

1968

Diamond T Utah, Inc., A Utah Corporation v.
Travelers Indemnity Company, Pacific Finance, Inc.,
A Cor-Poration Authorized To Do Business In The
State Of Utah : Brief of Appellant

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IN THE SUPREME COURT
of the STATE OF UTAH

DIAMOND T UTAH, INC.,
corporation,

Plaintiff,

vs.

TRAVELERS INDEMNITY COM-
PANY, a corporation,
do business in the State of Utah,
PACIFIC FINANCE COR-
poration authorized to do business
in the State of Utah,

Appeal from a Judgment of the

Circuit Court of the

Honorable

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IN THE SUPREME COURT
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STATE OF UTAH

DIAMOND T UTAH, INC., a Utah
corporation,

Plaintiff-Appellant,

vs.

TRAVELERS INDEMNITY COM-
PANY, a corporation authorized to
do business in the State of Utah,
PACIFIC FINANCE, INC., a cor-
poration authorized to do business
in the State of Utah,

Defendant-Respondents.

Case No.
10951

BRIEF OF APPELLANT

STATEMENT OF KIND OF CASE

Appellant Diamond T Utah, Inc., who is a dealer in new and used motor trucks, brought an action against Respondent Pacific Finance Corporation, hereinafter called Pacific, who financed the sale of appellant's trucks and in the alternative against Respondent Travelers Indemnity Company, hereinafter called Travelers, who was appellant's insurance carrier, for the value of a truck and trailer that had been sold on a conditional sales contract and then repossessed and then stolen back by the purchaser and subsequently wrecked.

DISPOSITION IN LOWER COURT

At the pretrial, both respondents made a motion to dismiss and the appellant made a motion for a summary judgment. It was stipulated by the parties that the amended and second amended complaint and the answer of the respondents would comprise the issues. However, there might be a dispute on the facts which are detailed in the amended and second amended complaint. The deposition of Oral J. Wilkinson was ordered, published and it purportedly contained all agreements upon which the appellant relies for recovery together with all other agreements which Pacific has in their possession pertaining to this matter and others which the appellant might find through discovery.

The appellant further contends that as far as Pacific is concerned that the past dealings and past conduct on the part of both the appellant and Pacific will have some effect on construing the agreements in question.

The parties submitted written briefs and after arguing the matter the court granted both Travelers and Pacific's motion to dismiss. (R. 39, 56, 94, 37.)

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the trial courts judgment granting the respondents' motion to dismiss and the granting of appellant's motion for a summary judgment against Travelers or in the alternative against Pacific.

STATEMENT OF FACTS

Diamond T Utah, Inc., purchased from Travelers

an insurance policy the date of issue of which was January 19, 1961. This insurance policy provides for the payment of the actual cash value of loss due to collision or upset less \$250.00 deductible. It also provides that they will pay for loss or damage to the automobiles caused by theft, larceny, robbery, or pilferage. The property to be covered by the insurance is set forth in the insurance contract in the Endorsement No. 4124B:

It is agreed that such insurance as is afforded by the policy applies subject to the following provisions: 1. Property Covered - The policy covers automobiles (a) consigned to or owned by the insured and held for sale or used in the insured's business as an automobile dealer including repair service or as demonstrators, exclusive of automobiles leased or rented to others, and automobiles sold by the insured under bailment lease, conditional sale, purchase agreement, mortgage or other encumbrance; (b) held by the insured pending delivery after sale, except as to loss for which the interest of the purchaser is covered by insurance. Automobiles consigned to or owned by the insured which are subject to a trust agreement, bailment lease, conditional sale, purchase agreement, mortgage or other encumbrances are not covered hereunder unless specifically indicated below:

Interests and Automobiles Included

	New Automobiles	Used Automobiles
Insured's interest only	NO	YES
Insured's interest and lien— holder's interest subject to loss payable clause	NO	NO
Consigned automobiles subject to loss payable clause	NO	NO

When the policy does not cover all interests, the company shall not be liable for a greater proportion of any loss than the amount the interest covered bears to the value of such automobile at the time of loss.

The Appellant on the 23rd day of January, 1961, sold to one David Scott a 1952 Brown with Tranicold Van Trailer and a 1953 white freight liner tractor, both used. This sale was made under a conditional sales contract which provides first that the title of said property shall not pass to the purchaser until all of the sums due under the contract are fully paid in cash and further provides that seller may take immediate possession of said property without demand if the purchaser defaults in complying with any of the terms of the agreement. The contract also provides on the back thereof for the assignment of the agreement to Pacific, and in the assignment to Pacific is found the following language:

“ . . . I agree that if the assignee shall repossess said property for failure of the purchaser to perform any of the conditions of said contract, and shall deliver said property to my place of business within ninety (90) days after the due date of the oldest unpaid installment (excluding pickup payments and time property required to be held for legal sale, where required by state law) per contract, I will pay the balance remaining under said contract within thirty (30) days after delivery, or on demand at election of assignee; but no such delivery shall be required to be made to me if at the time of such repossession I am no longer in

the automobile business or am deemed by the assignee to be an unsafe risk, in either of which events the assignee shall have full right to sell such property as provided in said contract and I will upon demand pay to the assignee all sums provided in said contract to be paid by the purchaser after sale. Should the automobile be repossessed solely as the result of one accidental collision of overturning, then I shall be relieved of my liability hereunder up to the amount of the cost of repairing the damage done by said collision or overturning only, not to exceed, however, the sound value of the property at the time of collision or overturning. I understand that title to said property remains in the assignee until the contract balance shall be fully paid, and I agree that in the event of my failure to pay the amounts herein agreed to be paid in the event of delivery of said property to my place of business, or in the event I am deemed by the assignee to be an unsafe risk, then in either event the assigns may take possession and make sale of the said property as in the contract provided. . . .

On March 4, 1958, Diamond T Utah Inc., signed a continuing unconditional guarantee agreement and agreement to furnish insurance and agreement to furnish ownership certificate. The continuing unconditional guarantee agreement provides that "I guarantee and will pay assignee or holder upon demand all amounts due and to become due by the terms of said contract . . ." The agreement to furnish insurance provides that appellant agrees where Respondent Pacific does not directly order the insurance coverage that appellant will provide the coverage for the terms of the contract and in the event of a

loss occurring due to failure to have such coverage, appellant agrees to repurchase the contract for the net unpaid balance. Copies of all of these agreements are attached to the deposition of Mr. Oral J. Wilkinson.

David Scott failed to make payments on the conditional sales contract and let his insurance lapse; on the 16th day of June, 1961, the trailer and tractor were repossessed by Pacific at Madison, Wisconsin, and was taken to the Chief Auto Parts Body Shop at 1208 East Broadway, Madison, Wisconsin, where it was parked, locked, and left. Later the purchaser found the truck and trailer, gained possession of same, drove it away and some time later totally wrecked it. Thereafter, appellant placed a claim with Travelers to recover for the loss of the truck and trailer. Also thereafter, Pacific deducted monies from the appellant held by them in reserve to cover the amount due under the contract.

STATEMENT OF POINTS

POINT I

UNDER THE TERMS OF THE CONTRACTUAL AGREEMENT AND THE CONDUCT OF THE PARTIES, PACIFIC FINANCE, INC., IS LIABLE FOR THE LOSS OF THE TRUCK AND TRAILER.

POINT II

DIAMOND T UTAH, INC., HAD AN INSURABLE INTEREST IN THE UNIT SOLD UNDER THE CONDITIONAL SALES CONTRACT, THEREFORE, UNDER THE TERMS OF THE POLICY, TRAVELERS INDEMNITY COMPANY IS LIABLE FOR THE LOSS OF THE TRUCK AND TRAILER.

POINT III

ASSUMING THE POLICY EXCLUDED THE TRUCK UNDER THE CONDITIONAL SALES CONTRACT THEN THE POLICY WAS SUSPENDED DURING THE TERM OF THE CONDITION BUT WHEN THE TRUCK WAS REPOSSESSED, THE CONDITION NO LONGER EXISTED AND THE POLICY WAS REINSTATED AND TRAVELERS INDEMNITY COMPANY WOULD BE LIABLE FOR THE LOSS OF THE TRUCK AND TRAILER.

ARGUMENT

POINT I

UNDER THE TERMS OF THE CONTRACTUAL AGREEMENT AND THE CONDUCT OF THE PARTIES, PACIFIC FINANCE, INC., IS LIABLE FOR THE LOSS OF THE TRUCK AND TRAILER.

There are two contracts between the Appellant and Pacific. One contract is called an Unconditional Guarantee Contract. The other contract referred to is an Assignment and Repurchase Agreement. The Unconditional Guarantee Contract provides for full recourse against the Appellant in any and all circumstances. The Assignment and Repurchase Agreement provides that in order for Pacific to recover against the appellant when they repossess a vehicle, that they must deliver the property to the appellant within ninety (90) days after due date of the oldest unpaid installment. There is then a substantial uncertainty, indefiniteness and ambiguity as to which contract the parties should be bound to. Pacific has by past conduct always repossessed vehicles for the appellant when the contracts were in default and returned the vehicles to appellant before demanding recourse on their

contract. In the instant case, Pacific repossessed the vehicle, however, they were unable to return the vehicle because of the fact that it was stolen.

The doctrine of practical construction provides that where the contracting parties demonstrate by their actions that they know what the words mean in the contracts governing them, the meaning and intent of the parties should be enforced. This rule can also be invoked when the contract is unambiguous as far as the words are concerned, if there is ambiguity between the wording and the actions of the parties to the contract. This court in *Hardinge Company, Inc. v. Eimco Corp.* 266 P.2d 494, 4 Utah 2d 320 stated:

Further, in the interpretation of the contracts, the interpretation given by the parties themselves as shown by their acts will be adopted by the court.

In *Bullough v. Smis*, 16 Utah 2d 304, 400 P.2d 20, the reasoning of the court as set forth in the headnote:

Doctrine of practical construction by which conduct of parties is evidence of agreement is unavailable when contract is unambiguous but conduct of parties and an apparent conflict with requirements of agreement may create ambiguity required to bring doctrine into operation.

In this case, the court quotes *Hodges Irrigation Co. v. Swan Creek Canal Co.*, 111 Utah 405, 181 P.2d 217,

To warrant the court in according great weight to, or adopting, a practical construction by the parties, it is necessary and sufficient that each party shall have placed the same construction on the contract. While the construction placed by one party on his own language in a contract is the highest evidence of his own intention, the meaning

of the contract cannot be established by the construction placed on it by one of the parties unless such interpretation has been made to and relied on by the other party, or has been known to and acquiesced in by the other party, . . .

Also quoted is the case of *Crestview Cemetary Association v. Diedon*, 54 California 2d 744, 356 P.2d 171,

This rule of practical construction is predicated on the common sense concept that 'actions speak louder than words.' Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the court should enforce their interest.

Appellants correctly claim that this doctrine of practical construction can only be applied when the contract is ambiguous, and cannot be used when the contract is unambiguous. That is undoubtedly a correct general statement of the law. But the question involved in such cases is ambiguity to whom. Words frequently mean different things to different people. Here the contracting parties demonstrated by their actions that they knew what the words meant and were intended to mean. Thus, even if it be assumed that the words standing alone might mean one thing to the members of this court, where the parties have demonstrated by their actions and performance that to them the contract meant something quite different, the meaning and intent of the parties should be enforced. In such a situation the parties by their actions have created the 'ambiguity' required to bring the rule into operation. If this were not the rule the courts would be enforcing one contract when both parties have demonstrated that they meant and intended the contract to be quite different.

If Pacific had meant the unconditional guarantee contract to be the contract that would govern the relations of the parties hereto, there would be no obligation to repossess, but the course of action of both parties has been to have Pacific repossess the vehicles and return the possession to appellant prior to charging appellant under the recourse agreement, and this conduct would mean that the parties themselves in interpreting their own contracts meant the assignment and repurchase agreement to be the operating agreement.

POINT II

DIAMOND T UTAH, INC., HAD AN INSURABLE INTEREST IN THE UNIT SOLD UNDER THE CONDITIONAL SALES CONTRACT, THEREFORE, UNDER THE TERMS OF THE POLICY, TRAVELERS INDEMNITY COMPANY IS LIABLE FOR THE LOSS OF THE TRUCK AND TRAILER.

If it is determined as a matter of law that the unconditional guarantee contract takes precedence over the assignment and repurchase agreement, then the appellant is held under such contract liable to Pacific, under a one hundred (100%) percent recourse arrangement for any loss to any trucks that are repossessed by the appellant. This brings up the question then of whether or not the insurance policy covers a vehicle that has been returned to the possession of the appellant after being sold under a conditional sales contract. For the possession of Pacific would be the possession of the appellant for when they repossessed the truck, they did so as the agent of the appellant. The insurance contract itself provides that the insured's interest will be insured on used automobiles

even though it might have been sold under a conditional sales contract if the insured has an interest even if the conditional sales contract is in force. But in this case, the conditional sales contract had been rescinded by the repossession by appellant of the vehicle. See Williston on Sales, Volume 3, page 227, Section 579(b). The rule is well settled that though a change of possession may render a policy unenforceable during the time that the possession is changed, if the possession is returned to the policy holder, though not enforceable up to that time, then said policy is in force as it was before the change occurred. See *Germania Fire Insurance Company v. Turley*, 167 Ky. 57, 179 SW 1059, *Home Fire Insurance Company v. Chowning*, 192 Ky. 327, 233 SW 731. Therefore, the policy would cover the insured's interest in the used vehicle notwithstanding the fact that it had been sold under a conditional sales contract. That leaves the question as to whether or not the appellant has an insurable interest and the law in regard to this is well settled that as long as the insured has an interest where he could stand to lose monetarily, that loss is an insurable interest and particularly this is true wherein as in this case, there is a one hundred (100%) percent recourse arrangement. See paragraph 21 and 22, *Sunderlin on automobile insurance*. *Union Insurance Society of Canton v. Sudduth*, 103 So. 845, *Hassett v. Pennsylvania Fire Insurance Company*, 273 P. 745, *Pratt v. Hanover Fire Insurance Company*, 146 A. 763, *Fountain v. Importers and Exporters Insurance Company of New York*, 252 NW 569, *Fish v. Connecticut Fire Insurance Company*, 5 NW 2d 779, 8 ALR 2d 1426.

The general rule is also well established that insurance contracts should be interpreted if at all possible in favor of the insured against the insurer, generally on the grounds that the insurer prepares the contract and it is better policy to have the coverage intended. See Section 624 and 625, Williston on contracts, 3rd Edition, Volume 4. Also Corbin on contracts, Section 547, Volume 3, page 176. See *Tucker v. New York Life Insurance Company*, 107 Utah 478, 155 P.2d 173, *Stout v. Washington Fire and Marine Insurance Company*, 14 Utah 2d 414, 385 P.2d 608. Also see Appleman Insurance Law and Practice, Volume 13, paragraph 7401.

POINT III

ASSUMING THE POLICY EXCLUDED THE TRUCK UNDER THE CONDITIONAL SALES CONTRACT THEN THE POLICY WAS SUSPENDED DURING THE TERM OF THE CONDITION BUT WHEN THE TRUCK WAS REPOSSESSED, THE CONDITION NO LONGER EXISTED AND THE POLICY WAS REINSTATED AND TRAVELERS INDEMNITY COMPANY WOULD BE LIABLE FOR THE LOSS OF THE TRUCK AND TRAILER.

At the time the unit was sold and the contract was subsequently sold to Pacific, the purchaser had an insurance policy of his own insuring his interest as a conditional purchaser, but during the course of the contract, the policy expired. Pacific having complete control of the contract at that time had a duty to see that the insurance was kept in force for the conditional sales contract specifically provides that the seller has the right to place a policy of insurance on the vehicle and Pacific stood in the place of the seller having purchased the contract. This

Pacific has done in past transactions, but failed to do here. Appellant has signed an agreement to furnish insurance and they fulfilled this agreement by their policy with travelers which insured their interest. The question arises, if the purchaser had had a policy at the time of the accident, would his company have paid off after Pacific elected to consider the contract in default and the unit had actually been repossessed and then the purchaser illegally took possession of it. It would appear to be outside of his policy and under the policy of the Appellant.

Travelers in their Answer (R. 5) and Memorandum of Authorities (R. 101) makes a big fuss about an alienation clause in the insurance policy which excludes trucks sold under a conditional sales contract. The question arises to to what would be the effect if the property is sold and then regained by the insured prior to a loss which of course are the facts of this case. It has been held by the great weight of authority that a conditional sale of insured property is not an alienation but merely suspends the risk during the existence of the condition and re-acquiring of the property by the seller upon the failure of the condition revives the risk and entitles the seller to all rights possessed by him before the property was transferred. See 8 Couch on Insurance, Second Edition, Sections 37:1075, 37:1063.

In the case of *Cottingham v. Maryland Motor Car Insurance Company*, 168 N C259, 84 SE 274, the Court reasoned that the general rule from the weight of authorities was that the violation of a condition in a policy that which works a forfeiture merely suspends the insurance during the violation and if the violation is discontinued,

and does not exist at the time of a loss, the policy revives and the insurance company is liable. See 52 ALR 844, *Atlas Assurance Company Ltd. v. Cottam*, 11 SW2d 427.

CONCLUSION

In interpreting the contracts either Pacific is the owner and responsible for the vehicle at the time of the loss or the appellant is the owner. If Pacific has the ownership interest when the vehicle was stolen, then they are responsible under the terms of the repurchase agreement requiring them to return the vehicle to appellant prior to any liability to them from appellant. If the appellant has the ownership interest then the vehicle is covered by the insurance policy with the Travelers which covers the loss of used vehicles owned by them and in that event Travelers is responsible for the loss.

Even if the clause in the policy did exclude vehicles sold under conditional sales contracts, then the coverage would have been suspended during the condition, but when the vehicles were repossessed, the policy would be reinstated. But in *no* event can the appellant be held responsible for the loss of the vehicle.

Respectfuly submitted,

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