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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 : Respondent's Brief

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

FILED

SEP 1

LORENCE E. RUSSELL,
Plaintiff and Respondent

— vs. —

ORGE M. PAULSON, JR.,
Administrator of the Estate of
HARON 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

RESPONDENT'S

Appeal From the Judgment
Second District Court, Davis
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TABLE OF CONTENTS

AUTHORITIES – CASES CITED

TEXTS

STATUTES

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FLORENCE E. RUSSELL,
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— 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.

Case No. 10385

RESPONDENT'S BRIEF

STATEMENT OF FACTS

As in the brief of defendants and appellants, the same designations of the parties will be used for convenience in this brief of plaintiff and respondent. Defendants and appellants, Factory Mutual Liability Insurance Company of America and Automobile Mutual Insurance Company of America, will be considered one insurance company and will be referred to either as "Factory Mutual" or as

"the plaintiff's insurance company." The other insurance company involved and named as a defendant in the court below, namely, United Pacific Insurance Company, will be referred to as "United Pacific" or as "the driver's insurance company."

The applicable insurance provisions involved are set forth below for convenience, side by side:

FACTORY MUTUAL (Plaintiff's Policy)	UNITED PACIFIC (Driver's Policy)
PART IV – * * * **Uninsured Motorists (Damages for Bodily Injury)**	**Damages for Bodily Injury Caused by Uninsured Automobiles**
To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," sustained by the insured, caused by the accident and arising out of the ownership, maintenance or use of such uninsured automobile; . . . (R. 9).	To pay all sums which the insured or his legal representatives shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," sustained by the insured caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; . . . (R. 32).
Definitions – Insured. *The definitions under Part I, except the definition of "insured," apply to Part IV,* and under Part IV: *"insured" means*:	**Definitions – Insured.** The unqualified word "insured" means (1) the named insured as stated in the policy and any person designated

(a) the named insured and any relative;

(b) any other person while occupying an insured automobile; and

(c) any person, with respect to damages he is entitled to recover for care or loss of services because of bodily injury to which this coverage applies.

This insurance afforded under Part IV applies separately to each insured, but the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability. (Emphasis added.)
(R. 9).

named insured in the schedule and, while residents of the same household, the spouse of any such named insured and relatives of either; provided, if the named insured as stated in the policy is other than an individual or husband and wife who are residents of the same household, the named insured for the purposes of this endorsement shall be only a person so designated in the schedule;

(2) any other person while occupying an insured automobile; and

(3) any person, with respect to damages he is entitled to recover for care or loss of services because of bodily injury to which this endorsement applies.

The insurance applies separately with respect to each named insured under this endorsement and residents of the same household, but neither this provision nor application of the insurance to more than one insured shall operate to increase the limits of the company's liability.
(R. 32).

Other Insurance.

. . .

With respect to bodily injury to an insured while occupying or through being struck by an uninsured automobile, *if such insured is a named insured* under other similar insurance available to him, then the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable under this Part for a greater proportion of the applicable limit of liability of this Part than such limit bears to the sum of the applicable limits of liability of this insurance and such other insurance. (Emphasis added.)
(R. 10).

Other Insurance.

. . .

With respect to bodily injury to an insured while occupying or through being struck by an uninsured automobile, *if such insured is a named insured* under other similar insurance available to him, then the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable under this endorsement for a greater proportion of the applicable limit of liability of this endorsement than such limit bears to the sum of the applicable limits of liability of this insurance and such other insurance. (Emphasis added.)
(R. 33).

No insurance is involved in this litigation other than the above uninsured motorist coverages (UMC). Both policies have reference to occupants of the same vehicle. Plaintiff was a passenger in the car insured by United Pacific. Said car was driven by the wife of the insured of United Pacific. Sharon Mitchell, the driver of the other vehicle, was killed in the collision. It is agreed that Sharon Mitchell was an uninsured motorist at the time. (R. 12

The reference by appellants to Utah's financial responsibility laws is immaterial because the limits of liabil

of both Factory Mutual and United Pacific were established by contract (R. 7 and R. 32), and not by Section 41-12-1(k), UCA 1953. However, although immaterial, it is interesting to remember that when the collision herein involved occurred on April 4, 1961, the 1961 regular session of the Legislature had already approved an amendment to increase the statutory limits of financial responsibility from $5,000.00 to $10,000.00 for "bodily injury or death of one person, in any one accident." (See 1965 pocket Supp., Section 41-12-1, UCA 1953).

With reference to appellants' comment, (page 5, Appellants' Brief), that no findings of fact were made by the trial court, none are necessary when a motion for summary judgment is granted under Rule 52(a), Utah Rules of Civil Procedure.

The definitions of the Factory Mutual policy under Part IV (UMC) incorporate by reference the definitions under Part I, except the definition of "insured" (R. 9). The Part I definition reads, in part, as follows:

> Definitions
> Under Part I:
>
> "named insured" means the individual named in Item 1 of the declarations and also includes his spouse, if a resident of the same household . . ." (R. 8).

ARGUMENT

POINT I

THE "OTHER INSURANCE PROVISIONS IN THE TWO POLICIES ARE CONFLICTING "EXCESS" CLAUSES. FACTORY MUTUAL

CAN APPARENTLY AVOID LIABILITY BECAUSE PLAINTIFF WAS INJURED WHILE SHE OCCUPIED A CAR NOT OWNED BY A "NAMED INSURED," AND UNITED PACIFIC COULD DISCLAIM LIABILITY BECAUSE PLAINTIFF WAS A "NAMED INSURED" UNDER THE FACTORY MUTUAL POLICY. THERE IS NO RATIONAL BASIS TO FIND UNITED PACIFIC HAS "PRIMARY" LIABILITY.

> The rule that a policy or contract of insurance is to be construed liberally in favor of the insured and strictly against the insurer is based upon various reasons. The one most frequently advanced is that an insurance contract, like any written agreement should, in case of doubt as to the meaning thereof, be interpreted against the party who has drawn it and is responsible for the language employed therein. Other reasons mentioned are that a liberal construction in favor of the insured is most conducive to trade and business and, moreover, probably most consonant with the intention of the parties; and that in accord with the presumed intention of the parties the construction should be such as not to defeat without the plain necessity, the insured's claim to the indemnity which it was his object to secure and for which he paid a premium. (29 Am. Jur. 645 Section 259, "Insurance.")

There is nothing in the record concerning any settlement by plaintiff with United Pacific, and appellant is inaccurate when it argues that United Pacific "has acknowledged that it is the primary carrier and that it was directly liable for the loss" (Appellants' Brief), or else it would not have settled with plaintiff. (Appellants' Brief, pages 3, 14, 15.) It is apparent that under both policies the insuring agreements on their face both apply to cover the damage plaintiff incurred. This is why Factory Mutual claims

there was other insurance covering plaintiff's loss, and that its policy afforded only "excess" coverage because plaintiff was injured while occupying an automobile not owned by a "named insured." In other words, Factory Mutual claims it would not be liable until the limits of the United Pacific policy had been reached. If literal effect were to be given both policies, the result would be that neither insurance company could be liable to plaintiff, because United Pacific could also claim it had no liability until the limit of the Factory Mutual policy was reached because plaintiff was at the same time a "*named insured under other similar insurance*," namely under the Factory Mutual policy. In other words, such a result would be absurd.

Respondent desires to clarify how both policies referred to the plaintiff and respondent. We disagree (as alleged by appellant) that plaintiff "was an insured, though not a named insured, under her husband's policy with Factory Mutual" (Appellants' Brief, page 3). We disagree because the definitions incorporated by reference under the UMC definitions set forth above specify that the same definition of "named insured" under Part I, also applies to UMC. One such definition so incorporated is that:

> "named insured" means the individual named in Item 1 of the declarations *and also includes his spouse*, . . ." (Emphasis supplied.) (R. 9.)

The two "Other Insurance" clauses above quoted, as well as those at page 4 of Appellants' Brief, are identical to each other in every material way, but appellant quotes only the "excess" clause that, on its face, excepts Factory Mutual from liability to plaintiff; it ignores the conflicting "excess" clause quoted on page 4 of this brief that, also on its face, relieves United Pacific from any obligation to pay plaintiff

for her injuries. Here is the irreconcilable conflict between the two policies that makes both "excess" clauses void.

The United Pacific (driver's) policy included plaintiff as an "insured" because it covered "(2) Any other person while occupying an insured automobile" (R. 32). The Factory Mutual policy covered plaintiff as "(a) the named insured and any relative." (R. 9).

It must be observed that there is *no* reference in the UMC insuring clause (R. 9, Part IV, first paragraph), limiting the insurer's liability to an insured while occupying an *owned automobile* or an *insured automobile* as those terms are defined. To the contrary, said UMC insuring clause covenants to pay its insured and its named insured (including a spouse) . . . "all sums which the insured . . . shall be . . . entitled to recover . . . from the owner or operator of *an uninsured automobile* . . . arising out of the . . . use of such *uninsured automobile.*" (Emphasis added. R. 9

All cases cited by Factory Mutual that do not involve two conflicting "excess" clauses can be distinguished and discarded as inapplicable. The cases are collected in an annotation at 69 ALR 2d 1122, entitled "Apportionment of liability between liability insurers, each of whose policies provides that it shall be 'excess' insurance." The leading case preceding this annotation is *Cosmopolitan Mutual Insurance Co. vs. Continental Casualty Co.*, 28 N. J. 554, 147 A 2d 529, 69 ALR 2d 1115 decided in 1959, which states at 69 ALR 2d 1119:

> Where problems of conflicting "other insurance" provisions have arisen, many courts appear to have assumed that one, but not both, of such provisions must yield in order to establish one policy as the "primary" insurance upon which the "other insurance" provision of the "secondary" policy might op-

> erate. . . . Based upon this premise the courts have developed many varied and irreconcilable tests for determining which policy is "primary" and which "secondary."

The basic argument of Factory Mutual is that it should not be liable because United Pacific has settled with plaintiff and that this proves United Pacific had "primary" liability. It is more logical and reasonable to assume that United Pacific recognized the general rule that both companies were liable and it desired to avoid the long and costly litigation that Factory Mutual has persisted in pursuing. No inference can ever be drawn from a compromise settlement. This is a fundamental principle that needs no citation of authority.

Cosmopolitan discusses and rejects the arguments that have been made attempting to establish one carrier's liability as "primary." All are rejected (citing authorities), as follows: (1) the "primary" policy is the one issued first in time (page 119, 69 ALR 2d); (2) the "primary" policy was issued to the tortfeasor (page 1120); (3) the "primary" policy has more specific coverage (page 1120); (4) the "primary" policy is the one issued to the vehicle owner (page 1120).

At page 1121 of 69 ALR 2d, *Cosmopolitan* squarely answers an argument similar to Factory Mutual and winds the whole matter up as follows:

> If we should accept plaintiff's contention that the owner's policy is primary, we would be compelled to completely disregard the excess clause of that policy. . . . There is no reason to give absolute effect to a provision in one policy while ignoring a similar provision in the other. Both clauses should occupy the same legal status.

> As applied to the facts of the present case, both policies provide that they shall be "excess" insurance. However, it is obvious that there can be no "excess" insurance in the absence of "primary" insurance. Since neither policy by its terms is a policy of "primary" insurance, neither can operate as a policy of "excess" insurance. The excess insurance provisions are mutually repugnant, and as against each other are impossible of accomplishment. Each provision becomes inoperative in the same manner that such a provision is inoperative if there is no other insurance available. Therefore, the general coverage of each policy applies and each company is obligated to share in the cost of the settlement and expenses. We think that such a conclusion affords the only rational solution of the present dispute.

Actually, the most difficult unresolved problem presented by cases involving two insurance policies, each of which has a conflicting "excess" clause, is not *whether liability* exists under both; it is what method shall be used to apportion the loss between the two insurers. Under the facts of the instant case, there is no problem of proper apportionment because only one insurance company is before the court; and, in any event, the limits of liability of the two policies were *both* $5,000.00 and the judgment entered by the court against the uninsured motorist's administrator is for $11,285.66, $5,000.00 of which was ordered to be paid by Factory Mutual (R. 46-47).

The following also conclude, as is contended by plaintiff, that where two automobile insurance policies seek to be "excess" over any other, that neither policy was "primary," and that each policy, regardless of its limits and

the differences, shared the liability equally to the limits of the respective policies:

> *Allstate vs. Atlantic National Insurance Company,* 202 F. Supp. 85.
>
> *Hartford Accident and Indemnity vs. Select Risk Mutual,* 167 A. 2nd 821.
>
> *State Farm Insurance Company vs. Craig,* 364 SW 2d, 343.

There is no rational basis to find that United Pacific has "primary" liability.

POINT II

THE TWO CONFLICTING "EXCESS" OTHER INSURANCE CLAUSES ARE MUTUALLY REPUGNANT BECAUSE THEY WOULD PRODUCE THE ABSURD RESULT OF NEITHER INSURANCE COMPANY BEING LIABLE, WHEREAS BOTH INSURERS WOULD BE LIABLE IN THE ABSENCE OF THE OTHER. THEREFORE BOTH "EXCESS" CLAUSES ARE VOID AND OF NO EFFECT.

The best view of the "forest" instead of the "trees" on this question is afforded by the analysis in 7 Am. Jur. 2d 554-5, Section 202, "Automobile Insurance," concerning "Conflicts in 'Other Insurance' Clauses in Separate Policies":

> Many cases have arisen involving conflicts between insurance policies both of which purport to restrict or escape liability for a particular risk in the event that there is other insurance. Such conflicts have arisen, under automobile liability policies covering the same risk, in the following situations: (1) where one of the policies contains an "excess insur-

ance" clause and the other contains a "pro rata" clause; (2) where one of the policies contains an "excess insurance" clause and the other a "no liability" clause; (3) *where both of the policies contain an "excess insurance"* clause; (4) where one of the policies contains a "pro rata" clause and the other contains a "no liability clause; and (5) where a "no liability" clause expressly designates the types of insurance with which it might conflict.

* * * *

In the third situation mentioned above – this is where two or more policies provide coverage for the particular event and all the policies in question contain "excess insurance" clauses – *it is generally held that such clauses are mutually repugnant and must be disregarded, rendering each company liable* for a pro rata share of the judgment or settlement, since if literal effect were given to both "excess insurance" clauses of the applicable policies, neither policy would cover the loss and such a result would produce an unintended absurdity. In most of these cases, proration has been ordered in accordance with the proportionate policy limits afforded by the respective insurers, but this is not the universal holding. It has also been held that the insurer should be treated on an equal footing and required to bear equal shares of the loss. (Emphasis added.)

In *Oregon Auto. Ins. Co. v. U. S. F. & G. Co.*, 195 Fed. 2d 958, 960, the U. S. Court of Appeals for the Ninth Circuit, held:

> The two policies appear to us to be equally specific, and no difficulty whatever should be encountered in applying either to the facts if the other did not exist. It is true that the U. S. F. & G. policy named Suter as the insured, and it was Suter's negligence that caused the accident. But Oregon's policy insured any person who might drive a car of the

Redmond Motor Company with the latter's consent, and, as seen, Suter is an insured in this category.

In our opinion the "other insurance" provisions of the two policies are indistinguishable in meaning and intent. One cannot rationally choose between them. We understand the parties to concede that where neither policy has an "other insurance" provision, the rule is to hold the two insurers liable to prorate in proportion to the amount of insurance provided by their respective policies. Here, where both policies carry like "other insurance" provisions, we think must be held mutually repugnant and hence be disregarded. Our conclusion is that such view affords the only rational solution of the dispute in this case. The proration is to be applied in respect both of damages and of the expense of defending the suits.

The holding of the Oregon Supreme Court in *Lamb-Weston, Inc. vs. Oregon Automobile Insurance Company,* 219 Ore., 110, 341 P. 2d 110, 119, is even more impressive because it involved a conflicting "excess" clause and a "pro-rata" clause and the two are still determined to be conflicting, repugnant and void, resulting in liability on the part of both insurance companies, despite the general rule that the "excess" clause will be recognized.

At page 119 of 341 P. 2d, the court concludes:

The "other insurance" clause of all policies are but methods used by insurers to limit their liability, whether using language that relieves them from all liability (usually referred to as an "escape clause") or that used by St. Paul (usually referred to as an "excess clause") or that used by Oregon (usually referred to as a "prorata clause"). In our opinion, whether one policy uses one clause or another, when any come in conflict with the "other insurance" clause of another insurer, *regardless of the nature*

> *of the clause, they are in fact repugnant and each should be rejected in toto.* See Minnesota Law Review, supra. (Emphasis added.)

The Law Review article citation is 38 Minnesota Law Review 838 (1954), and is an excellent treatise on this subject.

The rationale of *Arditi vs. Massachusetts Bonding & Insurance Company,* ..... Mo. ....., 315 S.W. 2d 736, 743, stating the Missouri rule, could apply also to Utah:

> . . . The parties agree that this question has never been decided in Missouri and our conclusion is that we should follow the rule stated in Oregon Auto Ins. Co. v. United States Fidelity & Guaranty Co., 9 Cir., 195 F. 2d 958, 960, as follows: "In our opinion the 'other insurance' provisions of the two policies are indistinguishable in meaning and intent. One cannot rationally choose between them. We understand the parties to concede that where neither policy has an 'other insurance' provision, the rule is to hold the two insurers liable to prorate in proportion to the amount of insurance provided by their respective policies. Here, where both policies carry like 'other insurance' provisions, we think (they) must be held mutually repugnant and hence be disregarded."

All authorities cited by appellant can be readily distinguished. *Travelers Indemnity Company of Hartford vs. Wells,* 316 Fed. 2d 770 (7th Cir., 1963) does not specify whether two conflicting "excess" clauses were involved and it is submitted that either this question was not presented to the court, or as is more likely, only one and not two clauses were involved. The Virginia law also imposed a statutory limit for uninsured motorist coverage, and the court felt judgment should not be entered in excess of the statutory amount. This condition does not exist in Utah

Globe Indemnity Company vs. Estate of Abraham Barker, 253 N. Y. S. 2d 170 (incorrectly cited as 25 N. Y. S. 2d) correctly holds that where an insured is injured by an uninsured motorist *while a named insured*, the insured's insurance is only excess insurance. This is a proper exclusion applying to a person occupying an automobile not driven by the owner or his relatives, and it has no application to the case at bar because here the driver was a named insured under her United Pacific policy. The situation in this New York case would have been duplicated in the case at bar if plaintiff had been riding with a driver who was not a named insured.

Burcham vs. Farmers Insurance Exchange, ... Iowa ....., 121 N. W. 2d 500 cited by appellant as applying the same rule as the *Globe Indemnity* case, actually involves a "pro rata" clause versus an "excess" clause, and the court recognizes the excess clause in accordance with the general rule.

Employers' Liability Assurance Corporation vs. Firemans' Fund Insurance Group, 262 F. 2d 239 (inadvertently cited as page 259) does not involve two "excess" clauses but involves a claim case where the Borrower's policy was "excess" and the Lender's policy was primarily liable. The instant case does not involve the loan of a car.

Air Transport Manufacturing Company, Calif., 1949, 204 P. 2d 647, also cited by appellant involves a "pro rata" clause and has no application here.

Appellant also claims that plaintiff will receive a double recovery. Plaintiff was damaged in excess of $10,000 and is otherwise entitled to recovery under both policies. How can this constitute a double recovery when her damages are greater than the sum of the face amount of both poli-

cies? Our understanding of double recovery is limited to cases where twice the amount of the loss is recouped. This would be inequitable and improper; but such is not the case here. To allow Factory Mutual to escape liability to plaintiff under the plain intendment of its insuring clauses might more properly be called an unjust enrichment on the part of Factory Mutual.

Some attempt is also made by appellant to distinguish plaintiff's authorities as only involving disputes between two insurance companies as to whom is liable. No proper distinction can be drawn from this fact. The same principles are involved in either instance and it cannot be presumed that any court would apply one set of principles to insurance companies that were parties litigant, and another to the controversy between an insured and her insurer.

Appellant also contends that there is a distinction between the case at bar and the authorities relied on by plaintiff that the latter primarily involve two insurance policies written on the same automobile. That there is no basis in such a distinction is imediately apparent. More arguments can be made for "primary" liability existing under plaintiff's policy than there would be under that of United Pacific, which is the driver's policy. The collected cases overwhelmingly support the doctrine that two conflicting "excess" clauses, both of which appear applicable, are mutually repugnant and are of no effect.

CONCLUSION

Plaintiff has ben injured by an uninsured motorist in an amount in excess of $10,000.00, the combined uninsured motorist coverages of United Pacific and Factory Mutual. There is no rational basis to find that United Pacific had "primary" liability and that Factory Mutual had no liability where both insurance companies had inconsistent "excess" clauses in effect with respect to the existence of other insurance, making said other insurance provisions repugnant and of no force or effect. The trial court's decision awarding plaintiff summary judgment for $5,000 against Factory Mutual should be affirmed.

Respectfully submitted,

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