1983

Guaranty National Insurance Company v. Occidental Fire And Casualty Company : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

- -

GUARANTY NATIONAL
INSURANCE COMPANY,

Plaintiff-
Respondent,

vs. No. 18964

OCCIDENTAL FIRE AND
CASUALTY COMPANY,

Defendant-
Appellant.

- -

BRIEF OF APPELLANT

- -

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable Philip R. Fishler

- -

David H. Epperson
HANSON, RUSSON & DUNN
175 South West Temple, #650
Salt Lake City, Utah 84101

Attorneys for Respondent

David W. Slagle
SNOW, CHRISTENSEN & MARTINEAU
P. O. Box 3000
Salt Lake City, Utah 84111

Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

- -

GUARANTY NATIONAL
INSURANCE COMPANY,

Plaintiff-
Respondent,

vs. No. 18964

OCCIDENTAL FIRE AND
CASUALTY COMPANY,

Defendant-
Appellant.

- -

BRIEF OF APPELLANT

- -

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable Philip R. Fishler

- -

David H. Epperson
HANSON, RUSSON & DUNN
175 South West Temple, #650
Salt Lake City, Utah 84101

Attorneys for Respondent

David W. Slagle
SNOW, CHRISTENSEN & MARTINEAU
P. O. Box 3000
Salt Lake City, Utah 84111

Attorneys for Appellant

TABLE OF CONTENTS

CASES CITED

CASES CITED (CONT.) Page

IN THE SUPREME COURT OF THE STATE OF UTAH

- -

GUARANTY NATIONAL
INSURANCE COMPANY,

Plaintiff-
Respondent,

No. 18964

vs.

OCCIDENTAL FIRE AND
CASUALTY COMPANY,

Defendant-
Appellant.

- -

BRIEF OF APPELLANT

- -

NATURE OF THE CASE

This is an action for declaratory judgment based on an alleged overpayment of a settlement for personal injuries arising out of an automobile-truck accident. The original personal injury lawsuit was settled by the parties to this action, and then the plaintiff filed a declaratory judgment action seeking a determination of the respective rights of the two insurance carriers.

DISPOSITION IN THE LOWER COURT

Both the plaintiff and the defendant filed Motions for Summary Judgment based on stipulated facts. The Third Judicial District Court granted plaintiff's Motion and

denied defendant's Motion.

RELIEF SOUGHT ON APPEAL

Defendant, Occidental Fire and Casualty Company, seeks a reversal of the lower court judgment and a determination that the plaintiff is the primary insurance carrier.

STATEMENT OF FACTS

On July 17, 1978, DeLoy Bisel was driving his 1977 International tractor and collided with an automobile being driven by Brenda M. Howcroft. As a result of the collision, Brenda Howcroft, Lisa Howcroft and Karen Howcroft all sustained serious personal injuries. The Howcrofts initiated a lawsuit in the Third Judicial District Court and sought damages for these personal injuries in excess of $800,000.

At the time of the collision, Mr. Bisel was operating his truck under a Hauling Contract for Norwood Transportation, Inc. (R. 91-92.) Also, at the time of the accident, Bisel had a policy of insurance covering the truck with Occidental Fire and Casualty Company, the appellant herein (hereinafter designated "Occidental.") (R. 57-58.)

At the same time, Norwood Transportation, Inc., had a policy of insurance with Guaranty National Insurance Company, the plaintiff-respondent herein (hereinafter

designated "Guaranty." (R. 58.)

The personal injury lawsuit filed by the Howcrofts was finally terminated by settlement for the sum of $150,000. One Hundred Thousand Dollars of that amount was paid by Guaranty, and $50,000 was paid by Occidental. Guaranty paid its policy limits under protest, taking the position that it was the excess carrier to Occidental. Occidental, of course, took the position that Guaranty was primary and that Occidental's policy was excess. (R. 59.)

Hauling Contract

The agreement which was in effect at the time of the accident between Bisel and Norwood Transportation, Inc., is set forth in its entirety at pages 91-92 of the record. There are two paragraphs in the contract which are of some import in this case:

> 12. Contractor hereby indemnifies and saves harmless the company from any loss or liability for damages of every description arising out of the operation of the equipment herein described beyond the terms and conditions of this contract. (Emphasis added.)
>
> 13. Company agrees to assume full responsibility for liability to the public arising out of the operation of the equipment leased hereby, during the period the equipment is operated in accordance with the terms and conditions of this contract.

Under paragraph 6 of the Stipulation of Facts, there is no question but that DeLoy Bisel was operating his tractor under the terms of the Hauling Contract at the time of the accident. (R. 58.)

The Occidental Policy

The Occidental policy which was in effect at the time of the accident issued to DeLoy Bisel had a "Long Haul Truckman" endorsement. The endorsement provided, among other things:

> With respect to any automobile of the commercial type while leased or loaned to any person or organization, other than the named insured, engaged in the business of transporting property by automobile for others, or any other hired private passenger automobile insured on the "cost of hire" basis, or any non-owned automobile, this insurance shall be excess insurance over any other valid and collectible insurance. (R. 67.)

The Guaranty Policy

The Guaranty policy, which covered Norwood Transportation, Inc., at the time of the accident certified that Public Service Commission filings had been made in the States of Utah, Wyoming, Colorado, Oregon, and Montana, and that a filing was made with the Interstate Commerce Commission. (R. 76.)

In addition, the Guarantee policy had a "Truckman" endorsement which provided, in part:

> With respect to (1) any automobile of the commercial type while leased or loaned to any person or organization, other than the named insured engaged in the business of transporting property by automobile for others, or (2) any hired private passenger automobile, or (3) any non-owned automobile, the insurance under this endorsement shall be excess insurance over any other valid and collectible insurance, whether

primary, excess or contingent, available to the insured. Otherwise, the insurance under this endorsement is primary coverage. (R. 83.)

The policy issued by Guaranty to Norwood Transportation provided for payment of premiums based on the mileage of the entire fleet of Norwood Transportation. There was not a schedule of specific trucks or vehicles set forth in the Guaranty policy. (R. 88.)

ARGUMENT

THE GUARANTY POLICY IS PRIMARY AND THE OCCIDENTAL POLICY IS EXCESS. THE LOWER COURT ERRED IN HOLDING TO THE CONTRARY.

We are thus faced with two policies which cover the accident and provide indemnity for the tort liability of Mr. Bisel and Norwood Transportation, Inc. Both policies contain excess clauses applicable in the event there is other valid, collectible insurance. The Occidental policy contains a specific excess provision in the Long Haul Truckman endorsement, applicable where the insured vehicle is used under lease to a motor carrier. The Guaranty policy in this case is issued and certified pursuant to Federal regulations and state regulations which require the licensed common carrier to provide proof of financial responsibility by insurance or otherwise and to certify the existence of such insurance by filing a certificate with the ICC.

The appellant has found no Utah cases precisely in point. There are two distinct lines of authority. Some of

the cases disregard the fact that filings had been made with the ICC and/or Public Service Commission certifying insurance and decide that the policy written on the specific vehicle is primary. See, e.g., Carolina Casualty Insurance Company v. Insurance Company of North America, 595 F.2d 128 (Third Cir. 1979); Carolina Casualty Insurance Company v. Transport Indemnity Company, 488 F.2d 790 (10th Cir. 1973).

The appellant submits, however, that the better reasoned line of authority reaches the opposite result. In a decision rendered by the Supreme Court of Arizona on September 30, 1982, which had not been published when this case was argued to lower court on August 12, 1982, the issues are discussed in detail. Transport Indemnity Co. v. Carolina Casualty Co., 652 P.2d 134 (Ariz. 1982). In that case, the Arizona Supreme Court discussed all of the issues involved, including the specific language of the two policies. It specifically rejected the holding in the Tenth Circuit opinion of Carolina Casualty v. Transport Indemnity, supra, because in that case both insurance carriers had filed ICC certification. The Court then went on to point out that although both policies had specific excess clauses, the policy covering the lessee (in this case Guaranty) was rendered unenforceable by virtue of the provisions of the Interstate Commerce Act and the regulations that were enacted thereunder. Transport Indemnity Co. v. Carolina Casualty

Insurance, 652 P.2d at 139. See also, Argonaut Insurance Co. v. National Indemnity Co., 435 F.2d 718 (10th Cir. 1971); Hagans v. Glens Falls Insurance Co., 465 F.2d 1249 (10th Cir. 1972).

Anticipating that Guaranty will argue that the ICC endorsement and the language in the Hauling Contract are only effective with regard to disputes between the shipper and members of the general public who are injured, and that insurers are free between themselves to contract for allocation of the risk, Occidental still submits that, at most, its policy extends only excess coverage for any accident which occurs while the described vehicle is leased to a common carrier. This is the very reason, in fact, for the excess provision in the Long Haul Truckman's endorsement. See Transport Indemnity Co. v. Home Indemnity Co., 535 F.2d 232 (3rd Cir. 1976). Further, appellant contends that the Court cannot disregard the provisions of Federal law and that the ICC filing mandates that the Guarantee policy be primary. Truck Insurance Exchange v. Transport Indemnity Co., 180 Mont. 419, at 432, 591 P.2d 188, at 195 (1979).

In the final part of its analysis, the Arizona Supreme Court held that even if the ICC endorsement had not been present in the policy provided to the lessee, it would be compelled to decide the issue exactly the same based on its interpretation of the Interstate Commerce Act. It

said:

> The intent of Congress was not just to provide assurance that the claims of shippers and injured members of the public would ultimately be paid. The intent was to permit the ICC to abolish and regulate a wide range of practices which had come into existence in the trucking industry "by imposing 'responsibility-and-control' regulations governing the regulation of non-owned vehicles." . . .
>
> Thus, we disagree with the concept that all loss allocations between private parties are permissible so long as they do not directly prevent compensation to the public. In some cases private regulations respecting loss allegation do not significantly intrude in the Federal regulatory scheme and are permissible. . . . However, in all cases the Federal policy must be considered paramount and affects the interpretation and construction to be given the contractual agreements. We believe here that Federal policy does affect the determination of primary and excess status between carriers regardless of the presence or absence of the ICC clause physically attached to the policy.
>
> First, given the fact that the Congressional Act imposes direct liability on the lessee and given further that the lessee's insurance policy is proof of the lessee's financial responsibility for that very liability, we believe that the purposes which Congress and the ICC intended to accomplish in regulating the trip lease problem are better served if the lessee's insurance is considered "responsible for primary coverage, both as a matter of law and of public policy." Transport Indemnity Co. v. Carolina Casualty Insurance, 652 P.2d at 143-44.

The respondent, Guaranty, respectfully suggests that requiring primary coverage from the lessee's carrier has the effect of establishing a uniform rule fixing

primary financial responsibility for defense and payment of claims in all cases involving trip leases. This policy would have the effect of aiding in the disposition of claims without delays resulting from litigation between the insurers in order to determine which of them is to provide primary coverage and which is excess coverage.

CONCLUSION

The appellant recognizes that there are two distinct lines of authority deciding the issues presented in this case. Although there are no Utah cases precisely in point, the most recent, and the best reasoned of the cases deciding these issues holds that the insurance carrier providing coverage to the lessee is primary and that the insurance carrier providing coverage to the lessor is excess. For these reasons, it is respectfully submitted that the lower court's decision should be reversed, and that judgment should be entered in favor of the appellant and against the respondent, finding that the respondent is the primary insurance carrier and appellant is excess.

Submitted this ____ day of April, 1983.

SNOW, CHRISTENSEN & MARTINEAU

By _____
David W. Slagle
Attorneys for Appellant

MAILING CERTIFICATE

This is to certify that a true and correct copy of the foregoing Brief of Appellant was mailed, postage prepaid, to David H.Epprson, Esq., attorney for plaintiff-respondent, 650 Clark Leaming Office Center, 175 South West Temple, Salt Lake City, Utah 84101.
