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Florence E. Russell v. George M. Paulson, Jr., Administrator Fo the Estate of Sharon Mitchell, Deceased, United Pacific Insurance Company, A Corporation; Factory Mutual Liability Insurance Company of America and Automobile Mutual Insurance Company of America : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

FLORENCE E. RUSSELL,
Plaintiff and Respondent,

— vs. —

GEORGE M. PAULSON, JR., Administrator of the Estate of SHARON MITCHELL, Deceased, UNITED PACIFIC INSURANCE COMPANY, a corporation; FACTORY MUTUAL LIABILITY INSURANCE COMPANY OF AMERICA, a corporation, and AUTOMOBILE MUTUAL INSURANCE COMPANY OF AMERICA, a corporation,
Defendants and Appellants.

APPELLANTS' BR

Appeal From the Judgment
Second District Court, [illegible]
Honorable Thornley K. Sw[illegible]

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Case No. 10385

APPELLANTS' BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action by plaintiff against her husband's insurance company to recover $5,000 under the uninsured motorist provisions of his policy with said company. It involves an interpretation of the policies of two different companies.

DISPOSITION IN LOWER COURT

In the trial court, plaintiff, respondent, and defendant, appellant, each made a motion for summary judgment. Plaintiff's motion for summary judgment was granted and defendant's denied. Defendant appeals from the trial court's order and judgment.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the summary judgment granted in favor of plaintiff and for judgment in defendants' favor as a matter of law.

STATEMENT OF FACTS

The plaintiff was riding as a passenger in a vehicle owned by Earl V. Gritton and driven by Helen M. Gritton on April 4, 1961, when an accident occurred with a vehicle being driven by one Sharon Mitchell. The accident occurred in the City of Bountiful, Davis County, Utah.

As a result of the accident, Sharon Mitchell was killed and plaintiff was injured. Sharon Mitchell was uninsured at the time of the accident (R. 12). The Gritton vehicle in which plaintiff was riding was insured by United Pacific Insurance Company at the time of the accident and the coverages included uninsured motorists insurance with a limit of $5,000. Florence Russell was

an insured, though not a named insured, under her husband's policy with Factory Mutual Liability Insurance Company of America which policy also provided uninsured motorist coverage with a limit of $5,000 (R. 7).

Plaintiff filed suit against George M. Paulson, Jr., as administrator of the estate of Sharon Mitchell, deceased; United Pacific Insurance Company and your appellant herein, alleging Sharon Mitchell to be uninsured, to recover damages for her injuries and medical expenses. The defendant, United Pacific Insurance Company, settled with the plaintiff under the uninsured motorist coverage of the Gritton policy for the sum of $4,500 without filing an answer. The defendant Factory Mutual Liability Insurance Company of America and Automobile Mutual Insurance Company of America, which should be considered as one under the title of Factory Mutual Liability Insurance Company of America, denied liability under its policy on the basis that its uninsured motorist coverage was excess only to United Pacific Insurance Company's policy on the basis that United Pacific Insurance Company had the primary coverage and that under the terms of the other insurance provisions of the policy of Factory Mutual there was no coverage.

Subsequently the plaintiff secured a default judgment against the administrator of the uninsured motorist estate for the sum of $10,000 plus medical expenses and now seeks to collect $5,000 from the defendant, Factory Mutual Liabilty Insurance Company under the terms of its uninsured motorist provision.

The two insurance policies under *Other Insurance* provisions pertaining to uninsured motorist coverage provide as follows:

> United Services Policy.
>
> "Other Insurance — With respect to bodily injury to an insured while occupying an automobile not owned by a named insured under this endorsement, the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such occupant and this insurance shall then apply only in the amount by which the applicable limit of liability of this endorsement exceeds the sum of the applicable limits of liability of all such other insurance.
>
> FACTORY MUTUAL, "OTHER INSURANCE—With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such occupant and this insurance shall then apply only in the amount by which the applicable limit of liability of this part exceeds the sum of the applicable limits of all such other insurance." (R. 10)

United Pacific Insurance Company's policy, subparagraph 2, Definitions, under A(2) provides that the unqualified word "insured" means among other things:

> "(2) Any other person while occupying an insured automobile." (R. 32)

At the time of this accident, Utah's financial responsibility laws required a motorist to carry a minimum policy of liability insurance in the sum of $5,000 for in-

jury or death of one person in any one accident and subject to said limit for one person in the amount of $10,000 because of injury or death of two or more persons in any one accident. U. C. A. 1953, Section 41-12-1, subparagraph (k).

The trial court, pursuant to the motion of the plaintiff, apparently ruled that the other insurance provisions of the respective policies were repugnant to each other and void and granted judgment to the plaintiff for the sum of $5,000 against the defendant, although there were no findings of fact made by the court or prepared or filed in the case which was kept under advisement for approximately two and one-half years.

ARGUMENT

POINT I.

THE OTHER INSURANCE PROVISIONS OF THE TWO POLICIES ARE NOT CONFLICTING OR REPUGNANT TO EACH OTHER. UNITED PACIFIC'S COVERAGE IS OTHER INSURANCE AVAILABLE TO THE PLAINTIFFS AND FACTORY MUTUAL'S OTHER INSURANCE PROVISION IS BINDING UPON THE PARTIES TO THE INSURANCE CONTRACT.

It will be noted from reading the two paragraphs that they are almost identical but do contain some differences which, for the purpose of this argument, can be disregarded. The application of the two provisions of the policy to the facts of this accident, however, are en-

tirely different. Paragraph II A(2) of the United Pacific policy states that the definition of the word "*insured*" *means any other person while occupying an insured automobile.* Mrs. Russell became an insured of United Pacific while occupying the Gritton vehicle at the time of this accident. She was an insured occupying an automobile owned by a named insured under the endorsement. Therefore, United Pacific's coverage was in effect and the policy applied for the full amount of the coverage.

With respect to Factory Mutual's provisions pertaining to "Other Insurance." Mrs. Russell was occupying an automobile not owned by the named insured and Factory Mutual's uninsured motorists coverage, therefore, in accordance with said paragraph became excess insurance over any other uninsured motorist coverage available to her. United Pacific's insurance was available to her as an insured under its policy, and the only question then remaining was whether or not Factory Mutual's insurance as excess coverage would come into play. The "Other Insurance" paragraph of Factory Mutual, however, further limits the application of this policy as excess coverage by stating that the insurance should apply only in the amount by which the applicable limit of liability of Factory Mutual's uninsured coverage exceeded the sum of the applicable limit of liability of all such other coverage. In view of the fact that both policies were in the amount of $5,000, Factory Mutual's policy was completely inoperative as to the accident.

In the case of *Travelers Indemnity Company of Hartford, Connecticut, Appellant,* vs. *Mildred Nancy Wells*, U. S. Court of Appeals, 4th Circuit, April 22, 1963, 316 Fed. (2) 770, an action was commenced by the liability insurer for a judgment declaring that it was not liable for the death of one insured and injury sustained by another while they were passengers in an automobile not owned by them. The U. S. District Court for the Western District of Virginia entered a judgment adverse to the insurer and it appealed. Held on appeal:

> "Under the passenger's auto liability policy containing uninsured motor vehicle endorsement, but limiting passenger's recovery for injury suffered while occupying an automobile not owned by them to excess of limit under endorsement over limits of other similar insurance available to the passengers, the passenger's insurer was not liable for the death of one passenger and injury to another where the uninsured motorist coverage under the host's policy equaled the limit under the passenger's policy even though the host's insurance was absorbed by claims of others."

Paragraph 6 of the Travelers Insurance Company policy provided as follows:

> "OTHER INSURANCE — With respect to bodily injury to an insured while occupying an automobile not owned by the named insured under this endorsement, the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such occupant and this insurance shall then apply only in the amount by which the applicable limit of liability of this endorsement exceeds the sum of the applicable limits of liability of all such other insurance."

This paragraph is the same as Factory Mutual's almost word for word.

In answer to the plaintiff's contention that Travelers Insurance Company was liable for any balance on plaintiff's judgment not covered by the automobile owner's policy the court said:

> "This conclusion we think untenable. Our conviction is that in this situation no uninsured protection whatsoever was due from Travelers to the Wells. It was explicitly excluded by the Other Insurance condition. The condition made Fidelity and Casualty the primary insurer, inasmuch as the Wells were 'occupying an automobile (Smith's) not owned' by them. Travelers insurance then was confined to the amount by which its policy limit exceeded that of Fidelity and Casualty, the only other similar insurance. There was no other 'excess' because the two policies were each written for the statutory limits and no more —$15,000 for one injured and $30,000 for two or more. Hence, under the Other Insurance condition Travelers never became answerable to the Wells to any extent. Their sole insurance was the Fidelity and Casualty policy."

In the case of Application of *Globe Indemnity Company, Appellant* vs. *Estate of Abraham Barker*, 25N.Y.S. (2) 170, decided October 20, 1964, the New York court held the excess uninsured motorist coverage did not apply in regard to the insured driver's policy where the driver was driving a vehicle owned by another and where the insured's policy provided that with respect to bodily injury to the insured while occupying an automobile not owned by the insured, the insurance would apply only as

excess insurance and would apply only in the amount by which the applicable limit of liability exceeded the applicable limits of liability of other similar insurance, and the applicable limits of liability in the policies of both the car owner and the driver were the same.

For a case directly in point, both as to the actual facts and the policy provisions involved, with the case before this court, see *Dorothy Burcham, Appellant,* vs. *Farmers Insurance Exchange, Iowa,* May 7, 1963, 121 NW(2) 500, which applied the same rule as the foregoing cited case and recited its holding as being the majority rule.

In this case plaintiff, while riding in an automobile owned and driven by one Ray Navreal, received injuries in a collision with a car owned by one Beacom. The Beacom car and the driver were uninsured. Navreal carried insurance with Surety National Insurance Company (Surety). This policy provided uninsured motorist coverage. Surety settled its liability with the plaintiff for $3,700. Its limit for one person was $5,000.

The plaintiff's father had three identical policies with the defendant, Farmers Insurance Exchange, each of which policies provided uninsured motorist coverage with a $5,000 limit on each policy. After settlement with Surety the plaintiff brought action against Farmers Insurance Exchange on the three policies to recover under the uninsured motorist provisions of said policies. The defendant pleaded its excess-escape clause. (This excess-escape clause is the same as the one in Factory Mutual's policy quoted above.)

The court held in an unanimous decision that Surety's policy was other similar insurance available to the plaintiff and that Farmers Insurance Exchange was not liable.

The court stated that a fair construction of the intention as expressed in the policies is that each company intended to provide and the insureds intended to buy coverage to the extent stated in the excess-escape clause. Neither policy contains a pure excess clause. Clearly, neither company intended an insured to receive more than $5,000 from all sources while occupying a non-owned automobile.

The court further said it is clear the company intended to sell less coverage and the insureds to buy less coverage "while occupying an automobile not owned by a named insured." (This case has a good discussion pertaining to the so-called excess-escape clause.)

Plantiff's counsel in his memorandum to the trial court, and we assume that his brief in this court will be along the same lines, set forth legal authorities announcing the rule that where there are two conflicting excess insurance clauses which are irreconcilable, the courts will hold the clauses mutually repugnant to each other and pro rate the loss between the carriers. In order for this rule to be operative, however, it is necessary that the paragraphs be irreconcilable or that there be a conflict between such clauses and as has been pointed out there is no conflict in this case. Therefore, the rule plaintiff's counsel seeks to invoke is inapplicable. Plaintiff's

counsel in his memorandum to the trial court cited several cases upon which he relied to support his contention in this case. An examination of the cases upon which plaintiff's counsel relied will show that in each of them there was a definite dispute between the insurance companies as to which policy would apply and that the actual suit involved a dispute between the two insurance companies for determination as to which of the insurance companies should have to pay the loss. In other words, which should be declared primary and which excess. In most of the cases plaintiff's counsel has heretofore cited, both companies had written policies on the same car. In the case before this court, the United Pacific Insurance Co. has acknowledged that it is the primary carrier and that it was directly liable for the loss. This is in accordance with the general rule as set forth in *Appleman's Insurance Law and Practice,* Volume 8, Section 4194, at Page 400, where it is stated that,

> "Where the owner of an automobile or truck has a policy with an omnibus clause and the additional insured also has an ownership policy which provides that it shall only constitute excess coverage over and above any other valid, collectible insurance, the owner's insurance has the primary liability."

An example of cases supporting this rule is *Employers Liability Assurance Corporation* vs. *Firemans' Fund Insurance Group,* 1958, 262 Fed(2) 259, District of Columbia. In that case the facts were that a car belonging to Call Carl, Inc., was loaned to Carl Ray Kilmer to be used as a substitute while his car was being repaired. The

car was involved in an accident while being driven by Kilmer. An injured person sued him and Call Carl, Inc. The present suit is between the two insurers. Firemans' Fund was Kilmer's insurer. His coverage included driving a substitute car because of repairs with the condition that the insurance with respect to a temporary substitute automobile was excess insurance over any other valid and collectible insurance. Employers was Call Carl's insurer. Its policy defined "insured" as including not only the named insured but also any person while using an owned auto with permission of the named insured. It also provided that if other valid insurance exists protecting the insured from liability, this policy shall be null and void with respect to such specific hazard otherwise covered whether the insured is specifically named in such other policy or not; provided, however, that if the applicable limit of liability of this policy exceeds the applicable limit of liability of such other valid insurance, then this policy shall apply as excess insurance against any such hazard in an amount equal to the applicable limit of liability of this policy minus the applicable limit of liability of such other valid insurance. Employers sued Firemans for a declaratory judgment to declare Firemans' policy primary and Employers' secondary. The court held that Employers' was primary. The excess insurance which Firemans' provided with respect to a substitute car was excess insurance only. Where a substitute car is concerned, unless damage exceeds the dollar limit, the policy is not other valid insurance. Quoting *Zurich General Accident and Liability Insurance Company, Ltd.* vs. *Clamor,* 124 Fed(2) 717.

In these cases the policy on the owned automobile was held to be primary. United Pacific's coverage was on the owned car and that of Factory Mutual was not on the owned car. Factory Mutual's policy would not be other valid insurance, because under the terms of the policies it is excess. The excess, however, is limited to the amount by which the applicable limits of liability of Factory Mutual's policy exceeded the applicable limits of liability of the United Pacific policy. Inasmuch as both policies were for $5,000 coverage, there would be no excess and, therefore, no liability to Factory Mutual, and likewise, Factory Mutual's policy would not be other valid insurance.

The case of *Air Transport Manufacturing Company, Ltd.*, vs. *Employers Liability Assurance Corporation, California,* 1949, 204 P(2) 647, defines the phrase "other valid insurance." The case states that "other valid insurance" used in public liability policies providing that if other valid insurance exists protecting the insured, the policy shall be void with respect to such specific hazard otherwise covered, means insurance providing an unconditional coverage of loss even though limited as to amount. Factory Mutual's policy would not qualify under this definition. United Pacific Insurance Co.'s would qualify.

Plaintiff's counsel in his trial court brief relied heavily on the case of *Oregon Auto Insurance Company* vs. *U. S. F. & G.*, 195 Fed(2) 958, in which case each company claimed that it was not liable and that the other was liable and the wording of the policy was such that if

the wording had been applied strictly neither company would have paid the loss of the insured. In fact, the court said,

> "It is plain that if the provisions of both policies were given full effect neither insurer would be liable."

The parties admitted that such a result would produce an unintended absurdity and each argued that the court must settle upon some way of determining which policy was primary and which secondary. The court in that case found that the companies should pro rate the loss. The provisions of the United Pacific and the Factory Mutual policies do not in any way tend to bring out such a result as did the policies in the *Oregon Auto Insurance Company* vs. *U. S. F. & G.* case. The liability is so clear in the United Pacific policy that they have made payment under the same without argument, nor have they sought in any way to bring in Factory Mutual for reimbursement.

In view of the fact that United Pacific is not involved in this lawsuit this action by the plaintiff amounts to an action to have the "other insurance" paragraph of Factory Mutual declared void, but counsel has not cited any cases in point which would hold such paragraph against public policy or void for any other reason. The interest of the insurers should be ascertained and effectuated whenever possible. Factory Mutual has contracted with its insured to pay the insured up to $5,000 maximum if the insured is injured through the negligence of an uninsured motorist while the insured is rid-

ing in the owned automobile of the named insured, but further extends the coverage to say we will also apply the benefits of this coverage to you while riding in someone else's car if they don't have uninsured motorist coverage which is applicable to you. If they do have uninsured motorist coverage in an amount equal to the liability limit of our policy, we will not make any payment to you. As previously mentioned, the plaintiff has not cited any cases holding that such a provision is unlawful, and under the circumstances the insured and the company are bound by the terms of the contract of insurance.

If the two paragraphs on "other insurance" were mutually repugnant certainly United Pacific would be the first one to say so and try to enforce a contribution from Factory Mutual. The fact that they have not made an appearance or made any such claim certainly indicates that the provisions of the policies are not mutually repugnant. United Pacific Insurance Company's policy is not in issue, because they have paid off and are not contesting the issue. The cardinal rule is that the insured should not receive less protection than if he were covered by only one policy. 65 Col. L. R. 319, 1965. She has already received the protection which had been contracted for. She is not entitled to a double recovery.

CONCLUSION

The other insurance provision of Factory Mutual is binding upon the insured under the facts of this case. The trial court's decision granting plaintiff a summary judgment should be reversed and judgment entered in favor of the defendant, Factory Mutual.

Respectfully submitted,

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