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

Utah Supreme Court

Hanson, Baldwin & Allen; Robert W. Brandt; Attorneys for Plaintiff and Respondent;

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

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

Respondent agrees generally with the statement of facts set out in appellant's brief, but reference is made to the record for additional facts which which are material to the determination of this matter. The record will be referred to hereinafter as "R" and the deposition of Robert Corporon as "D".

At the time of the sale of the 1955 Cadillac to

Corporon by Pearson and Crofts it was agreed that as a part of the consideration the latter would transfer a trailer hitch from a 1953 Cadillac Corporon had turned in to the 1955 Cadillac he had purchased (D. 5). This agreement was reduced to writing by making it a part of the sales agreement (Pltf's Ex. 2.).

On the date of the sale there was not sufficient time to complete the transfer of the trailer hitch and Corporon was instructed to make an appointment with the garage foreman (D. 5). An appointment was made for Saturday, September 8, 1955 (D. 5). Ferd Sorenson, a mechanic and welder employed by Pearson and Crofts (R. 32) was assigned to make the transfer by the shop foreman (R. 14) and was working on and attaching the trailer hitch to Corporon's 1955 Cadillac at the time of the fire which caused the damage complained of (D. 7-8).

Corporon stayed at the garage while the work was being performed on his car as he had already made plans for a trip to California and was merely waiting for the completion of the work in order to leave (D. 7). The fact that Corporon was present while the work was being done does not alter the fact that a bailment existed between him and Pearson & Crofts for the purpose of having work done on his automobile.

STATEMENT OF POINTS

POINT I.

AT THE TIME THE AUTOMOBILE WAS DAMAGED IT WAS IN THE CARE, CUSTODY OR CONTROL OF THE DEFENDANT AND APPELLANT, PEARSON AND CROFTS.

ARGUMENT

POINT I.

AT THE TIME THE AUTOMOBILE WAS DAMAGED IT WAS IN THE CARE, CUSTODY OR CONTROL OF THE DEFENDANT AND APPELLANT, PEARSON AND CROFTS.

The policy of insurance issued to the appellant Pearson and Crofts by the respondent insured Pearson and Crofts for property damage liability, but under Paragraph 4 of the exclusions excluded coverage for liability resulting from "* * * *injury to or destruction of* * * * 2. * * * *property in the care, custody or control of the insured* * * *".

Appellants do not dispute the fact that if the automobile of Corporon was in the care, custody or control of Pearson and Crofts at the time the damage occurred there is no coverage under the policy of insurance issued by the respondent. Therefore, the sole question for determination is whether or not Corporon's automobile was in the care, custody or control of Pearson and Crofts at the time their

employee Ferd Sorenson accidentally set fire to it with an arc welder.

Corporon brought his automobile to Pearson and Crofts in accordance with an agreement entered into in advance for the purpose of having a trailer hitch installed on his automobile. Pearson and Crofts were, among other things, engaged in the business of an automobile sales agency and repair garage and in connection with the latter maintained and equipped a service garage and repair shop and employed mechanics, welders and other personnel for the purpose of performing work on customers' automobiles.

While the question of what constitutes "care, custody or control" appears to be one of first impression with our court, the matter has been the subject of consideration by other courts, and under strikingly similar circumstances they have held the property to have been in the "care, custody or control" or "in charge of" the garage and consequently excluded the policy.

In the case of *Maryland Casualty Company* v. *Holmsgaard et al*, 133 N. E. 2d 910 (Ill. 56). Holmsgaard drove his car to the Gem Welding and Machine Shop in Rockford, Illinois, and left it to have a trailer hitch welded to the frame. While a Gem employee was working on the job the car caught fire from the welding torch and was totally destroy-

ed. The shop was covered by Maryland Casualty Company's M & S schedule liability policy with express coverage under premises operations for welding work. An exclusion clause stated the policy did not apply to "injury to or destruction of * * * property in the care, custody or control of the insured."

Holmsgaard brought suit against the shop and the employee, alleging that while the car was under the "sole care, custody and control" of defendants his car had been destroyed through their negligence. Later he amended the complaint by striking out the quoted words and inserted instead "while in the possession of the defendants as bailees for hire". Maryland Casualty brought an action for a declaratory judgment as to its rights and duties, maintaining the exclusion clause barred coverage.

The trial court gave judgment against Maryland Casualty and they appealed. The appeal court reversed the trial court's decision and held that the property was a bailment, and bailment includes custody and control. The property was property in the care, custody and control of the insured and excluded by the policy.

In the case of *Guidici* v. *Pacific Automobile Insurance Company*, 179 Pac. 2d 337 (Calif. 1947), J. A. Palmquist left his automobile with Earl Clifford, a garage owner, to have the carburetor re-

paired. While Clifford was cleaning the carburetor after its removal from the car, a fire started on the work bench where he was working. The fire spread and Palmer's automobile was destroyed.

Clifford carried a policy of liability insurance insuring him against liability for property damage in the operation of his place of business. The insurer denied coverage upon the grounds that the policy excluded coverage for damage to "property owned by, rented to, leased to *in charge of* or transported by the insured".

The District Court of Appeal affirmed the decision of the trial court and held that Earl Clifford was a "bailee" of the automobile under a bailment for purposes of performing services upon it and as such the property was in his "charge, possession and control".

In the case of *John G. Speirs & Company* v. *Underwriters at Lloyd's London*, 191 Pac. 2d 124 (Calif. 1948), a Dodge truck belonging to Gussie Speirs was in the possession of plaintiffs on their business property in Bakersfield for the purpose of having a trailer hitch installed. There was no such hitch then on the truck. The trailer hitch was pre-fabricated by plaintiffs and was being welded on the frame of the truck when a fire occurred, damaging the truck. The policy of insurance provided as follows:

"It is expressly agreed that the agreement of the company to indemnify attaches only when the liability imposed by law upon the assured exceeds the amount stated in item (a) and (b) below and then only for such excess.

"(a) $5,000 as respects any one claim or series of claims arising out of any one occurrence by reason of the ownership, operation, maintenance or control of any automobile.

"(b) $100 as respects any claim or series of claims arising out of any one occurrence other than described above."

Plaintiff sought to have coverage apply under (b). Defendant claimed the loss to be under (a) as the truck was in the control of the plaintiff.

The court, in holding that coverage (a) applied, states at Page 125:

"There can be little doubt that the Dodge truck was under the control of plaintiffs at the time of the fire and that the claim for damages against them arose out of an occurrence by reason of that control."

Appellants apparently contend that Pearson and Crofts did not have "care, custody or control" of the automobile by reason of the fact that Corporon was present while the work was being done. It is submitted that such fact is completely and wholly immaterial. He brought his automobile to the garage

for the specific purpose of having a trailer hitch installed. He was entitled to, and did tell them of the work he wanted done and the result desired. Work of the nature and type he sought was the business of the garage. In order for the garage to perform the work, Corporon had to entrust the care of the automobile to them. As a bailee the burden was on the garage to see that the installation and welding of the trailer hitch was done in a safe and workmanlike manner, and in order to do this the garage had to have the power or authority to manage, direct and supervise the installation and work done.

"Bailment" as defined by Black's Law Dictionary is:

> "A delivery of goods or personal property by one person to another in trust for the execution of a special object upon or in relation to such goods, beneficial either to the bailor or bailee or both and upon a contract, express or implied, to perform the trust and carry out such object, and thereupon either to re-deliver the goods to the bailor or otherwise dispose of same in conformity with the purpose of the trust."

Appellants in their brief set out definitions for the words "care, custody and control", citing such words as being inherently ambiguous and as such should be construed against the insurer who wrote them. While respondent does not deny that

such definitions may have been given, a definition, to be of value, must be applied in the light of a particular fact situation. In the Holmsgaard, Guidici and Speirs cases (supra), the question of ambiguity was raised in considering the words "care, custody or control" and "in charge of". In each of those cases the court held the wording to be clear and unambiguous and that as such the rule of construction as cited by the appellants does not apply. The court, in the Holmsgaard case, in considering the words "care, custody and control", words identical to those in the case at bar, said:

> "The language of the policy is clear. The ruling that ambiguous language is to be construed most strongly against the insurer does not authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists".

Appellants state in their brief that if the "care, custody or control" exclusion is applied, there is no conceivable situation in which an insurer, under a garage liability coverage, would be exposed to risk. Such is not the case. The garage owner is protected against liability imposed upon him as a result of injury to or destruction of property arising out of such coverages as are afforded under the policy, subject to applicable policy conditions and exclusions. Thus, under the policy in question, if the damage results to the property upon which the in-

sured performed service, after it leaves his care, custody or control and the damage results from the insured's negligence, he is covered under the policy. For example, in the case at bar, if the mechanic Ferd Sorenson had failed to properly weld the hitch to Corporon's car and it had come loose while Corporon was pulling his trailer to California, Pearson and Crofts would be covered for any liability imposed upon them. There are numerous other examples of where coverage applies, such as the case where the garage fails to replace the oil in an automobile motor and it is damaged, or where the oil plug is left out or is not secured properly, or in a case where the steering mechanism of an automobile is not repaired properly and the owner or driver loses control, causing injury or damage.

The exclusion of coverage for property in the care, custody or control of an insured is found in the garage liability coverage because of the substantial increase in risk. Coverage for loss of or damage to property in care, custody or control is available to a garage owner either by endorsement on his garage liability coverage or by a separate policy. An additional premium is charged by the insurer, and such endorsement or policy generally carries a deductible clause for collision damage and full coverage for other types of damage. Pearson and Crofts apparently had not seen fit to secure this type of coverage.

CONCLUSION

It is respectfully concluded that the appellant Pearson and Crofts as bailees of Corporon's automobile had care, custody or control of said automobile regardless of the physical presence of Corporon, and that such care, custody or control clearly excludes coverage under respondent's policy of insurance under the provisions thereof hereinabove set forth.

The ruling of the Third District Court from which this cause arises must be affirmed.

Respectfully submitted,

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