

1960

Plewe Construction Co. v. Franklin National Insurance Co. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

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PLEWE CONSTRUCTION COM-
PANY,

Plaintiff and Appellant,

vs.

FRANKLIN NATIONAL INSUR-
ANCE COMPANY,

Defendant and Respondent.

Clerk, Supreme Court, Utah

Case No. 9315

BRIEF OF RESPONDENT

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INDEX

	<i>Page</i>
STATEMENT OF FACTS.....	2
STATEMENT OF POINTS	6
ARGUMENT	7
THE COURT DID NOT ERR IN GRANTING FRANKLIN'S MOTION FOR SUMMARY JUDGMENT.	
A. THE DAMAGED PREMISES WERE OCCUPIED BY PLEWE OR WERE IN ITS CARE, CUSTODY OR CONTROL.	7
B. PLEWE IS ESTOPPED BY JUDGMENT IN THE CUDAHY CASE FROM DENYING THAT THE DAMAGED PREMISES WERE UNDER ITS CONTROL.	9
C. DISCUSSION OF APPELLANT'S CONTENTIONS.	12
CONCLUSION	16

CASES CITED

Bailey Motor Co. vs. Northwest Casualty, (Washington, 1935)	
49 P. 2d 911	15
Dupler vs. Yates, 10 Utah 2d 251, 351 P.2d 624 (1960).....	14
Geddes & Smith, Inc., vs. St. Paul-Mercury Indemnity Company, (Calif., 1959) 334 P. 2d 881.....	13
Grant vs. Sun Indemnity, (Calif., 1938) 80 P. 2d 996.....	13
Hardware Mutual Cas. Co. vs. Mason-Moore-Tracy, Inc., (2 Cir., 1952) 194 F. 2d 173.....	8, 16
Kershaw vs. Maryland Casualty Company, (Calif., 1959) 342 P. 2d 72.....	13, 15
Lee vs. Aetna Casualty and Surety Co., (2 Cir., 1949) 178 F. 2d 750	16
Rose vs. Union Gas and Oil Co., (6 Cir., 1924) 297 F. 16.....	8
Volf vs. Ocean Accident & Guaranty Corp., (Calif., 1958) 325 P. 2d 987	8
Woodland vs. Pacific Indemnity Company, (Calif., 1937) 72 P. 2d 256	15

AUTHORITIES CITED

123 A.L.R. 708, 712.....	12, 15
Black's Law Dictionary (3 Ed.).....	8
46 C.J.S. 260 (Insurance, Section 1251).....	11
50 C.J.S. 160 (Judgments, Section 3705).....	12

RULES CITED

Rule 56, Utah Rules of Civil Procedure.....	4
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IN THE SUPREME COURT of the STATE OF UTAH

PLEWE CONSTRUCTION COM-
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Plaintiff and Appellant,

vs.

FRANKLIN NATIONAL INSUR-
ANCE COMPANY,

Defendant and Respondent.

Case No. 9315

BRIEF OF RESPONDENT

BRIEF OF RESPONDENT

In this brief the appellant Plewe Construction Company will be referred to as "Plewe," the respondent Franklin National Insurance Company will be referred to as "Franklin," Cudahy Packing Company will be referred to as "Cudahy" and Fiberglas Engineering and Supply Division of Owens-Corning Fiberglas Corporation will be referred to as "Fiberglas."

Since appellant's Statements of Facts includes a recital of material either not found in the record or not relevant to this appeal, respondent submits the following:

STATEMENT OF FACTS

Plewe was constructing an addition to the plant of Cudahy in North Salt Lake, Utah, when, on January 27, 1956, a fire occurred, damaging said addition.

On April 23, 1958, Cudahy filed suit against Plewe in the District Court of Salt Lake County, Utah, Civil No. 116,222. In Count I of its Complaint, Cudahy alleged that Plewe violated the terms of the construction contract and that as a result of said breach of contract, Cudahy's building was damaged, profits from its business were lost and expenses and costs were incurred by reason of the fire.

In Count II Cudahy alleged that the damaged premises were under the exclusive control of Plewe and that the fire would not have occurred in the absence of negligence.

On August 15, 1958, Plewe filed its Answer to the Complaint denying that the premises were in its possession immediately prior to the fire and alleging that other contractors or subcontractors were in possession and control of portions of said premises.

On November 16, 1959, Cudahy dismissed Count I of its Complaint and Plewe confessed judgment upon Count II. Judgment was entered accordingly.

After satisfying the judgment in favor of Cudahy, Plewe filed the present suit against Franklin in the District Court of Salt Lake County, Utah, Civil No. 123,709. In its Complaint against Franklin, Plewe alleged that Franklin had issued a policy of insurance which was in effect on January 27, 1956; that on February 28, 1955, Plewe entered into a contract with Cudahy for the construction of an addition to the Cudahy plant at North Salt Lake, Utah; that Plewe commenced work under said contract and continued performance of the obligations thereunder up to January 27, 1956, at which time a fire occurred on the premises being constructed by Plewe pursuant to said contract and that said fire caused extensive damage to the premises under construction, which damage become a claim asserted by Cudahy against Plewe (R. 2).

In its Answer, Franklin, among other defenses, contended that the damaged premises were occupied by or under the care, custody or control of Plewe; that Plewe had confessed judgment upon Count II of the Complaint of Cudahy and was, therefore, estopped, precluded and barred from asserting that said damaged premises were not under its control and set up exclusion (f) of its policy, providing in part:

“This policy does not apply . . . to injury to or destruction of (1) property owned, occupied or used by or rented to the insured, or (2) . . . pro-

perty in the care, custody or control of the insured . . .” (R. 10).

On April 26, 1960 a pretrial was held in this case before the Honorable Stewart M. Hanson at which time the issues were discussed and counsel for Plewe was granted leave to file an amended complaint which was later filed but contained nothing material to this appeal.

Further pretrial was set for May 20, 1960 and the case set for trial on June 15, 1960. The order recited:

“It is specifically understood and agreed by and between the parties hereto that in the event this procedure was followed that the defendant would not be barred from making any motions or taking any depositions or taking any other steps for discovery purposes so long as the same did not delay the trial of this action.” (R. 19).

On May 4, 1960, Franklin filed a Motion for Summary Judgment pursuant to the provisions of Rule 56, Utah Rules of Civil Procedure. This motion was expressly based upon the pleadings and file in this action, the pleadings and file in Case No. 116,222 entitled “Cudahy Packing Company vs. Plewe Construction Company” and the policy of insurance referred to in Plewe’s Complaint (R. 22).

Notice of hearing upon said motion was attached fixing Friday, May 20, 1960, the date theretofore set for

further pretrial proceedings. The Motion and Notice were served on May 3, 1960 (R. 23).

At the hearing upon Franklin's Motion for Summary Judgment, the court received the insurance policy as an exhibit (R. 24). The Motion for Summary Judgment was taken under advisement and the case continued for further pretrial on June 1, 1960 (R. 26).

On May 26, 1960 the court entered Summary Judgment against Plewe (R. 31, 32).

On July 22, 1960, Judge Hanson rendered a Memorandum Decision finding that Franklin had issued a liability policy insuring Plewe against liability for damaged property but that said policy did not apply to property owned, occupied or used by or rented to Plewe or property in the care, custody or control of Plewe and that Plewe in the action brought by Cudahy had confessed judgment and judgment had been duly entered upon such confession against Plewe under allegations that the damaged premises were under the exclusive control of Plewe.

The court noted that no affidavits, testimony or representations of counsel were offered or made contradicting said facts.

The court stated that it was of the opinion that the premises were under the control of Plewe within the meaning of the policy and further that Plewe was estop-

ped by the judgment in the Cudahy case from denying that the damaged premises were under its control (R. 39-41).

After entry of Summary Judgment, Plewe filed a Motion for New Trial, although it had had no trial. This motion came on for hearing on July 11, 1960. At that time Mr. Pratt, counsel for Plewe, made certain representations concerning what evidence could be produced tending to impeach the judgment confessed. After this statement had been made, counsel for Franklin made certain objections to the procedure and pointed out that what counsel for Plewe really wanted was a reconsideration of the motion, but even at this time had offered no affidavits, depositions or testimony tending to generate an issue of fact.

This appeal followed denial of Plewe's Motion for New Trial.

STATEMENT OF POINTS

Appellant's statement of points is most confusing to respondent and respondent has, therefore, adopted its own form for discussion of the points involved in this appeal as there is only one real issue before the court.

THE COURT DID NOT ERR IN GRANTING FRANKLIN'S MOTION FOR SUMMARY JUDGMENT.

A. THE DAMAGED PREMISES WERE OCCUPIED BY PLEWE OR WERE IN ITS CARE, CUSTODY OR CONTROL.

B. PLEWE IS ESTOPPED BY THE JUDGMENT IN THE CUDAHY CASE FROM DENYING THAT THE DAMAGED PREMISES WERE UNDER ITS CONTROL.

C. DISCUSSION OF APPELLANT'S CONTENTIONS.

ARGUMENT

THE COURT DID NOT ERR IN GRANTING FRANKLIN'S MOTION FOR SUMMARY JUDGMENT.

A. THE DAMAGED PREMISES WERE OCCUPIED BY PLEWE OR WERE IN ITS CARE, CUSTODY OR CONTROL.

In its Complaint against Franklin, Plewe pleaded:

"3. That on or about February 28, 1955, plaintiff entered into a contract with Cudahy Packing Company for the construction of an addition to the Cudahy Plant at North Salt Lake, Utah; that the plaintiff commenced work under the said contract and continued performance of the obligations thereunder up to January 27, 1956, at which time a fire occurred *on the premises being constructed by the plaintiff*, pursuant to said contract; and that *said fire caused extensive damage to the premises under construction, which damage became a claim* asserted by Cudahy against the plaintiff herein." (R. 2)
(Emphasis added.).

Franklin's policy excluded:

“... injury to or destruction of (1) property owned, occupied or used by or rented to the insured, or (2) ... property in the care, custody or control of the insured ...” (R. 10, Ex. 1).

In Black's Law Dictionary (3 Ed.), “control” is defined as:

“Power or authority to manage, direct, superintend, restrict, regulate, direct, govern, administer or oversee.”

In *Rose vs. Union Gas and Oil Co.*, (6 Cir., 1924) 297 F. 16, it is defined as follows:

“The word ‘control’ does not import an absolute or even qualified ownership. On the contrary, it is synonymous with superintendence, management, or authority to direct, restrict, or regulate.”

In *Volf vs. Ocean Accident & Guaranty Corp.*, (Calif., 1958) 325 P.2d 987, it was held that portions of a residence under construction by a contractor were in the care, custody or control of the contractor within the meaning of a policy provision excluding from coverage damage to such property.

In *Hardware Mutual Cas. Co., vs. Mason-Moore-Tracy, Inc.*, (2 Cir., 1952) 194 F.2d 173, the court held

that the "control" exclusion clause required only that the insured be in control of the property injured and that whether its use of the property was exclusive or in conjunction with others was immaterial.

Examination of Plewe's Complaint reveals that Plewe claims that the damaged premises were under construction by it at the time of the fire (R. 2).

The finding of the lower court, therefore, that

"The damaged premises were under the control of Plewe within the meaning of the exclusion of the policy and that Franklin was, therefore, under no obligation to defend Cudahy's claim against Plewe or pay the judgment against Plewe . . ."

finds adequate support in the uncontroverted evidence before the court at the hearing on the Motion for Summary Judgment.

B. PLEWE IS ESTOPPED BY THE JUDGMENT IN THE CUDAHY CASE FROM DENYING THAT THE DAMAGED PREMISES WERE UNDER ITS CONTROL.

The judgment entered against Plewe in the Cudahy case was :

"This matter having come on regularly before the above-entitled court for trial on Monday, the 2nd day of November, 1959, with the Honorable Aldon J. Anderson, Judge thereof, presiding and the parties having appeared by and

through their respective attorneys, and a jury having been impaneled and the plaintiff thereupon having moved to reduce the prayer of its Complaint and to dismiss the first Count of its Complaint and to seek recovery against the defendant Plewe Construction Company on the second count of its Complaint and solely on the basis of the negligence of Plewe Construction Company and no objection having been made to such motions, and the court having considered and granted the same, and the defendant Plewe Construction Company having then confessed judgment on the second count of plaintiff's Complaint in the amount of \$12,500 and having dismissed its Third Party Complaint with prejudice,

NOW, THEREFORE, it is ordered, adjudged and decreed as follows:

1. That the first cause of action stated in the first count of plaintiff's Complaint should be, and the same is hereby dismissed with prejudice and on the merits.

2. That the plaintiff should have and it is hereby granted judgment in the amount of \$12,500 against Plewe Construction Company on the Second Count of Plaintiff's Complaint.

3. That the Third Party Complaint filed by defendant against Fiberglas Engineering and Supply Division of Owens-Corning Fiberglas Corporation should be, and the same is hereby, dismissed with prejudice and on the merits, and that the cross-claim filed by Fiberglas Engineering and Supply Division of Owens-Corning Fiber-

glas Corporation against the plaintiff should be, and the same is hereby, dismissed with prejudice and on the merits.”

In Count II of Cudahy’s Complaint against Plewe it was alleged:

“At the aforesaid time and prior thereto, the work on said addition and the premises thereabout were under the exclusive control of the defendant; the said fire would not have occurred in the absence of negligence as aforesaid.”

In addition to finding that the damaged premises were under the control of Plewe the Court found also that Plewe was estopped by the judgment in the Cudahy case from denying that the damaged premises were under its control. The general rule has been stated as follows:

“The judgment against insured under a liability policy in the prior action is conclusive against him as to facts therein established, and it has been held, that where there was a general verdict for plaintiff in such action, it may be assumed for the purpose of an action on the policy that every issue litigated in the former action was decided against insured’s right to recover against insurer where it establishes that the injury was caused in a manner constituting a breach of warranty on the part of insured or that the injury was one not covered by the policy . . .” 46 C.J.S. 260 (Insurance, Section 1251).

Numerous cases so holding are collected in the annotation found in 123 A.L.R. at page 708 entitled “Judgment in action by third person against insured as res judicata in favor of indemnity or liability insurer which was not a nominal party.” In its Brief, Plewe does not deny this to be the rule.

As the lower court correctly found, this rule applies to judgments on confession as well as to judgments rendered after full trial (50 C.J.S. 160 (Judgments, Section 3705)), a point also not attacked by Plewe in its Brief.

By its confession of judgment in the suit brought by Cudahy Packing Company, Plewe admitted all of the material allegation of the Complaint against it. Under the second cause of action one of the material allegations was that the premises were under the exclusive control of Plewe. Plewe by one of the most solemn acts known to the law confessed judgment under this second cause of action and cannot at this time, therefore, take a different position with respect to that allegation.

C. DISCUSSION OF PLEWE’S CONTENTIONS.

In its Brief, Plewe makes five principal contentions. These will be discussed in order.

1. *Respondent Has No Standing to Rely Upon Said Judgment.*

Contrary to the assertions of Plewe, Franklin is not

repudiating the policy but rather, is specifically relying upon the exclusion contained in the policy relative to property in the possession of or within the care, custody or control of Plewe.

The decision of the lower court was that the claim asserted against Plewe was excluded from the coverage of the policy. The decision of the court in no way rests upon the failure of Plewe to give prompt notice of the accident or upon the so called "no action" clause. Therefore, the decisions of *Kershaw vs. Maryland Casualty Company*, (Calif., 1959) 342 P. 2d 72 and *Grant vs. Sun Indemnity*, (Calif., 1938) 80 P.2d 996, have absolutely no application to this case. *Geddes & Smith, Inc. vs. St. Paul-Mercury Indemnity Company*, (Calif., 1959) 334 P.2d 881, does not deal with the subject for which it is cited by Plewe.

2. *The Judgment Is Based Upon Negligence and Not Upon Control of the Premises or Control of the Damaged Property.*

The answer to this contention is found in Cudahy's complaint against Plewe wherein it is alleged:

"At the aforesaid time and prior thereto, the work on said addition and *the premises thereabouts* were under the exclusive control of the defendant; the said fire would not have occurred in the absence of negligence as aforesaid." (Emphasis added.).

However, if this were not sufficient, Plewe makes the same claim in its Complaint against Franklin in this language:

“... a fire occurred on the premises being constructed by the plaintiff, pursuant to said contract; and that *said fire caused extensive damage to the premises under construction*, which damages became a claim asserted by Cudahy against the plaintiff herein.” (R. 2). (Emphasis added.).

3. *The Judgment Does Not Fall Within the Policy Exclusion.*

By its confession of judgment and the entry of judgment thereon, Plewe admits that the premises were under its exclusive control. The policy does not apply to property owned, occupied or used by or rented to Plewe or property in the care, custody or control of Plewe.

At the time of the hearing upon the Motion for Summary Judgment, Plewe made no offer by affidavit or otherwise of any evidence tending to controvert the effect of its judicial admission. Indeed, even at the hearing upon the Motion for New Trial, no affidavits or other admissible evidence was offered. It is well settled that the unsworn statements of counsel do not generate issues of fact. *Dupler vs. Yates*, 10 Utah 2d 251, 351 P. 2d 624 (1960).

4. *The Judgment Is Not Conclusively Binding Upon Plewe in This Case.*

The decisions cited by Plewe are clearly not in point.

In the case of *Bailey Motor Co. vs. Northwest Casualty*, (Washington, 1935) 49 P. 2d 911, cited by appellant, the finding relied upon by the insurer was not implicit in the judgment and, instead of admitting the fact, the insured denied it throughout the trial.

In *Woodland vs. Pacific Indemnity Company*, (Calif., 1937) 72 P. 2d 256, cited by appellant, the court pointed out that the issue involved in the second action was "not material in the other action."

Kershaw vs. Maryland Casualty, (Calif., 1959) 342 P. 2d. 72, does not involve the doctrine of res judicata.

Although Plewe quotes from the annotation found at 123 A.L.R. 712, the quotation is of exceptions to the rule. The general rule itself as therein set forth is:

"... a judgment in action by a third person against one insured under a liability or indemnity policy may be invoked as conclusive in its favor by the insurer in a subsequent action against it, if the issue decided in such prior action was material to the decision thereof and is identical with the issue claimed in the later action to have been adjudicated, even though the insurer was not a nominal party to the first suit."

5. *The Judgment Has No Reference to the Damaged Property.*

This is, indeed, a startling contention in view of the allegations of Plewe's Complaint in this case that the damage to the premises under construction ". . . became a claim asserted by Cudahy against . . ." Plewe.

CONCLUSION

It is well settled that the duty of an insurer with respect to the defense of a claim is measured by the allegations of the Complaint against the insured. *Lee vs. Aetna Casualty and Surety Co.*, (2 Cir., 1949) 178 F. 2d 750; *Hardware Mutual Cas. Co. vs. Mason-Moore-Tracy, Inc.*, *supra*. If an insurance company cannot rely upon the truth of such allegations after the insured has admitted their truth by judicial confession, then an insurance company can never know whether it does or does not have a duty to defend the insured.

Respectfully submitted,

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& CHRISTENSEN,

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and Respondent.*