

1960

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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

PLEWE CONSTRUCTION COMPANY,
a corporation,

Plaintiff and Appellant,

—vs.—

FRANKLIN NATIONAL INSURANCE
COMPANY,
a corporation,

Defendant and Respondent.

OV 17 1960

Supreme Court, Utah

APPELLANT'S BRIEF

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IN THE SUPREME COURT
of the
STATE OF UTAH

PLEWE CONSTRUCTION COMPANY,
a corporation,

Plaintiff and Appellant,

—vs.—

FRANKLIN NATIONAL INSURANCE
COMPANY,
a corporation,

Defendant and Respondent.

Case No.
9315

APPELLANT'S BRIEF

STATEMENT OF FACTS

Since this appeal relates almost entirely to the pleadings in the subject case and the pleadings in Civil No. 116,222, filed in the District Court of Salt Lake County, a development of the factual background of both cases is necessary.

On February 28, 1955, appellant, Plewe Construction Company, entered into a contract with Cudahy Packing Company for the construction of an addition to the Cudahy Plant at North Salt Lake City, Utah. During the construction, a fire occurred in the beef cooler room January 27, 1956. (R. 2, 8)

Fiberglas Engineering & Supply Division of Owens-Corning Fiberglas Corporation was a subcontractor for Plewe and was engaged in the installation of fiberglass insulation in the beef cooler room, at the time of the fire.

The fire occurred, causing damage to equipment and to a portion of Cudahy's plant, and Cudahy sued Plewe to recover the damages suffered in the fire. (Ex.—File No. 116,222) The Complaint stated causes of action in contract in Count I and in negligence in Count II. In the Answer filed by Plewe, he denied liability and specifically denied the allegations relating to exclusive control of the premises and of the work on the addition, and alleged that the premises were in possession of the plaintiff and of other contractors, and he further alleged contributory negligence on the part of the plaintiff.

Thereafter, Plewe joined Fiberglas as a third party defendant, alleging that if there was any liability of Plewe to Cudahy, Fiberglas, because of its subcontract work in the area, was liable to Plewe. Fiberglas denied liability and included by way of defense an allegation that Fiberglas had paid Cudahy for a covenant not to sue and that Plewe was thereby barred in its third party

complaint. Fiberglas also filed a Cross Complaint against Cudahy, alleging that it had paid \$59,523.07 to Cudahy for the damage and for a covenant not to sue.

In Answers to Interrogatories filed October 21, 1959, Cudahy stated that the damage it suffered included the cost of reconditioning and repairing its own equipment damaged by the fire, the cost of repairing its plant damaged by the fire, and also, the loss of business and incidental expenses resulting from a plant shut-down caused by the fire. (Ex. File No. 116,222)

Thereafter, Fiberglas' Cross Complaint was dismissed and after considerable Pre-Trial investigation, the case came on for a jury trial. At the trial, the jury was selected and then just prior to commencement of the proof, the case was settled and compromised by the payment to the plaintiff of \$12,500.00. The settlement was made by means of a Judgment confessed to by appellant, Plewe. The method of settlement is the main problem before us on the appeal. The present action was filed by appellant, Plewe, against respondent, seeking recovery of the amount paid pursuant to said settlement, attorneys' fees incurred in the defense of the prior action, and attorneys' fees and costs incurred in pursuing the present action, all based on the insurance policy issued by respondent to appellant.

The Complaint (R. 4), the Answer (R. 8), the Amendment to the Complaint (R. 14), and the Answer to Amendment to Complaint (R. 20), established the following material undisputed facts:

1. That Cudahy and Plewe had a construction contract under which Plewe had performed work up to the time of the fire; that the fire occurred January 27, 1956 in the beef cooler room, resulting in damages to Cudahy; and that Cudahy asserted a claim against Plewe by filing civil action No. 116,222, to recover damages in the amount of \$119,047.35, based upon the contractual relationship between Cudahy and Plewe, and also upon the negligence of Plewe. (R. 2, Para. 3 and 4; R. 8, Para. 1)

2. That respondent was given a copy of the Complaint and thereafter repeatedly was informed of the defense of the law suit, and was requested to participate therein; that respondent refused to do so up to and through the final negotiation and settlement of the law suit.

3. That the negligence insurance policy (Ex. 1) was in full force and effect at the time of the fire.

The same pleadings formulated the following disputed issues of fact material to the points on appeal:

1. To what extent, if any, was the property damaged by the fire within the care, custody or control of appellant?

2. What notice, if any, of the fire was given respondent?

3. If inadequate notice was given, whether or not the notice was waived by respondent.

On April 26, 1960, a Pre Trial was held before

Honorable Stewart M. Hanson, and a Pre Trial Order was issued. (R. 16-20) At this time a further Pre Trial was set for May 20, 1960 and the ultimate trial for June 15, 1960. As a result of the April 26 Pre-Trial, an Amendment to the Complaint and an Answer to said Amendment were filed by the respective parties. (R. 14, 20) At the next Pre-Trial hearing on May 20, 1960, of which no record was made, respondent introduced in support of its Motion for Summary Judgment, the subject insurance policy (R. 24) (Ex. 1), and although the Pre-Trial Order does not so indicate and although there was no record made of the hearing, respondent argued that the judgment in the prior case, No. 116,222, was conclusive evidence of the fact of Plewe's control of the property damaged by the fire. Appellant, at said hearing, argued that not only the Judgment, but the entire file in said exhibit should be considered by the Court, and further, that at the forthcoming trial, evidence would show that the property damaged was not under the care, custody or control of Plewe.

At this point, Judge Hanson entered a Summary Judgment (R. 31) indicating there was no material issue of fact, but at the same time, giving no reason for his decision and making no Findings or Conclusions from which an appeal could be taken. Thereafter, upon Motion of appellant, the Court, although not delineating the Decision as a Findings, entered a Memorandum Decision, setting forth what it considered to be the facts upon which there was no issue and thus upon which he could grant a Summary Judgment. (R. 39-41)

At Pages 52-62 of the record, in order to make a proper transcript of the proposed evidence to be offered relating to the lack of control of the property damaged, appellant made a proffer of proof at the hearing on the Motion for New Trial. The Motion For New Trial was denied and this Appeal was taken.

STATEMENT OF POINTS

POINT I

THE COURT ERRED IN HOLDING THAT THE JUDGMENT IN CIVIL NO. 116,222 CONCLUSIVELY SHOWED THAT THE DAMAGED PROPERTY WAS IN THE CARE, CUSTODY OR CONTROL OF APPELLANT.

A. RESPONDENT HAS NO STANDING TO RELY UPON SAID JUDGMENT.

B. THE JUDGMENT IS BASED UPON NEGLIGENCE AND NOT UPON CONTROL OF THE PREMISES OR CONTROL OF THE DAMAGED PROPERTY.

C. THE JUDGMENT DOES NOT FALL WITHIN THE POLICY EXCLUSION.

D. THE JUDGMENT IS NOT CONCLUSIVELY BINDING UPON APPELLANT IN THIS CASE.

E. THE JUDGMENT HAS NO REFERENCE TO THE DAMAGED PROPERTY.

POINT II

THE COURT ERRED IN GRANTING RESPONDENT A SUMMARY JUDGMENT.

ARGUMENT

There are two main interrelated errors committed by the lower court which have prevented appellant from having an adequate consideration of its case at the trial level. These errors are discussed under Points I and II below:

POINT I

THE COURT ERRED IN HOLDING THAT THE JUDGMENT IN CIVIL NO. 116,222 CONCLUSIVELY SHOWED THAT THE DAMAGED PROPERTY WAS IN THE CARE, CUSTODY OR CONTROL OF APPELLANT.

A. RESPONDENT HAS NO STANDING TO RELY UPON SAID JUDGMENT.

Inasmuch as appellant has not had the opportunity of presenting evidence on the adequacy of notice to the insurance company, we must assume in this Summary Judgment proceeding, that the matter is considered in a light most favorable to appellant. Therefore, as alleged in the Complaint, the respondent had received adequate notice of the fire and of the proceedings undertaken by Cudahy. Notwithstanding this notice and information, respondent refused to defend the case or to take any part in the preparation of the defense or in the negotiation of the ultimate settlement. Therefore, respondent, in attempting to invoke the protection of the exclusion clause, is in effect relying on a provision in the policy, when it has repudiated the policy and has denied liability thereunder. This is an inconsistent position and as indicated in *Kershaw v. Maryland Casualty Company*, 342 P. 2d 42 (Cal., 1959), untenable. The Court held

that an insurance company could not deny liability under a policy and in a situation, such as we have here, then invoke the protection of a clause put in the policy for its own benefit. See also *Grant v. Sun Indemnity*, 80 P2nd 996, 997 and *Geddin and Smith v. St. Paul Mercury Indemnity Company*, 334 P.2nd 881.

B. THE JUDGMENT IS BASED UPON NEGLIGENCE AND NOT UPON CONTROL OF THE PREMISES OR CONTROL OF THE DAMAGED PROPERTY.

In compromising and settling the Cudahy lawsuit it is clear that the parties were intending to and did dismiss the contractual cause of action, Count I, and placed liability squarely upon the negligence cause of action, Count II. The settlement and liability was further narrowed to a cause based “solely on the basis of negligence . . .” and the general reference to Count II was qualified by the specific reference to negligence liability. Therefore only that part of Count II relating to negligence is even material here. The confession of judgment reads in part, (Ex., File 116,222.):

“ . . . and a jury having been empaneled 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. . . .”

The elements of negligence to which reference is above made are found in Paragraph 7 of the first count

and are incorporated in the second count by reference. Paragraph 7 lists 7 individual negligent acts, any one or more of which allegedly caused the fire. None of these negligent acts depended for its validity upon the care, custody or control of any property, nor even upon the allegations of paragraph 2 of Count II.

Paragraph 2, Count II reads as follows :

“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.*” (Italics added)

This paragraph is the only basis upon which Respondent can rely as a cause of action coming within the exclusionary language of the policy, yet the paragraph has nothing to do with negligence. Actually the part not italicized also appears in the contractual cause of action, Paragraph 9, Count I, which Count was dismissed, further indicating lack of materiality to this negligence cause in Count II. The italicized portion clearly places added emphasis upon the foregoing allegations of specific negligence, and negatives any effect the first part of the paragraph might conceivably have had in connection with negligence. Unless this is an attempt to allege the doctrine of Res Ipsa Loquiter, which only has presumptive value, as a matter of evidence, it is difficult to see what the purpose of this paragraph is at all. In any event, there are seven different negligence situations each of which gave rise to possible liability of Plewe, and each of

which were independent from and not affected by paragraph 2.

Appellant, however, cannot be charged in this case with having control or having agreed to such a statement concerning control merely because he confessed judgment on the basis of negligence and upon the basis of Count II. Appellant certainly did not agree to all the facts alleged in the 10 paragraphs of Count I nor in the 3 paragraphs in Count II, since some of the allegations relate to contractual liability and some have no particular relationship to either contractual or tort liability. Certainly it is not reasonable to hold that this Judgment based upon negligence is a binding stipulation as to all matters alleged in the Complaint. This Paragraph 2 of Count II has no place in the negligence allegations, and, therefore, cannot be held to have been admitted by appellant.

The background of Civil No. 116,222 is important in considering this matter for the reason that the legal theories in the First Count have materiality to the liability of Fiberglas as a third party defendant. The distinction between a cause of action on contract in the First Count and a cause of action in tort on the Second Count was important in the manner of final settlement of the liabilities of all concerned. We cannot, therefore, ignore the meaning and the reasons for the dismissal of the First Count and the responsibility of the negligence allegations in the Second Count by considering the whole Judgment in a general manner without giving

particular consideration to the individual parts thereof and to the particular elements of the Complaint referred to therein. Therefore, the general allegation in Paragraph 2 certainly cannot be considered an admission conclusively binding upon appellant merely because he confessed judgment solely upon negligence.

C. THE JUDGMENT DOES NOT FALL WITHIN THE POLICY EXCLUSION.

We must compare the wording of the exclusion paragraph in the policy with the wording of Paragraph 2 of the Second Count.

The policy provides as follows:

“This policy does not apply:

(f) Under coverage C to injury to or destruction of . . . property in the care, custody or control of the insured.”

Paragraph 2 of Count I provides:

“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.”

It is clear that Paragraph 2 is not couched in the same terms as is the policy provision. Paragraph 2 says that work on the addition is in the control of appellant. Work, of course, as it is here used, means the actual manual effort of construction. Paragraph 2 further says that work on the premises or the premises thereabout are under the control of the contractor. Can

we infer reasonably that such a phrase conclusively includes the plant of Cudahy, the equipment of Cudahy which was being stored by Cudahy in the area of the fire, or the loss of business because of the plant being shut down. Certainly such a general term would need amplification in order to bring within its meaning the property which was actually damaged by the fire in this case. The damage is not alleged in Paragraph 2 to have resulted to property under the control of the contractor. It is clear that the intent of Paragraph 2 is not nearly so restricted as is the provision in the policy exclusion clause. Nevertheless, the lower court has held that such a general statement has the same meaning as the very narrow provision in the policy. The court holds appellant to a very strict adherence to the words when such words do not substantiate the court's position. The lower court has refused to allow additional evidence on the problem of control even though the proposed evidence would certainly explain the factual situation with which we are concerned.

The Complaint itself, therefor, does not bring the subject matter within the restricted meaning of the policy exclusion clause. Furthermore, the Interrogatories and Answers thereto in the file of Civil No. 116,222, indicate clearly that the damage to the building and to certain of the equipment could not be considered as within the exclusive control of the contractor under the meaning of the insurance policy clause. The evidence proffered by Appellant would also have shown a complete lack of such control of the property.

D. THE JUDGMENT IS NOT CONCLUSIVELY BINDING UPON APPELLANT IN THIS CASE.

In order that a prior judgment against the insured be conclusively binding upon him in a subsequent action against the insurer, the issues in each action must be identical and the issue involved in the two suits must have been material and necessary for recovery in the prior suit. As is stated in 123 A.L.R. 714:

“In a number of instances the view has been taken that, since the issue in question involved in the suit by the injured party against the insured was not material to the decision of that case or was not identical with the issue in the instant case alleged to have been determined by the judgment in the prior action, the insurer could not rely upon such judgment as determining such issue in its favor.”

In the case of *Braley Motor Co. vs. Northwest Casualty*, 49 P. 2nd 911 (Wash. 1935) the case went to the jury on three different conditions, only one of which involved facts placing it under the policy exclusionary clause. The Court there held that a judgment based thereon was not conclusive because recovery could have been made upon either of the other two conditions, independent of the cause within the exclusion of the policy. See also *Woodman vs. Pacific Indemnity Co.*, 72 P. 2nd 256, (Calif. 1937), and the other cases cited in 123 A.L.R. 714.

Again in a more recent case, *Kershaw vs. Maryland Casualty*, 342 P. 2nd 72, 77 (Calif. 1959), the insurer raised the same defense, claiming that the facts upon

which the insured was found liable established conclusively that this liability was within the same exclusionary language relating to control of the damaged property as we have in the instant case. The insured had settled the case after the insurer had refused to defend. Some of the property as a matter of fact, according to the complaint was not within the control of the insured. The complaint was for some \$120,000 and the settlement was for \$12,000. The Court held that since some of the property was not within the control of the insured, a settlement was reasonable and such a settlement could not be attacked upon the grounds that the suit against the insured was barred conclusively by the allegation of control of the property. See also *Larmie-Estates v. Omnicrome Corp.*, 275 N.Y. 426, 10 N.E. 793.

In the instant case we have seven clear allegations of negligence, none of which depend upon the general statement of control of the property, and each one of which would support an award of damages. Therefore we have in our case a much stronger basis for holding that the judgment is not conclusive than existed in any other of the above cited cases.

E. THE JUDGMENT HAS NO REFERENCE TO THE DAMAGED PROPERTY.

As is shown in the *Kershaw* case, *supra*, a general application of the exclusionary provision should not be made, but rather it must be considered in terms of the specific property damaged which was in the care, custody or control of the insured. Thus in the instant case,

the phrase "the work on the addition and the premises thereabout" clearly does not specify that the property damaged was within the insured's control, in fact the phrase is so general that it is virtually impossible to determine the specific property contemplated. Yet under the cases cited above, the law is clear that insured is only barred in its claim if all of the property for which judgment or settlement was made clearly falls within the exclusionary language.

The pleadings in Civil No. 116,222 indicate in part some of the problems with which the parties were faced in determining liability for the damage, to-wit: the relationship of Fibre-Glas as a subcontractor and its part in performing the work; the fact that Plewe had finished with its work in the area of the fire; the payment by Fibre Glas of one half of the damages suffered by Cudahay; the possession and ownership by Cudahay of much of the equipment which was damaged and its location with reference to the fire; the location of other parts of the Cudahay plant where the beef damaged by the fire was kept; the alleged fact that parts of the plant were in possession of Cudahay, and that other contractors together with members of the public were also on the property at the time of the fire. These matters, and probably other related matters, all had to be decided in order that the specific application of the exclusionary language could be made, and the property actually within control of the insured could be ascertained.

Because of the complexity of these factual problems,

Appellant argued that the entire file of Civil No. 116,222 be considered and that Appellants proposed evidence be admitted to properly determine these matters. Certainly as the record now stands there are no facts, admissions or stipulations establishing that any of the specific items of damage were within the control of the insured. It seems unlikely that Fibre glas would have paid some \$59,000 in partial settlement of the claim, had the damaged property been within the control of the insured.

In view of all of the above factual issues which are still unresolved is it reasonable to hold, as the trial court has, that there are no issue of fact, and that Appellant is not entitled to put on evidence to settle these questions? Is it reasonable to eliminate or fail to consider the evidence which must be considered before the judgment can be given any stature, even if it is conclusively binding in some respects? Certainly not, and Appellant should be given the opportunity to put on this evidence.

POINT II

THE COURT ERRED IN GRANTING RESPONDENT A SUMMARY JUDGMENT.

This Point II relating to Summary Judgment is so interrelated with the problems discussed above on the conclusiveness of the prior judgment, that very little need be said here. Although it is quite fundamental that if there are issues on material facts, summary judgments will not be granted, judgment was granted here when very apparently there were material issues of fact.

This matter came up in a series of pre trial hearings at which the matter was argued rather piecemeal, at which no record of the proceedings was kept until the very last hearing after the judgment had been entered, at which Respondent offered parts of the evidence, and at which Appellant stated its position indicating what the evidence would be, contrary to the statement of the Court on page 2 (R. 40) (R. 52-62). Certainly such a procedure has been prejudicial to the rights of Appellant in attempting to obtain a justiciable decision on the merits.

Admittedly, if Paragraph 2 of Count II of the complaint conclusively settles all issues of fact and law and thus bars Appellant in its recovery herein, then this matter rightfully can be handled in a summary fashion. However, Appellant strongly urges for the many reasons set forth above, that evidence must be taken to properly determine the factual issues concerning care, custody and control of the property. The pleadings and the interrogatories in Civil No. 116,222, together with the proffered evidence all point up facts which have not yet been resolved.

SUMMARY

The confession of judgment based solely and specifically upon negligence can not now be extended to cover some indefinite cause based upon a statement "the work on said addition and the premises thereabout were under the exclusive control of the defendant.". The statement

relates to the actual labor involved and has nothing to do with the control of any property. Even assuming that the statement does concern itself with control of property, it certainly is not the only basis for liability, and clearly is not the basis for negligence liability. Yet the confession of judgment is based solely upon negligence.

Therefore unless the only cause of action upon which recovery could be had is one clearly within the exclusionary language of the policy, the judgment or settlement is not a bar to this suit by the insured against the insurer. Appellant submits that such is clearly not the case here. Furthermore, even if paragraph 2 of Count II were the only cause of action upon which recovery could be predicated and upon which judgment was confessed, it does not of itself fall within the exclusionary language of the policy, and is meaningless without further evidence to show its applicability to the actual damage sought by Cudahay.

Wherefore Appellant respectfully submits this matter should be remanded to the trial court for a trial on the facts.

Respectfully submitted,

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