1982

Utah Farm Bureau Mutual Insurance Co. v. Orville Andrews & Sons et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH FARM BUREAU MUTUAL INSURANCE COMPANY, Plaintiff/Appellant, vs. ORVILLE ANDREWS & SONS, d/b/a NEBO BLACK ANGUS RANCH, ORVILLE ANDREWS, and NELDON ANDREWS, Defendants/Respondents.	Case No. 18239

BRIEF OF APPELLANT

From a Summary Judgment of the Fourth District Court in and for Juab County, State of Utah, The Honorable George E. Ballif, Presiding

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STATEMENT OF THE CASE

This is an action to construe a farm liability policy issued by the Appellant Insurance Company to the Respondents as farmers.

DISPOSITION IN THE LOWER COURT

This matter was decided in the lower court on November 24, 1981 when the Court granted Defendants/Respondents' Motion for Summary Judgment. Thereafter, Plaintiff/Appellant made objections to the Findings of Fact and Conclusions of Law, but said objections were denied by the Court on February 1, 1982. The lower court ruled that a vehicle owned by Defendants and used by Defendants to feed their cattle, which was involved in a automobile accident on a public highway, was not an automobile under the insurance policy and therefore was not excluded from coverage.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the lower court's granting of Summary Judgment against it and entry of Summary Judgment in its favor or remand of the case to the lower court for trial on the merits.

STATEMENT OF THE FACTS

At all times relevant to this matter, Defendants/Respondents owned and operated a farm North of Mona, Utah. Approximately eleven years ago, Defendants purchased a two ton Ford Truck chasis in Spanish Fork, Utah. Thereafter, Defendants purchased a Gehl feeder box, to be used in spreading feed for cattle, and attached that box to the truck chasis. This feeder truck was thereafter used on a year round basis for feeding cattle until it was involved in a fatal traffic accident on February 6, 1980.

The feeder truck was not registered nor did it receive a state safety inspection during this period of time. (Deposition of Orville Andrews, p. 21) Prior to the winter of 1979/1980, the feeder truck was used primarily on property around the farmhouse to haul feed to Defendants' cattle. (Deposition of Orville Andrews, p. 15) However, during the four to six weeks prior to the accident of February 6, 1980, Defendants used the feeder truck to haul feed to cattle located on property rented by Defendants which was approximately 5 1/2 miles from Defendants' farm, resulting in a daily round trip of eleven miles on the public highway. (Ibid. pp. 12:

The Farmer Liability Policy, which is the subject of this action, was obtained by the Defendants from Plaintiff in the early 1970's and was merely renewed annually thereafter. Neither at the time of the original purchase of the said policy nor later did

Defendants ever inform Plaintiff or its agent that the feeder truck would be used on the public highway. (Deposition of Neldon Andrews, p. 23)

As of February 6, 1980, Defendants owned four two-ton trucks, two of which were registered and two of which were not. The two which were registered and licensed were used to haul feed, grain and silage into the pit and to haul livestock to market on the public highways on a weekly basis. (Deposition of Orville Andrews, p. 24) These same two trucks were listed on the vehicle schedule of the automobile portion of the subject insurance policy. Of the two trucks that were not registered, one was a manure spreader, used by Defendants to spread manure on their fields in the spring, and the other was the subject feeder truck, neither of which were listed on the vehicle schedule of the subject insurance policy, because Defendants considered both to be just like the other farm machinery. (Deposition of Orville Andrews, p. 24 and Deposition of Neldon Andrews, pp. 12, 23)

On February 6, 1980, at approximately 11:15 a.m., approximately two to three miles from Defendants' farm, Defendant/Appellant, Neldon Andrews, was driving the loaded feeder truck South on Old U.S. 91, on his way to the daily feeding of the cattle on the rented property, when said Defendant/Appellant applied his brakes to avoid hitting a dog in the road. (Deposition of Neldon Andrews, pp. 5 and 6) The brakes on the feeder truck locked, pulling the truck to the left of the center line of the highway, into the path of an on-coming pick-up truck. A collision resulted, causing personal injuries and property damages.

At the time of the said accident, the subject insurance policy, No. 25000-38, was in effect and contained the following exclusion, located on page 3, thereof:

> "This policy agreement does not apply:
> 2. Under coverages F[1] (Bodily Injury Liability), F[2] (Premises Medical), G (Property Damage Liability, H (Employer's Liability), I (Medical Payments--Employee), or J (Medical Payments--Named Persons) to bodily injury or property damage arising out of the ownership, maintenance, operation, or use, loading, or unloading of:
> b. Any automobile owned or operated by or rented or loaned to any insured. But this subsection (b) does not apply to bodily injury or property damage occurring on the insured premises if the motor vehicle is not subject to motor vehicle registration, because it is used exclusively on the insured premises." (Emphasis added)

That policy defines "automobile ", on page 1 thereof, as follows:

> "Automobile means a land motor vehicle, trailer, or semi-trailer, but the word automobile does not include any crawler or farm-type tractor, farm implement and, if not subject to motor vehicle registration, any equipment, which is designed for use principally off public roads." (Emphasis added)

ARGUMENT

THE LOWER COURT ERRED IN DETERMINING THAT THE SUBJECT FEEDER TRUCK WAS NOT AN AUTOMOBILE UNDER THE FARM LIABILITY POLICY, AT THE TIME OF THE ACCIDENT SINCE, THOUGH IT WAS BEING USED IN THE FARMING OPERATION, IT WAS BEING DRIVEN UPON THE PUBLIC HIGHWAYS EXTENSIVELY AND THUS, ANY DAMAGES OR INJURIES CAUSED BY ITS USE AWAY FROM THE FARM PREMISES, WOULD NOT BE COVERED BY THE FARM POLICY.

The net effect of the first of the above-quoted policy provisions, is that the policy does not cover damages or injuries occurring away from the farm premises and resulting from the opera-

tion or use of an "automobile". The net effect of the second provision, quoted above, is to define an "automobile" under the subject policy. This Brief is directed at that second provision, which defines an "automobile" as a land motor vehicle, trailer, or semi-trailer, with three exceptions. Since there can be no question that Defendants/Respondents' feeder truck was a land motor vehicle, the following discussion is focused on those three exceptions.

1. Is Defendants' feeder truck a crawler or farm-type tractor? Common sense would exclude the truck as a crawler, since it is a truck with a conventional drive train and wheels, that can be driven on highways, at highways speeds. As to whether it is a farm-type tractor, Section 41-1-1(e), Utah Code Annotated, 1953, as amended, defines "farm tractor" as "every motor vehicle designed and used primarily as farm implement for drawing plows, mowing machines, and other implements of husbandry." This definition would exclude Defendants/Respondents' feeder truck because it is not designed or used to draw or pull things, but rather to transport and spread chopped hay.

In the case of State vs. Thompson, 101 So.2d 381, 386 (Fla. 1958), the Florida Supreme Court was called on to determine whether trucks used in farming operations on the farm premises the majority of the time, but used on the highways incidentally to the farming operations, were farm tractors entitled to special licensing fees. That court defined "farm tractor" as:

> "merely a tractor used in connection with farm and grove pursuits, it is not a load-carrying truck to be used indiscriminately over the highways of the state, merely

> because it may be used on a farm 51% of its operational or mileage time."

The statutory definition cited above as well as the definition supplied by the Florida Supreme Court, quoted above, would give the term "farm tractor" its common meaning, and would exclude from that term a truck such as Defendants/Respondents' feeder truck, which was designed and used to haul chopped hay.

2. Is the feeder truck a farm implement? The feeder truck was used as a vehicle to transport and spread chopped hay for Defendants/Respondents' cattle. For over a month prior to the accident on February 6, 1980, the said feeder truck was being driven on the public roads at least eleven miles per day, six days per week. While on the farm premises and engaged in farming operations, the feeder truck was a farm implement, but when the feeder truck was using the public highways to transport feed to cattle 5 1/2 miles from Defendants/Respondents' farm, the feeder truck was a transport vehicle merely engaged in farming operations.

In 7 Am Jur 2d 768 (Automobile Insurance, Section 229), it states:

> "It sometimes has been held that a particular vehicle may fall within a policy coverage, as an automobile or motor vehicle, while engaged in one activity and be excluded while engaged in another. A vehicle may be a motor vehicle while traveling on the highway, but not while engaged in off-highway activities."

This is true in regard to the subject feeder truck, which lost its identity as a farm implement when it used the public highways in its eleven mile trip to haul feed to Defendants/Respondents' cattle.

In Nepstad vs. Randall, 82 S.D. 615, 152 N.W. 2d 383, (1967), the South Dakota Supreme Court determined that a motor driven golf cart operated on a golf course was not a "motor vehicle", but when the same cart was operated on the public highway to transport persons or property, it was a "motor vehicle".

In Mission Insurance Company vs. Nethers, 119 Ariz. 405, 581 P.2d 250, 253 (1978), the court stated:

> "Exclusions in an insurance contract are strictly construed in favor of the insured and coverage against the insurer. . . . Even so, they must be construed in a reasonable manner and given ordinary meaning and effect to the terms used therein."

The reasonable interpretation of the term "farm implement" would surely include the subject feeder truck while it was being used on the farm premises, but the same term would not reasonably include the feeder truck when it was being used extensively on the public highways traveling at highway speeds and in traffic.

And again as stated in Kansas Farm Bureau Mutual Insurance Company vs. Cool, 205 Kan. 567, 471 P.2d 352, 357 (1970), "The manner in which a vehicle is used, as well as its construction, is an important factor in determining its character." The highway use of the feeder truck should affect its definition and character as a farm implement.

In the case of Washington National Insurance Co. vs. Burke, 258 S.W. 2d 709, 710 (Kentucky Court of Appeals, 1953), the court stated, "With all the liberality of construction in favor of the insured, in the quest for the intention of the parties, regard must necessarily be had for the fact that a small premium was payable."

The Defendants/Respondents, made the choice not to list the feeder truck on the vehicle schedule of the automobile portion of the subject insurance policy, and rather viewed the feeder truck as farm machinery. By so doing, Defendants/Repondents' insurance premium was reduced, since the rating for a vehicle used on the farm premises would be significantly less than a vehicle used on the highways becasue of reduced speed, traffic, and likelihood of accidents. The smaller premium was certainly an indication to the Defendants/Respondents that the coverage on the feeder truck was limited. Based on that reasoning, Defendants/Respondents should not be allowed to maintain their position that the subject feeder truck. while being used extensively on the public highway, was a farm implement.

3. Is the feeder truck subject to motor vehicle registration, and if not, is it designed for use principally off public roads? As to whether the subject feeder truck was subject to registration, Section 41-1-19, Utah Code Annotated, 1953, as amended, requires that every motor vehicle be registered when driven or moved on a highway, with certain listed exceptions. Subsection (c) of the above-mentioned section, is the only exception which possibly applies to Defendants/Respondents' feeder truck. This subsection excepts from registration "any implement of husbandry, whether of a type otherwise subject to registration hereunder or not, which is only incidentally operated or moved upon a highway;". However, this subsection is inapplicable when considering the highway use Defendants/Respondents made of the feeder truck, because the truck was operated upon the highways at least eleven miles per day, six days per week, which does not qualify as incidental operation

or movement upon the highways. In the case of Allred vs. Engelman, 123 Tx. 205, 61 S.W. 2d 75, (1933), the Texas Supreme Court found that farm vehicles traveling an average of one-fourth of a mile on public roads running through and enclosed within a single track of land were only temporarily and incidentally using the highways. In the present action, there are two pieces of property separated by 5 1/2 miles of public road which is transversed twice daily by the subject feeder truck. This is not incidental operation or movement upon the highways. Because the feeder truck does not qualify under any of the exceptions to the above-cited statute, the law requires that it be registered.

Should this Court determine that the feeder truck was subject to the registration requirements, the second part of question No. 3 need not be pursued. However, if it is determined that the feeder truck was not subject to registration requirements, an examination must be made as to whether the feeder truck was designed for use principally off public roads. In the case of Terrace Park, Inc. vs. Hartford Fire Insurance Co., 84 S.D. 259, 170 N.W.2d 467, 468 (1969), the court stated: "The word 'designed' has been defined as 'appropriate, fit, prepared, or suitable' and also as 'adaptable, designated, or intended'." As demonstrated by the Defendants/Respondents during the 6 weeks prior to February 7, 1980, the feeder truck was in fact appropriate and adapted to be used principally on public roads. During that time, the majority of its operational mileage was registered over the public highways. The Ford chasis on which the feeder box was attached, was designed for and

capable of use on public roadways. The addition of the feeder box did not alter that design or capability.

CONCLUSION

Defendants/Respondents' feeder truck is an "automobile" within the scope of the subject insurance policy, since it is a land motor vehicle, and it is not a crawler or farm-type tractor, farm implement or, if not subject to motor vehicle registration, equipment which is designed for use principally off public roads.

When the feeder truck was used as a farm implement or equipment on the farm, and only incidentally on the public highway, it was covered under the subject insurance policy. Under these circumstances, there was little risk and thus an appropriately small premium was charged to cover that limited risk. However, when the feeder truck was used as a land motor vehicle on the public highway, as it was at the time of the accident and for six weeks prior thereto, traveling some eleven miles per day on the public highway, it became subject to motor vehicle registration, it became an "automobile", as defined in the subject insurance policy, and it was not covered under the subject insurance policy. Under such circumstances, the risk greatly increased and thus an appropriately larger premium was chargeable in order to cover the greater risk. However, when the Defendants/Respondents changed the use of the feeder truck from a farm implement to a land motor vehicle, no notice was given to Plaintiff/Appellant, and thus Plaintiff/Appellant had no opportunity to decide whether or not to insure the feeder truck under the automobile policy and if so, what amount of premium to charge. At the time of the accident, the feeder truck was not covered under the farm liability policy nor was it listed

as an insured vehicle under the automobile liability policy. Thus, there was no coverage, and the insurer would not have covered it.

It is respectfully submitted that the lower court erred in finding that the subject vehicle was not an "automobile" and this Court should reverse that decision and enter Summary Judgment in favor of Plaintiff/Appellant on the issue that the subject feeder truck was an automobile and damages arising from the use thereof away from the farm premises was excluded from the subject policy.

DATED this 28th day of May, 1982.

MORGAN, SCALLEY & DAVIS

Stephen G. Morgan

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MAILING CERTIFICATE

I hereby certify that I mailed a true and exact copy of the foregoing Appellant's Brief, postage prepaid, to Mr. R.C. Skeen, Attorney for Defendants/Respondents, Suite 1600, 50 South Main Street, Salt Lake City, Utah 84144, and to Mr. Ray H. Ivie, Attorney for Defendants/Respondents, 48 North University Avenue, Provo, Utah 84601, on this 28th day of May, 1982.

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