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Robert W. Trojan v. Southern General Insurance Company : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

ROBERT W. TROJAN, Plaintiff/Appellee, vs. SOUTHERN GENERAL INSURANCE COMPANY, Defendant/Appellant,	)	Case No. 920880CA (900-900481CN) Priority No. 15

REPLY BRIEF OF APPELLANT SOUTHERN GENERAL INSURANCE COMPANY

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE JAMES S. SAWAYA, PRESIDING

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POINT I.

THERE WAS NO COVERAGE FOR DAMAGE WHICH OCCURRED AFTER THE AIRCRAFT WAS TOTALLY DESTROYED BY A NON-COVERED LOSS.

Before the crash, Mr. Trojan's aircraft was worth $25,875. (Affidavit of William H. Greene, R. 68). It is undisputed that when the aircraft impacted with the surface of the water, and while the aircraft was moving under its own power or resulting momentum, it was damaged in excess of its market value. Cost of repairs for that damage would have been at least $34,500, and probably $5,000 to $10,000 more. (Affidavit of William H. Greene, R. 68-69. The facts in his affidavit were stipulated by both parties, R. 97).

Mr. Trojan made a voluntary decision not to purchase insurance coverage for this risk, which would have been coverage "G. All Risks While in Motion." (R. 6).

However, even though the aircraft was destroyed below its market value, the trial court nevertheless awarded $4,839 for further and additional damage from submersion in lake water and contamination by lake water and particles of dirt and other debris in the water. It is undisputed that this damage occurred subsequent in time to the total destruction of the aircraft while in motion, which was uninsured.

It is simply unreasonable for Mr. Trojan to claim and for the trial court to award this amount for damage to the aircraft subsequent and in addition to its total destruction through an

uninsured risk. The unreasonableness of any such interpretation of the policy is illustrated by the fact that Mr. Trojan himself chose to insure the aircraft only in the total amount of value of $23,000 (subject to a deductible amount of $500 for a net total coverage of $22,500) under the coverage he did purchase, Coverage "F. All Risks While Not in Motion." (R. 6).

Where the policy itself reflects a total insured value for the risks which were covered (all risks while not in motion) of $22,500, and the stipulated undisputed facts are that the aircraft was worth $25,875 and was damaged in excess of that amount by impact while in motion which Mr. Trojan chose not to insure, the trial court should not have fashioned for Mr. Trojan a better deal than he made for himself. The trial court opinion essentially made a gift to Mr. Trojan at Southern General's expense of $4,839 worth of property damage coverage which Mr. Trojan had chosen not to purchase or pay a premium for.

It would be contrary to any reasonable contract interpretation for Mr. Trojan to get casualty insurance proceeds where his aircraft was already totally destroyed by a non-covered risk. This common-sense conclusion is supported and corroborated by condition no. 11 of the policy, which provides that when there is a loss, whether or not it is covered, the amount of insurance on the aircraft is reduced by the amount of the loss, and remains reduced until repairs are commenced. (R. 15). It is undisputed that the uninsured total loss to the aircraft occurred first in time, while the aircraft was in motion, as a result of impact

with the surface of the water. It was only subsequently, after the aircraft was no longer moving under its own power or resulting momentum, that water contamination and pollution caused further damage. Condition no. 11 is consistent with a reasonable interpretation of the policy as a whole. The trial court award of $4,839 for damage to the aircraft while not in motion should be reversed.

POINT II.

THE TRIAL COURT AWARDED DAMAGES FOR LOSS WHILE NOT IN MOTION RESULTING FROM SUBMERSION IN WATER IN UTAH LAKE AND FROM CONTAMINATION BY LAKE WATER AND BY PARTICLES OF DIRT AND OTHER DEBRIS IN THE LAKE WATER. THIS WAS EXCLUDED UNDER THE POLICY.

The trial court award of $4,839 for loss while not in motion was as a result of damage from submersion in Utah Lake and from contamination by water, particles of dirt, and other debris in the water after the aircraft stopped moving under its own power or resulting momentum and the engine was not operating. This fact is undisputed and stipulated in the record. (Stipulation, para. 1, R. 96. See also, Aff't of William H. Greene, para. 9, R. 69).

The plain language of the policy states that it does not apply to "loss by pollution and contamination of any kind whatsoever." (Exclusion No. 14, R. 13). The wording of the exclusion extending to "contamination of any kind whatsoever," clearly and obviously extends to submersion in lake water and contamination by water and substance in the water to the engine

parts and instruments of the aircraft. Such a substance is foreign to the engine parts, instruments and other components of the aircraft.

Mr. Trojan's brief argues that dirty lake water is not sufficiently "foul or toxic to qualify under this exclusion." (Brief of Appellee, p. 11). However, this argument simply seeks to re-write the terms of the exclusion. The exclusion itself covers contamination "of any kind whatsoever," without regard to the level of foulness or toxicity which Mr. Trojan apparently would imply as an additional unstated requirement. Mr. Trojan's brief opines broadly that "the kinds of risks excluded by this provision include air pollutants or chemicals which could damage the aircraft." (Brief of Appellee, p. 11). Again, the whole basis of Mr. Trojan's claim for the $4,839 of damage while the aircraft was not in motion is that the aircraft was in fact damaged by lake water and substances borne in the lake water. These certainly qualify as contaminants. More importantly, the exclusion does not use the word "chemicals" or "air pollution." Mr. Trojan simply seeks to impress these conditions as unstated terms to the contract rather than dealing with the terms of the contract as it is written.

The cases cited by Southern General in its initial brief all stand for the rule that the pollution exclusion applies where an outside substance invades the insured product. American Casualty Co. of Reding, Penn. v. Myrick, 304 F.2d 179 (5th Cir. 1962); Hi-G Inc. v. St. Paul Fire & Maurine Ins. Co., 283 F.Supp. 211 (D.

Mass. 1967) aff'd per curiam, 391 F.2d 924 (1st Cir. 1968); McQuade v. Nationwide Mutual Fire Ins. Co., 587 F.Supp. 67 (D. Mass. 1984). Mr. Trojan has pointed to no case authority for his argument that the conditions present in the instant case do not amount to "contamination of any kind whatsoever" within the scope of the exclusion.

POINT III.

THE POLICY DOES NOT PROVIDE FOR EXPENSES FOR RETRIEVING OR RECOVERING THE AIRCRAFT. THERE IS NO GROUND FOR AWARDING SUCH EXPENSES.

Unless expressly provided in the policy, no coverage for salvage costs should be assumed or implied. The policy contract is silent about any such coverage. (R. 6-18).

Of course, the bodies of the two occupants were removed in rescue efforts immediately after the crash. Mr. Trojan makes no claim against Southern General in connection with emergency rescue efforts for the occupants of the aircraft.

Mr. Trojan attempts to justify the trial court's award of salvage expenses by reference to the policy provision which states: "When we pay for repairs or replace damaged parts, we will also pay for transporting your aircraft or the parts necessary to the place of repair." (R. 14). By its own terms, this language applies only when the company pays for repairs or replaces damaged parts. Neither side has ever claimed that this procedure was requested or followed in the instant case. On the contrary, the next previous paragraph on the same page of the

policy states: "In the event of total loss, we will pay you the amount of insurance shown under declarations for Coverages F and G less any deductibles. We may pay for a loss in money." (R. 14). In this case, the total loss was uninsured because Mr. Trojan did not purchase Coverage G. However, this provision obviously makes a distinction between total loss such as in the instant case, and other situations where there is not a total loss and the aircraft may be repaired or replaced.

Mr. Trojan also asserts generally that the duty to provide a liability defense somehow requires Southern General to recover the salvage from the lake and preserve it. This is nowhere stated in the policy. On the contrary, the policy provides that Southern General may make any investigation of liability claims as it sees fit. (R. 11, "Additional Protections"). Further, there is nothing on the record to show that the salvage of the aircraft was necessary to provide a proper liability defense. In fact, a full and complete liability defense was provided and the liability limit of $50,000 was paid to fully protect Mr. Trojan and the estate of his son from liability claims by the estate of his passenger, without the benefit or use of the aircraft salvage, because Mr. Trojan had already sold it to a third party. These facts themselves refute Mr. Trojan's contention that the duty to defend liability claims implied a separate duty to retrieve and save the aircraft salvage.

On the contrary, numbered paragraph 8 of the policy provides that when a loss occurs under Coverages F or G, it was Mr.

Trojan's duty to protect the aircraft even if the loss was not covered by this insurance. (R. 15).

CONCLUSION

The trial court awarded a total judgment of $10,499, consisting of $4,839 for damage from submersion and contamination under "Coverage F. All Risks While Not in Motion;" plus cost of recovering the aircraft from Utah Lake of $6,160, less the deductible of $500.

The property damage judgment should be reversed because the aircraft had already been totally destroyed below its insured value and below its fair market value by the uninsured risk of impact while in motion. Mr. Trojan chose to insure the aircraft for risk while not in motion in the maximum amount of $23,000 less deductible of $500. The aircraft was damaged while in motion to the extent of at least $34,500, when it was worth only $25,875. The award of $4,839 for later damage was not justified by the coverage Mr. Trojan purchased, and should be reversed.

The further damage of $4,839 was caused by contamination specifically excluded in the policy.

The award of costs of retrieving the aircraft from Utah Lake was not covered under the policy. No duty by Southern General to retrieve and protect the salvage should be implied from any other coverage in the policy.

For the above reasons, the Court should reverse summary judgment entered for plaintiff/appellee Robert W. Trojan and

order that judgment be entered as a matter of law in favor of defendant/appellant Southern General Insurance Company.

DATED this 7 day of April, 1993.

STRONG & HANNI

By _____
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203675nh

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed, first class postage prepaid, this 7 day of April, 1993.

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