1965

P. E. Ashton Company v. Russell J. Joyner v. United Pacific Insurance Company : Respondent's Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

P. E. ASHTON COMPANY,
Plaintiff,

vs.

RUSSELL J. JOYNER,
Defendant and Third Party Plaintiff and Appellant,

vs.

UNITED PACIFIC INSURANCE COMPANY,
Third Party Defendant and Respondent.

Case No. 10254

RESPONDENT'S BRIEF

Appeal From The Judgment Of The
Fourth District Court For Utah County
Hon. R. L. Tuckett, Judge

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TABLE OF CONTENTS

CASES CITED

OTHER AUTHORITIES CITED

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STATEMENT OF THE NATURE OF THE CASE

This is an action by the Third Party Plaintiff against the Third Party Defendant, Insurance Company, to create a new and entirely different insurance policy than the one for which the Third Party Plaintiff paid a premium.

DISPOSITION IN THE LOWER COURT

The trial court entered judgment in favor of the Third Party Defendant and against the Third Party Plaintiff. In particular the trial court found that by the terms of the insurance policy, insurance coverage was not found to exist when the vehicle in question was being operated by a person other than

Rosalie Joyner under the age of twenty-five years.

And second, the trial court found the Third Party Defendant did not waive it's right to assert the defense of non-coverage and was not barred by the doctrine of estoppel to assert this defense.

RELIEF SOUGHT ON APPEAL

The respondent wants the judgment of the lower court affirmed.

STATEMENT OF MATERIAL FACTS

The appellant's Statement of Facts is not complete, and it is also incorrect in some detail. Policy No. ACR 65992 issued by the United Pacific Insurance Company to the Third Party Plaintiff, in effect from November 18, 1961 to November 18, 1962 affords coverage for Bodily Injury Liability, Coverage A; Property Damage Liability, Coverage B; Automobile Medical Payments, Coverage C; Comprehensive Coverage, Coverage E; and Collision Coverage, $100 deductible, Coverage F (R 21). No coverage was afforded under Coverage D for Fire and Theft, and no separate premium was paid for this item (R 21). Coverage E, the Comprehensive Coverage, is the coverage most favorable to the Third Party Plaintiff and Appellant. The respondent concedes that except for Endorsement 1, coverage would have been afforded to the Third Party Plaintiff and Appellant under Coverage E.

Endorsement No. 1 reads as follows:

> "Driver Exclusion — It is agreed that no insurance is afforded the named insured, any

other insured, person, organization, firm or corporation by or under any provision of the policy or of any endorsement attached thereto or issued to form a part thereof while any automobile covered by the policy is being operated, maintained or used by or under the control of any driver under the age of twenty-five (25), other than Rosalie Joyner."

The appellant in his Brief, Page 4, concedes that at the time the loss in question occurred, the vehicle insured was being operated by one Jimmy Joyner, age 13 years.

The respondent did not negotiate with the P. E. Ashton Company relative to the repair of the appellant's vehicle. Neal Kershner, the body shop foreman for the plaintiff, (Tr. 10) testified that in the latter part of 1962 he had a conversation with Mr. Joyner with respect to repairs of the 1958 Dodge Truck (Tr. 10). He said at that time the truck was in their yard and that relative to repairing it he talked to a Mr. Green. He knew at that time Mr. Green was an adjuster for the Independent Auto Damage Appraisers of Salt Lake City. Further, Mr. Kershner said (Tr. 19) that he never talked to Mr. Kind, the adjuster, until after the vehicle of the Third Party Plaintiff was repaired. Further, Mr. Kershner said at the time he repaired the car (Tr. 19) that they did not talk to anyone but claims the estimate was alright and that he could proceed to repair the automobile of Mr. Joyner. And in particular, (Tr. 19) Mr. Kershner said that he understood in talking to Mr. Green the estimate was okay

as far as the adjustor was concerned; not the Insurance Company. Mr. Kershner (R 25) testified that the first conversation with Mr. Kind relative to the repair of the vehicle was in June or July of the year following the repair of the vehicle or 1963. Mr. Kershner said that he had no conversation with Mr. Kind or anyone else authorizing him to go ahead with repairs on the vehicle, (Tr. 26). Further, although it is not admitted that Mr. Bowen, the agent for Insurance Incorporated, had any authority to make adjustments, Mr. Kershner testified that Mr. Bowen did not tell him to repair the vehicle either. On cross-examination (Tr. 28) Mr. Kershner testified that he knew from his own custom and practice in the insurance industry that insurance companies don't authorize repairs of vehicles (Tr. 28). Mr. Kershner, (R 29) testified that the authorization to repair the vehicle had to come from the owner.

Mr. Joyner, Third Party Plaintiff, (Tr. 40) admitted that when Mr. Kind contacted him about the damage to the vehicle that Mr. Kind said the Insurance Company was definitely not going to pay the claim (Tr. 40).

ARGUMENT

POINT I

THE LOWER COURT CORRECTLY HELD THE APPELLANT WAS NOT INSURED AGAINST THE LOSS.

Endorsement No. 1 was attached to the policy at the time it was issued. Under Policy No. ACR 65992, it was agreed no insurance was afforded to

the appellant, the named insured, any other insured, person, organization, firm or corporation by or under *any provision* of the policy, or endorsement attached thereto or issued to form a part thereof for any automobile covered by the policy was being operated, maintained or used by, or under the control of any driver under the age of twenty-five, other than Rosalie Joyner.

There is no ambiguity in the insurance policy and respondent contends that to a person of ordinary intelligence and understanding, the wording of the endorsement was clear and certain and that in the usual and natural meaning, the endorsement excluded all coverage to the named insured while Russell Joyner, a thirteen-year old, was operating the vehicle.

It has long been the practice of the insurance industry for insurance companies to protect themselves against the carelessness and hazards involved of underaged drivers.

In 7 Appleman, Insurance Law and Practice, Sec. 4404, it is stated:

> "A provision that the insurer shall not be liable when the automobile is being driven by a person under the specified age is valid and binding upon the parties, and operation by a person below that age is not covered. The legal responsibility of his parents would not change the rule. *Nor would the result depend on the question of whether or not the owner knowingly permitted such a person to operate.*" (Emphasis added.)

In *State Farm Mutual Automobile Insurance Company vs. Coughran* (1927) 303 U.S. 485, 82 L. Ed. 970, the Supreme Court of the United States declared where the policy excluded coverage from the vehicle that was being operated by a driver underage, and where at the time of the accident a thirteen-year-old was operating a car, that a provision excluding coverage was enforceable, and reversed a judgment in favor of the plaintiff and directed a judgment be entered in favor of the Insurance Company of "No Cause of Action."

In *Mitzner vs. Fidelity & Casualty Company* (1927) 154 N.E. 881, 94 Ind. App. 362, where the policy excluded coverage where a vehicle was operated by one under the age of sixteen, and where admittedly the driver in the case was under the age of sixteen, the court said in holding in favor of the Insurance Company:

> "There is no doubt or ambiguity about the above clause; it is not open to construction; it is a part of the coverage of said policy, and as said automobile was, at the time of said accident, being driven by a person under the age of sixteen years, said policy did not afford such operation of said automobile; it was without the coverage of said policy; and there was no duty upon the insurance company to defend said damage suit nor is there any liability for the expenses thereof."

In *Hossley vs. Union Indemnity Company of New York*, (1925) 102 So. 561, 137 Miss. 537, where the policy provided that it should not cover an auto-

mobile driven by a person in violation of law as to age, or if there was no age limit, by a person under sixteen years, the court held the insurer was not liable for injuries resulting proximately by the automobile being driven by a person under sixteen years of age regardless of whether or not the owner agreed for such person to drive the car.

In *Helm vs. Inter-Insurance Exchange* (1945) 354 Mo. 935, 192 S.W. 2d 417, 167 A.L.R. 238, where the driver was fifteen years old at the time of the accident and where the policy excluded coverage if a driver was under the age of sixteen, the court held there was no liability and no coverage was afforded under the terms of the policy.

In 6 Blashfield Cyclopedia of Automobile Law & Practice, Section 3949, Blashfield states that express exemptions or exclusions from liability arising where the automobile was being operated by a person in violation as to the age of the driver are not repugnant to the statute provisions and are not void as against public policy.

United Pacific Insurance Company knows of no statute or case in this state ruling such an exclusion to be invalid or void as against public policy.

In case of doubt or ambiguity, it is correct to construe the insurance policy in favor of the insured and against the insuror. In this case, however, we have no ambiguity or doubt as to the meaning of Endorsement No. 1. The Insurance Company is

entitled to have the terms of their policy interpreted in their ordinary and popular sense.

In *State Farm Mutual Automobile Insurance Company vs. Shaffer* (1959) 250 N.C. 45 108 S.E. 2d 49, the general rule as to interpretation with regard to a problem of this type was stated:

> "The interpretation of provisions of a liability policy in light of facts found is a matter of law for the court, and in construing the policy, it unambiguous terms are to be taken in their plain, ordinary and popular sense."

In Utah, in *Auto Lease Company vs. Central Mutual Insurance Company* (1958) 7 U. 2d 336, 325 P. 2d 264, our court said that the rule that in case of uncertainty or ambiguity of the insurance policy should be construed most strongly against insuror because it drew and issued the policy, but unless there is some genuine ambiguity or uncertainty in the language upon which reasonable minds may differ as to the meaning, and that the requirement was not satisfied merely because a party may get a different meaning by placing a forced or strained construction, and that the test to be applied was:

> "That the meaning be plain to a person of ordinary intelligence and understanding, viewing the matter fairly and reasonably, in accordance with the usual and natural meaning of the words, and in light of existing circumstances, including the purpose of the policy. If so, the special rule of construction is obviously unnecessary."

United Pacific Insurance Company submits that under Endorsement No. 1 excluding coverage to the named insured, the appellant, there is no coverage afforded for the vehicle in question when being operated by Jimmy Joyner, age thirteen, and the endorsement excluded coverage to Mr. Joyner if the vehicle was being operated by someone under the age of twenty-five other than Rosalie Joyner. The meaning of the policy is clear and certain and not ambiguous.

Since the Insurance Company knew that Jimmy Joyner had been operating the vehicle since he was eleven years of age at the time the endorsement (1) was attached to the policy, it is difficult if not impossible to believe the father, the appellant, did not know as much. However, it is submitted in view of the wording of Endorsement No. 1 that it was not material as to whether or not the father admittedly knew of the operation of the vehicle by Jimmy Joyner.

The pertinent question is whether or not Jimmy Joyner was under the age of twenty-five, and this is admitted.

The purpose of exclusionary endorsement is to prohibit insureds from permitting inexperienced operators to use the vehicle. The owner has control over the use of the car. Either by proper training of his family or by proper locking of the car and retention and custody of the keys, use can be re-

stricted. Only the owner can restrict the use, not the Insurance Company.

The only case the appellant cites which even remotely support appellant's contention, is the case of *Aetna Casualty and Surety Company vs. Habib Etoch*, 174 Ark. 409, 295 S.W. 2d 376. This is a case that holds that where the driver of vehicle left it in charge of an eleven year old boy while he was in a barber shop, the vehicle nevertheless was in the control of the person in the barber shop and not in control of the eleven year old boy who endeavored to operate it.

Applying this analogy to our particular case, we would have to find that at the time of the loss, Mr. Joyner was in control of the vehicle when in fact, he did not know about the loss until some days later and was, in fact, on a plane to Washington D.C. some hundreds of miles from the scene of the accident. In the *Aetna Casualty & Surety Company vs. Habib Etoch case*, supra, the court went a long way to hold the Insurance Company liable. In this case, the appellant wants the court to go a good many miles further in an effort to reach the deep pocket of the Insurance Company.

POINT II

THE COURT CORRECTLY FOUND NO ACCORD BETWEEN THE APPELLANT AND THE RESPONDENT.

An Accord and Satisfaction is an agreement between two parties to give and accept something

in satisfaction of a right of action which one has against the other, which when performed, is a bar to all actions upon the account. To be effective, an accord must be complete.

The record shows that P. E. Ashton Company, acting through it's Body Shop Foreman, started in on the repairs of the truck at the direction of the appellant, and not the respondent, and that Mr. Keshner knew it was not the policy nor practice of the Insurance Company to authorize repairs on vehicles damaged. Further, it would appear that if there is still a dispute in existence as to whether or not the appellant was making his claim under the comprehensive or collision coverage, no accord or agreement was reached, and in any event, the appellant admits he did not accept the offer of the respondent, because he wanted to make a larger claim under the comprehensive coverage and that the respondent merely offered to pay appellant under the collision coverage.

As a practical matter, the adjuster, Mr. Kind, forgot about the exclusionary endorsement, excluding all coverage to Mr. Joyner when the vehicle was being operated by a person under the age of twenty-five other than Rosalie Joyner and mistakenly mailed out a Collision Release. The mistake caused no damage and was discovered before any payment was made.

Although in this appeal and at the various hearings (R 46) the appellant argues that by hav-

ing made the offer to pay under the collision coverage, the respondent waived it's defense of non-coverage; that an accord was reached; and that it was stopped from denying liability on this basis. However, the trial court, in accordance with *Keck vs. American Fire Insurance Company* (1942) 237 Mo. App. 308, 167 S.W. 2d 644, held that a waiver does not create a new cause of action where none is existent, and that ordinarily a waiver is applied for the purpose of defeating a forfeiture, and even if a substantial right is claimed as a waiver, there must be some consideration for it. Further, with respect to an estoppel, an estoppel does not create a new cause of action, but merely protects the rights previously acquired, and further an estoppel does not apply to work a gain to a party, but only to protect from loss. An estoppel does not operate unless a party has been induced to act to his injury.

The respondent submits the appellant cannot recover under the Doctrine of Accord and Satisfaction because:

(1) The Release tendered was in the amount of $913.49 under the collision coverage (Exhibit D-7),

(2) The Release tendered was never accepted by the Third Party Plaintiff and Appellant,

(3) The testimony of the Third Party Plaintiff and Appellant shows he never had any intention of accepting the Release tendered,

(4) The Release was withdrawn before an acceptance was made.

It is obvious from the evidence the lower court was not compelled in any respect to find an Accord and Satisfaction, and that further the evidence would not have supported such a finding.

In *Dillman vs. Massey Ferguson, Inc.* (1962) 13 U. 2d 142, 369 P. 2d 296, where there was a dispute as to whether the manufacturer breached it's contract by refusing to buy back items, and where plaintiff accepted and cashed the manufacturer's check after protesting the check did not take care of all that was due plaintiff, the court affirmed a judgment holding acceptance of the check was not an Accord and Satisfaction.

In *Richards and Sorenson vs. Lake Hills* (1964) 15 U. 2d 150, 289 P. 2d 66, where trial court found defendant offered plaintiff a non-interest bearing debenture in the sum of $10,000.00 and where plaintiff returned it with a letter rejecting it, the court sustained the trial court's finding that no accord was reached.

If acceptance of a check does not constitute an accord, it would appear that for better reason, the non-acceptance of a Release would also not constitute an accord.

No coverage was afforded Mr. Joyner because of Endorsement No. 1 excluded coverage for vehicles operated by a person under twenty-five. The

effect of Mr. Joyner's claim is to ask for a new cause of action to be created where none existed, and further he wants a new cause of action created where he gave no consideration for it.

As he had no right to make a claim when the vehicle was being operated by someone under twenty-five other than Rosalie, he is asking for a gain by way of estoppel and not for protection against a loss. This, of course, is not an estoppel anymore than an accord, and as the evidence shows, Mr. Joyner was not induced to repair the vehicle by Mr. Kind, even if you assume repairing his own vehicle is an injury, no estoppel existed. And, of course, Mr. Joyner was benefited by Mr. Kershner's repairs to the vehicle and not damaged. On the question of accord, the lower court found the evidence in favor of the respondent and against the appellant, and the evidence in that respect should be weighed in the light most favorable to the respondent.

The only issue for the court to decide, in the opinion of the respondent, is:

Was Endorsement No. 1 an effective bar to the appellant's right to recover?

CONCLUSION

It is respectively submitted Endorsement No.

1 excluded all coverage to the appellant under any coverage, and bars respondent from any liability to the plaintiff in this action.

Respectfully submitted,

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I hereby certify that on this ..... day of ....., 1965, I mailed two copies of this Brief by United States mail, postage prepaid, to Jackson B. Howard for Howard & Lewis, Attorneys for the Appellant, 120 East 3rd North, Provo, Utah.
