been paid in full for the installation of the trailer hitch on the vehicle (D. 4 and 10). The owner, Corporon, at any time during the progress of repairs, had the right to order the garage to stop work and to leave with the vehicle, the garage having no rights whatsoever in retaining possession of the car or holding it. The garage had no "general or special interest" whatsoever in the vehicle under the circumstances of the case at Bar.

In the leading case of State Automobile Mutual Insurance Company vs. Connable Joest, Inc., 174 Tenn. 377, 125 SW 2d 129, the Court states:

> " . . . It is clear that the policy, which is one of indemnity, afforded coverage to the insured in the event of damage to the property of others, not rented, leased by, or in charge of the insured."
>
> " . . . the interest of the parties . . . was to exclude the insurance company from liability for claims for damage to property under the control and management of the insured, whether by virtue of ownership, lease, rental, or having charge of the property under any other authority, or in any other capacity."

In Sky vs. Keystone (Pa) 29A 2d 230, the Court pointed out that the words "in charge of" does not mean mere possession. The Court states: "Property is not in charge of the insured unless he has the right to exercise dominion or control over it."

In Cohen and Powell vs. Great American Indemnity Company, 16A 2d 354 (Conn.) the Court states, at Pg 355:

> "A person or thing is not in charge of an insured within the meaning of the policy unless he has the right to exercise dominion or control over it. This element is present in every illustration of the use of the phrase which comes to mind, for example, a nurse in charge of a child, a warden in charge of a prison, a caretaker in charge of an estate".

In Welborn vs. Ill. National Casualty Company, 106 NE2nd 142 (Ill.) the Court states:

> "The exclusion pertains to (the insured's) own personal loss from damage to his own property".
>
> "It is perfectly logical to treat a car which the insured had rented from another as though it were his own for purposes of exclusion. Likewise, if he borrowed a car from a friend, and was temporarily 'in charge of' such car, the same reasoning should apply."
>
> "Thus we treat the exclusion . . . as though the terms in the exclusion have a related significance, so that they apply to property owned by the insured, or which have a status which is logically treated the same as ownership for the purposes of the policy".

In Vaughan vs. Home Indemnity Co. (Ga.) 71 SE 2d 111, the Court states:

> "The plaintiff had custody of and control and dominion over the automobile at the time . . . so as to render him 'in charge of' it and so as to bring it under exclusion."

The fact that dominion over the vehicle is required in order for the exclusion under the policy to become effective is more readily apparent when we look at the very purpose of the exclusion.

We submit that the reason for the exclusion is to prevent an insured, garage keeper, from making claims against his own insurance company, repayment of which would financially benefit the garage keeper. In other words, the insurance companies, quite properly, did not intend to entertain claims wherein, in effect, the insured was making claim against himself.

In Appleman Automobile Liability Insurance, at Page 200, the text quotes the purpose of exclusion as follows:

> "Property owned by the insured and damaged by him personally could never form a proper basis of a claim as he could not, of course, be plaintiff and defendant in the same action.
>
> . . . There is entirely too much danger of the human element entering into the proper settlement of losses which, except for this exclusion, would otherwise be covered. The natural desire to escape payment of a loss personally would lead the policyholder to establish a certain situation, not in fact existent, or to exaggerate or color the facts in order to have the loss covered."

We point out that in the usual situation where the garage has incurred a substantial bill during the course of repairs of a customer's automobile, and then, through their own negligence, damaged the vehicle, the garage, without the exclusion, could encourage a claim against the insurance company, the payment of which would, of course, result in the payment of the garage's bill for services for the repairs prior to the garage's own negligence which resulted in the loss.

## CONCLUSION

There was no dominion over the Corporon vehicle at the time of this loss and there was, therefore, no care,

custody, and control under the meaning of the policy, and the defendants, Pearson and Crofts, are entitled to protection under the insurance policy.

Respectfully submitted,

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