1967

Julie F. Hays, Guardian Ad Litem For Kathy Shawn Hays v. Raymond Donald Robertson, Defendand and Appellant, State Farm Mutual Automobile Insurance Company and Mrs. Melvin Sanders, Guardian Ad Litem For Paulette F. Sanders v. Raymond Donald Robertson, State Farm Mutual Automobile Insurance Company : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

JULIE F. HAYS, Guardian ad litem for KATHY SHAWN HAYS,
Plaintiff and Respondent,

— vs. —

RAYMOND DONALD ROBERTSON,
Defendant and Appellant,
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Garnishee and Appellant.

MRS. MELVIN SANDERS, Guardian ad Litem for PAULETTE F. SANDERS,
Plaintiff and Respondent,

— vs. —

RAYMOND DONALD ROBERTSON,
Defendant and Appellant,
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Garnishee and Appellant.

Case No. 10866

APPELLANT'S BRIEF

Appeal From the Judgment of the Third District Court
in and for Salt Lake County, Utah
THE HONORABLE STEWART M. HANSON, *Judge*

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STATEMENT OF THE NATURE OF THE CASE

Plaintiffs, Paulette Sanders and Kathy Shawn Hays, were the passenger and driver, respectively, in a car involved in a collision with a 1958 Chevrolet owned and

operated by Raymond Donald Robertson in Salt Lake County on April 6, 1965. They brought separate actions against Robertson and obtained default judgments for personal injuries sustained in the accident. Plaintiffs subsequently served garnishments upon State Farm Mutual Insurance Company which had denied coverage and a defense to the defendant Robertson on the ground that the insurance policy issued to Robertson's father on a 1962 Chevrolet pick-up truck did not cover the 1958 Chevrolet being operated by Robertson at the time of the accident.

DISPOSITION IN LOWER COURT

The cases were consolidated for trial before the Honorable Stewart M. Hanson, Judge, sitting without a jury, who held that the defendant Robertson was entitled to coverage under the policy and granted judgment to each of the plaintiffs against the Garnishee State Farm Mutual Insurance Company.

RELIEF SOUGHT ON APPEAL

The appellant garnishee seeks reversal of the judgment of the lower court and judgment in appellant, garnishee's favor.

STATEMENT OF FACTS

Plaintiffs secured default judgment against Raymond Donald Robertson for injuries sustained in an accident on April 6, 1965, at the intersection of Wasatch

Avenue and State Street (U. S. 91) in Midvale, Utah. After being served with summons and complaint, Mr. Robertson tendered the defense of the action to State Farm Mutual Insurance Company which refused to defend for him on the ground that the company did not have a policy covering the automobile being driven by Mr. Robertson at the time of the accident. Robertson allowed the cases to go by default, and plaintiff, Paulette Sanders, secured a judgment for $2500.00 general damages and her medical bills of $28.00 (R. 8, 9), and Kathy Hays secured a judgment for $7,500.00 general damages and $1,024.36 medical bills (R. 31, 32).

After securing said judgments the plaintiffs served garnishments on State Farm Mutual Insurance Company which traversed the same and the case was then tried to the District Court of Salt Lake County, Judge Stewart M. Hanson presiding, who granted judgment to the respective plaintiffs against State Farm Mutual Insurance Company for the amount of said judgments, holding that the policy of insurance issued to Loyd J. Robertson covered the 1958 Chevrolet purchased by Raymond Donald Robertson.

Loyd J. Robertson is the father of Raymond Donald Robertson. Loyd operates a mink ranch in Midvale, Utah, with his wife, June. He had two sons, Raymond Donald Robertson, and Robert D. Robertson (Exhibit D-5, p. 8, para. 1).

In about 1960 or 1961 (R. 129) Mr. Robertson started insuring his cars with State Farm Mutual Insurance

Company, through its agent, Ron Steeneck, and insured all of his cars with that company. At that time Raymond Donald Robertson was in the Navy and didn't return until about four years later when he was 20. When Raymond returned, he helped his father around the mink ranch, and Loyd J. Robertson, the father, bought two 1955 Fords for the use of his two sons (R. 102). The titles to the two cars were taken in the name of Loyd J. Robertson (Exhibits D-3 and D-4). He purchased insurance from State Farm Mutual on the cars through Mr. Steeneck and on the application covering the 1955 Ford four-door sedan Raymond was listed as the principal driver with Loyd J. and June as the applicants for the insurance (Exhibit D-5). Liability, medical pay, comprehensive and auto death indemnity coverage in the amount of $5,000.00 covering Loyd J., Robert D. and Raymond were applied for and written (Exhibit D-5). In November of 1964 Raymond was involved in a roll-over accident with the 1955 Ford four-door sedan and damaged it beyond repair (R. 101).

On December 22, 1964, Loyd J. and Raymond D. Robertson purchased a 1962 Chevrolet ½-ton pick-up truck and financed it through Continental Bank of Midvale. Title to the pick-up was taken in Raymond's name. Both Raymond and Loyd J. signed the note at the bank (Exhibit P-7) in a meeting with Mr. Robert Sheeran, an employee of the Continental Bank (R. 122).

Mr. Steeneck, the insurance agent, was called by Loyd J. Robertson and told to transfer the insurance from the 1955 Ford to the 1962 Chevrolet pick-up truck

(R. 116, 117). He did not at any time advise Mr. Steeneck that title to the 1962 Chevrolet pick-up truck was being taken in Raymond Robertson's name, and, in fact, at that time did not know whether title was in his name or Raymond's name (R. 107, 108).

Mr. Sheeran did not advise Mr. Steeneck as to the manner in which title to the 1962 Chevrolet pick-up was taken (R. 125). Mr. Steeneck was never advised prior to the accident in whose name the 1962 Chevrolet title was taken (R. 133). He took the information over the telephone and made a straight transfer of the insurance policy on the 1955 Ford to the 1962 Chevrolet pick-up (R. 134). Raymond was listed as the principal driver on the 1955 Ford and continued as such on the 1962 Chevrolet pick-up even though his name did not show as such on the application for transfer of the insurance (Exhibit P-8, D-5). Loyd J. Robertson and June Robertson were the named insureds on the Policy (Exh. P-1). One Hundred dedeuctible collision insurance was added to protect the bank on its lien. In the application Loyd J. Robertson is listed as the insured, and Robert D. and Raymond are listed as his sons. Loyd J. and June are shown as the applicants and the application is shown as a transfer (Exhibit P-8).

Raymond Robertson failed to keep his payments to the bank current and an arrangement was made between Loyd J. and Raymond Robertson with the bank for the bank to take possession of the pick-up for the purpose of trying to sell it (R. 125). They were unable to sell it, and Loyd J. Robertson took the pick-up and after

making a couple of monthly payments finally paid it off in full (R. 126).

When the bank took the car to sell it, there was no cancellation of the insurance, and the policy continued in full force and effect (R. 125). The bank was still trying to sell the car on April 6, 1964, when Raymond Robertson was involved in an accident (R. 126). In May of 1965 a change of classification was made on the policy by removing Raymond Robertson as the principal driver and naming Loyd J. Robertson as the principal driver which naturally effected a reduction of the premium (R. 135, Exhibit D-9).

On April 5, 1965, Raymond Robertson who was then 21 years of age and living in a motel, although he continued to have his clothing at his home, and according to his father, still maintained his address at his father's home, went to Miller Finance Company, arranged for financing and purchased a 1958 Chevrolet Belair (Exhibit D-6). He was working at Kennecott Copper at the time (R-98). He borrowed $500.00 from Miller Finance to purchase the car. The car was purchased from Ballard Wade Motor Company (R. 92). Loyd J. Robertson had nothing to do with the purchase of this car.

On April 6, 1965, the day following the purchase of the car and while driving it, Raymond Robertson was involved in the accident in which the two plaintiffs were injured and which is the basis of this lawsuit. It is this car on which State Farm Mutual refused coverage and denied a defense to Raymond Robertson.

ARGUMENT

POINT I.

THE 1958 CHEVROLET PURCHASED BY RAYMOND DONALD ROBERTSON DID NOT QUALIFY AS A TEMPORARY SUBSTITUTE AUTOMOBILE NOR AS A NEWLY ACQUIRED AUTOMOBILE UNDER THE INSURANCE CONTRACT ISSUED TO LOYD J. AND JUNE ROBERTSON.

The face of the policy under declarations shows that the named insured on the policy is Loyd J. Robertson and June Robertson (Exhibit P-1). Loyd J. Robertson, Robert Robertson and Raymond D. Robertson are also named as insured persons under coverage S which is $5,000.00 death indemnity. However, the only named insureds under their liability policy are Loyd J. and June Robertson.

On Page 3 of the policy (Exhibit P-1) temporary substitute automobile and newly acquired automobile are defined as follows:

> Temporary substitute automobile means an automobile not owned by the named insured or his spouse while temporarily used as a substitute for the described automobile when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction.
>
> A newly acquired automobile means an automobile ownership of which is acquired by the named insured or his spouse if a resident of the same household if (1) It replaces an automobile owned by either and covered by this policy or the company insures all automobiles owned by the named insured and said spouse on the date of its delivery.

The 1958 Chevrolet acquired by Raymond D. Robertson did not qualify as a temporary substitute automobile because it was not acquired by the named insureds for their use nor was it being used temporarily as a substitute for the described automobile under the provisions of the above paragraph contained in the policy. As a matter of fact, the 1958 Chevrolet was a vehicle acquired on a permanent basis by Raymond D. Robertson for his use. The 1962 Chevrolet pick-up truck was not withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction. The car had been turned over to the Bank for sale by the Bank about February 1, 1965 (R. 18).

In the case of *Travelers Indemnity Company v. American Casualty Company of Reading, Pennsylvania* (1964), U. S. D. C. S. D. West Va. C. D. 226 Fed. Supp. 354, where the insured vehicle had been re-possessed by the seller because the purchaser failed to pay the installments under the conditional sales contract and advertised the car for sale, the court held that the replacement vehicle obtained by the insured did not qualify as a substitute vehicle for the insured vehicle because it was not withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction but because it was repossessed.

Even if Raymond D. Robertson had been the named insured, the automobile would not constitute a temporary substitute automobile which was involved in the accident because he had acquired the title to that automobile.

The other vehicle, of course, was not out of use as defined under the terms of the policy to enable the insured to replace it with a temporary substitute automobile.

The 1958 Chevrolet involved in the accident did not qualify under the policy as a newly acquired automobile. For it to do so under this paragraph, it would have to be acquired by the named insured or his spouse, if a resident of the same household. Rather than being acquired by the named insured, it was acquired by Raymond D. Robertson, who was the principal driver of the 1962 Chevrolet, but was not a named insured under the policy but only an insured under the policy while living in the home with his parents. The evidence was clear that neither the agent nor the company knew that Raymond D. Robertson was the owner of the 1962 Chevrolet. As a matter of fact, on Page 10 of the policy the insured, under declarations, asserts by acceptance of the policy that he is the sole owner of the described automobile except as stated in the exceptions. There are no exceptions set forth except that the policy shows that the vehicle was financed with the Continental Bank of Midvale. The insured, Loyd J. Robertson, was the owner of the 1950 Ford from which the policy was transferred to the 1962 Chevrolet.

Loyd J. Robertson had some interest in the 1962 Chevrolet because he had co-signed to make the payments on it. In fact, he eventually ended up with the title to the 1962 Chevrolet and eventually disposed of it under his own name. At the time the 1958 Chevrolet was purchased by Raymond D. Robertson he was living at the Majestic

Motel, although he still kept his clothes and ate some of his meals at his home. He did not even consult with his father about the purchase of the 1958 Chevrolet nor did his father know about the purchase of it until after the accident had occurred.

In the case of *Robinson* v. *Georgia Casualty and Surety Company*, So. Car. 1959, 110 S.E. 2d 255, St. Paul Mercury Insurance Company issued a liability policy on a 1956 Chevrolet to Napoleon Tuesdale, the owner. Eugene Tuesdale, son of Napoleon, did not own a car and had lost his license because of his driving record. Georgia Casualty issued an owner's policy to Eugene and filed an SR 22. This policy was on the 1956 Chevrolet owned by Napoleon. Thereafter, Napoleon traded his 1956 Chevrolet for a 1958 Chevrolet which was likewise registered in his name. Eugene Tuesdale, however, had unrestricted use of the 1958 Chevrolet. Eugene asked a friend of his by the name of Robinson to drive the car and while so driving without Eugene being in the car, one Williams who was riding with Robinson was killed.

The Georgia Casualty Company denied coverage for the 1958 Chev., and Robinson against whom a judgment had been taken by Williams filed suit against the company. The court held: (1) The 1958 Chevrolet was not covered under Georgia Casualty's policy as a newly acquired automobile since that covers only automobiles the ownership of which is acquired by the named insured and the ownership of the 1958 Chevrolet was in Napoleon. (2) That the position of Robinson that Georgia

Casualty by accepting a premium with knowledge of a misrepresentation as to ownership of the automobile which would render the policy void *ab initio* was estopped to assert a forfeiture was not sound since Georgia Casualty was not asserting a forfeiture but granted that the policy was in force with regard to Eugene on the 1958 Chevrolet. (3) The fact that Georgia Casualty knew that Eugene did not own a 1956 Chevrolet was of no importance since there was nothing in the Georgia policy to require Eugene to be the owner of the car described in the policy. (4) The insurance for a newly acquired automobile confined itself to an automobile acquired by the named insured.

In the case of *Adkins* v. *Inland Mutual Insurance Company* (1942), 124 W. Va. 388, 20 S.E. 2d 471, 663, the West Virginia Financial Responsibility Act provided that a driver's license suspended shall remain so until the driver furnishes evidence of responsibility, and that in case the guilty person has no motor vehicle registered in his name, but is a member of the household of the owner of the vehicle, the guilty person shall be relieved of giving proof in his own behalf "so long as he is operating a vehicle for which the owner has given proof."

Earl Canterbury was the registered owner of an automobile. James Canterbury, who lived in the same household, paid the deferred purchase installments on the car and the insurance premiums. James Canterbury's operator's license had been revoked. The insurer's policy was issued to Earl Canterbury as named insured. The insurer filed an owner's policy certificate showing

that it had issued a motor vehicle liability policy as defined in the act to Earl Canterbury. The certificate was endorsed as "intended to relieve a household member * * * who was not a motor vehicle owner." James Canterbury was named in an endorsement deleting the "use of other automobiles" insuring agreement as to James Canterbury. James obtained an operator's license limited to operation of the automobile described in the policy.

Kauffman accompanied James Canterbury in the described automobile. James Canterbury became intoxicated * * * and asleep or passed out. Kauffman told James Canterbury that he would drive home and received an unintelligible answer. Kauffman took the wheel and had driven about 200 yards when the automobile struck and injured Adkins.

Adkins recovered judgment against Kauffman and then brought action against the insurer, claiming that James Canterbury was the "named insured" and that Kauffman was covered as an omnibus insured having permission from James Canterbury. Earl Canterbury testified that Kauffman did not have his permission to drive the automobile. The insurer appealed from an adverse judgment. The Supreme Court of Appeals reversed and remanded holding (1) That Earl Canterbury and only he was the named insured, (2) That James Canterbury did not become a named insured by virtue of being named in an endorsement, nor (3) By virtue of the act, nor (4) By virtue of having paid for the car and (5) That, therefore, the actual use of the automobile was

without the permission of the named insured since (6) Earl Canterbury's testimony to that effect was undisputed.

In the case of *Ireland* v. *Firemen's Fund Insurance Company* (1951), 115 N.Y. Supp. 2d 762, affirmed without opinion (1) N. Y. 2d 655, 133 N.E. 2d 511, the facts were that Mary Stopera purchased an automobile. John Stopera, her husband, arranged for the insurance, informing the agent that the car was registered in his wife's name but would be used continuously by him and that the wife had no license and never drove the car. The policy provided "name of insured — Mary Stopera." The named insured is housewife, husband—chef, Thaxton Hospital," and "the purposes for which the automobile is to be used are pleasure and to work for husband." The agent told John Stopera that the policy would cover him and John paid the first year's premium on the policy which expired July 16, 1946.

On March 30, 1946, Mary Stopera died leaving no estate except the automobile, a bank deposit and savings bonds. No administrator was appointed. No notice of the death was given to the insurer or the agent. John Stopera continued to use the automobile and received a renewal certificate extending the policy for a year to July 16, 1947, and a bill for the renewal premium. The certificate and bill were in the name of Mary Stopera. In June, 1946, Stopera married again.

In September, 1946, the agent called to collect the premium, was informed of Mary's death, and was introduced to the second wife. The agent told Stopera the

policy was in force since the agent had paid the renewal premium out of his own pocket. Stopera asked to have the policy changed to his name and the agent said, "Yes, that will be all right." Stopera promised to pay the premium, "If I have the money."

While Stopera was driving the automobile on November 24, 1946, an accident occurred in which a man was killed. On November 25, 1946, the second wife paid the renewal premium to the agent without disclosing the facts of the accident. The agent receipted the bill which had been sent to Mary Stopera. On November 26, 1946, the agent called at the Stopera home and said that he had heard about the accident and that the policy was no good and put the $38.00 on the table.

The insurer refused to defend an action brought against Stopera for the death and default judgment was entered against Stopera. This action was then brought against the insurer by the judgment creditor. The Supreme Court entered judgment in favor of the insured dismissing the complaint and holding: (1) That by statute John Stopera became the sole owner of the automobile upon the death of his wife. (2) That where credit is given failure to pay the renewal premium is not a defense. (3) That there was no fraud vitiating the policy. (4) That Stopera was not a named insured even though he relied on the agent's representation that the policy covered him personally, and (5) That the policy as written did not cover Stopera at the time of the accident.

See also *Banker's Insurance Company of Pennsylvania* v. *Griffin,* So. Car. 1964, 137 S.E. 2d 785, holding that in order to qualify for automatic coverage the newly acquired automobile must be one the ownership of which is acquired by the named insured.

In the case of *Hinton* v. *Carmody,* et al., Washington, 1936, 60 P. 2d 1108, Robert P. Kauffman purchased a vehicle, he being 20 years and 9 months old. His father, P. C. Kauffman, took out and paid for the insurance policy in question. The father signed the conditional bill of sale for the reason that his son was under 21 years of age. The minor son loaned the car to a third person who was involved in an accident. The policy contained a provision in it that permission to drive could only be given by the named insureds or adults living in the same house. A third party injured in the accident secured a judgment against the driver who was driving with the permission of the minor son and sought to recover against the insurance company contending that Robert Kauffman, the owner of the car, was in legal effect a named insured under the policy. The court held that the contract of insurance could not be so extended. The son was not a named insured and insofar as the appellant is concerned, the terms of the policy could not be enlarged for appellant's benefit in the manner suggested.

In the case of *American Indemnity Company, Appellant,* v. *C. E. Davis, et al., Appellees,* U. S. Court of Appeals, 5th Cir., 260 F. 2d 440, where a liability policy provided coverage for an automobile "ownership of which is acquired by the named insured, the quoted

term comprehended the qualified terms 'sole and joint ownership' and the acquisition of a vehicle by both the father and son in their joint names as a replacement automobile qualified within the policy as ownership of a vehicle acquired by the named insured." The court said:

> We must determine whether the words 'an automobile ownership of which is acquired by the named insured' given the literal meaning and the usual significance, can comprehend anything other than sole ownership as to the replacement automobile. Appellant directs its argument principally to the proposition that the term *'named insured' is not ambiguous. To this we agree, as did the able trial court.* This, however, does not answer the question. Whatever is meant by 'ownership' all agree it must have been acquired by C. E. Davis. Here the question is: Does joint ownership of C. E. Davis and his son, Jackie, qualify as 'ownership.' Since ownership in its literal sense includes joint as well as sole 'belonging,' the use of the more general term 'ownership' comprehends the qualified terms 'sole' and 'joint' ownership. The term is ambiguous, and thus by the authority of the Georgia cases cited by appellant himself the construction placed on the phrase by the trial court must be affirmed. (Emphasis supplied.)

An insurable interest in the property covered by liability insurance is usually not required, in the same sense as in the property insurance, since the risk insured against is not based on ownership of property but upon loss and injury caused by its use for which the insured might be liable §4253 Appleman, Vol. 7, Page 11.

See *Osborne v. Security Insurance Company, et al.*, 318 P. 2d 94 Calif., Dec., 1957. Where a mother gave automobile to her minor son but obligated herself to pay for it and signed the son's application for his driver's license. She has an insurable interest and, therefore, the liability policy issued to the mother as named insured was valid, though covering the son's automobile and coverage was afforded where the mother gave permission for use of vehicle to another, under a provision of the policy covering as insured anyone driving vehicle with consent of named insured.

The claimed insured bears the burden of proof, of bringing himself within the provisions pertaining to extended insurance. §4292, Appleman, Vol. 7, Page 83, citing *Sheeren* v. *Gulf Insurance Co.*, La. 174 So. 380.

The obligation of a liability insurer has been held to be contractual and is determined by the terms of the policy. The intention of the parties as to the coverage is determined by the words they have used. A liability policy covers all losses for which the insured is legally liable which are fairly within the terms of the policy, but it cannot be extended to liabilities or losses which are neither expressly nor impliedly within its terms. Section 4254 Appleman, Vol. 7, Page 12.

CONCLUSIONS

The 1958 Chevrolet purchased by Raymond Donald Robertson did not qualify as a temporary substitute automobile nor as a newly acquired automobile under the

insurance contract issued to Loyd J. and June Robertson and the coverage of the insurance company did not, therefore, extend to the accident out of which the plaintiffs received their injuries. The judgment of the trial court should, therefore, be reversed and judgment entered in favor of the defendant garnishee insurance company.

Respectfully submitted,

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