1965

P. E. Ashton Company v. Russell J. Joyner v. United Pacific Insurance Company : Brief of Appellant

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.

BRIEF OF APPELLANT

Appeal from Judgment of the Fourth District Court of Utah County
HON. R. L. TUCKETT, Judge

JACKSON B. HOWARD
HOWARD AND [illegible]
120 East 300 North
Provo, Utah
Attorney for Appellant

RAYMOND M. BERRY
455 East 400 South
Salt Lake City, Utah
Attorney for Respondent

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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. 26,367

BRIEF OF APPELLANT

STATEMENT OF NATURE OF CASE

This is an action by third party plaintiff against the third party defendant, his insurance carrier. The plaintiff, appellant herein contends that his automobile insurance covers certain damages to his automobile. The re-

spondent contends that it does not by reason of a certain exclusion rider attached to the policy. The appellant further contends that, notwithstanding the exclusion provision, the respondent is liable to the appellant by reason of an accord.

DISPOSITION IN LOWER COURT

The trial court first held in favor of the appellant. A motion was made by the respondent for a new trial and to amend the findings of fact and conclusions of law. The court granted the motion of the respondent in part and amended its findings, conclusions and judgment and found in favor of the respondent. From this decision the appellant appeals.

RELIEF SOUGHT ON APPEAL

The appellant seeks reversal of the lower court's judgment and an order directing the lower court to enter judgment in favor of the appllant.

STATEMENT OF FACTS

On or about the 18th day of November, 1961, the appellant purchased from the respondent collision insurance with a comprehensive insurance rider covering a 1958 Dodge ¾ ton truck and paid all premiums necessary to maintain the insurance for a period of one year from that date. This insurance policy is known as Policy No. ACR 65992 of the United Pacific Insurance Group. (Tr. 35 and 36) This policy (Exhibit 5, Tr. 35) carried a rider which contained the following language:

"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 therof 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 25 other than Rosalee Joyner. All terms and conditions of the policy to which the endorsement is attached, remain unchanged except as herein specifically provided."

The policy further defines "insured" as follows:

"Insured means: (a) with respect to the owned automobile, (1) the named insured and (2) if the named insured is an individual who owns a private passenger or utility automobile covered herein, any person or organization other than a person or organization engaged in the automobile business or as a carrier or bailee for hire maintaining, using or having custody of the said automobile with the permission of the named insured; (b) with respect to a non-owned automobile, if the named insured is an individual who owns a private passenger or utility automobile covered herein: (1) the named insured, and (2) any relative, provided the actual use thereof by either such named insured or relative is with the permission of the owner." (Exhibit 5)

In addition to the general coverage stated above, the insurance policy had Coverage D, fire, transportation and theft, and Coverage E, comprehensive. The terms of the policy in this respect are as follows:

"COVERAGE D—Fire, Transportation and Theft.

To pay for loss to the owned automobile or if the named insured is an individual who owns a private passenger

or utility automobile covered herein, to a non-owned automobile caused (a) by fire or lightning, (b) by smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment serving the premises in which the automobile is located, (c) by the stranding, sinking, burning, collision or derailment of any conveyance in or upon which the automobile is being transported, or (d) by theft, larceny, robbery or pilferage. (Emphasis added)

COVERAGE E—Comprehensive.

To pay for loss caused other than by collision to the owned automobile or if the named insured is an individual who owns a private passenger or utility automobile covered herein, to a non-owned automobile. For the purpose of this coverage, breakage of glass and loss caused by missiles, falling objects, fire, theft, or larceny, explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, riot or civil commotion shall not be deemed to be loss caused by collision." (Emphasis added)

Mr. Joyner did not know of the rider in the policy excluding drivers under the age of twenty-five years. (Tr. 36) This rider was added by the agent and was never mentioned to the appellant prior to the accident. (Tr. 36)

On or about September 10, 1962, the son of the appellant, Jimmy Joyner, was thirteen years of age and was in the company of one David Martin who was of the age of 15 years. (Tr. 34) On the day that the vehicle was taken, the appellant, Mr. Joyner, had left for Washington, D. C., and his wife had driven him to the airport in Salt Lake. (Tr. 37) The keys to the truck were left in the house.

By stipulation of counsel the depositions of Jimmy Joyner, David Martin and Bobby Jorgenson were introduced as part of the record in lieu of their actual testimony at trial. (Tr. 32) Reference to their depositions and page numbers will be as follows, respectively: Jimmy Joyner: J. J. p._____; David Martin, D. M. p._____; and Bobby Jorgenson, B. J. p._____.

After his parents had gone, Jimmy, without permission, took the keys from the house and gave the keys to David Martin who backed the truck out of the driveway. The reason David Martin drove the truck out the driveway was that Jimmy did not know how to back it. David drove the truck with Jimmy as a passenger to Rodney Jorgenson's house. (D.M., p. 5) This was five or six blocks away. At Rodney's house, Jimmy became the driver and the three persons, Jimmy Joyner, David Martin and Rodney Jorgenson took the truck on an unauthorized excursion. All of the boys knew Jimmy Joyner did not have permission to take the truck. (J. J. p. 3, 4; D. M. p. 4; R. J. p. 8)

They drove around Provo for some time and then drove toward the Provo boat harbor on Utah Lake. Jimmy was unable to control the truck and an accident ensued in which the truck was damaged to the extent of $1,121.44. The accident occurred at approximately 8:00 o'clock p. m. The important testimony concerning taking of the car was elicited from all three boys in their depositions, which depositions were substituted at the trial. The questions were asked by Mr. Berry, and the testimony is as follows:

Deposition of Jimmy Joyner, page 4:

"Q Had you ever driven this 1958 Dodge ¾ ton truck when your father was around prior to the accident?

"A No I had not.

"Q Where did you get the keys to the truck in order that you could operate it?

"A I think in the house, we used to keep them in a little bowl in the house. I think I got them out of the inside of the bowl. We had to go in the house, I remember that.

"Q At the time your parents were not in the house?

"A No, they were on the way to Salt Lake. My dad had to go to Washington, D. C. and my mom was taking him to the airport.

"Q In Salt Lake City?

"A Yes.

"Q You took this truck to drive without the permission of your father?

"A Yes.

"Q Had you ever asked permission to drive his sedan?

"A No.

"Q Had your mother let you drive a car prior to the date of the accident?

"A No.

"Q And were you the person who was driving the truck when the accident happened?

"A Yah."

Deposition of David Martin, page 4:

"Q Were you with Jimmy at the time he obtained the truck?

"A Yes.

"Q Do you know how he got the keys to the truck?

"A They were either in the house or in the truck, I can't remember.

"Q Did you or Jimmy ask anyone for their permission to use the truck?

"A No, no one was home.

"Q And do you happen to know where Jimmy's father, —where his parents were at that time.

"A Yes.

"Q Where?

"A They were going to Salt Lake City.

"Q I see, does Jimmy have any older brothers and sisters?

"A Yes.

"Q Where were they?

"A I don't know, they were not at home.

"Q They were not at Jimmy's place?

"A No.

"Q What time of night did you take the truck?

"A Seven or eight o'clock, I guess. After it got dark.

"Q Do you know who drove the truck away from the premises?

"A Yes.

"Q Who was it?

"A Me."

Deposition of Rodney Jorgenson, page 8:

"Q Did Jimmy on the day of this accident have any conversation with you about how he obtained the truck that he was driving?

"A No, not conversation. I knew where he got it.

"Q Did you ask him if he had his father's or mother's permission to take the truck?

"A No, I didn't need to.

"Q Why didn't you need to ask him that?

"A Because I knew his father would not let him take the truck."

Mr. Joyner, the appellant, did not know his son could drive a vehicle.

Another issue of fact is whether the respondent authorized the repair of the vehicle and by so doing entered into an accord and satisfaction with the appellant. There was a disputed issue as to whether the respondent directly negotiated with P. E. Ashton Company, the plaintiff herein, for the repair of the appellant's vehicle. Apparently, that matter was resolved in favor of the respondent and P. E. Ashton Company to the effect that P. E. Ashton Company negotiated directly with the appellant and that the third party defendant was absolved from liability to the plaintiff by reason of contract.

Notwithstanding that finding, the evidence was to the effect that the respondent had authorized the appellant to get his truck repaired at P. E. Ashton Company and by so doing, had entered into an accord with the appellant. There was no evidence to the contrary.

The truck was repaired by P. E. Ashton Company. The appellant believes the issues to be as hereinafter set forth under Points I and II.

POINTS ON APPEAL

POINT I

THE COURT ERRED IN NOT FINDING THAT THE APPELLANT WAS COVERED BY INSURANCE UNDER THE CIRCUMSTANCES OF THIS CASE.

POINT II

THE COURT ERRED IN FAILING TO FIND AN ACCORD BETWEEN THE APPELLANT AND RESPONDENT.

ARGUMENT

POINT I

THE COURT ERRED IN NOT FINDING THAT THE APPELLANT WAS COVERED BY INSURANCE UNDER THE CIRCUMSTANCES OF THIS CASE.

It is the contention of the appellant that Coverage D and Coverage E of his insurance policy most accurately fit the facts and circumstances of this case. The appellant has authority for coverage both under theft and comprehensive provisions. In either instance the appellant would be entitled to recover the entire amount of his damage without the $100.00 deduction provision of the general collision coverage.

It is further the contention of the appellant that the exclusion rider attached to the policy applies only to the voluntary letting of the car to a person under the age of 25 years and has no application to an automobile involuntarily taken by a thief, a vandal, or mischievous child. If a contrary meaning were applicable, then the theft and

vandalism provisions of the policy would be of little or no effect and would offer little or no coverage, for presumably, it would put upon the appellant the burden of proving that the theft or vandalism was caused by a person over the age of 25 years. We respectfully submit that this would be distorting the reasonable meaning of the policy.

We shall take the issue up under the two categories named in the policy, to-wit: theft and comprehensive.

(a) **Theft.** All of the cases that interpret the exclusion clause for a driver under a particular age are cases involving situations where the parent or owner has voluntarily parted with the control of the car to a minor. In these cases, the Courts have determined that there is a lack of coverage because of the voluntary nature of the parting. In situations where there has been a question of whether there is an actual theft in light of the intent of the party to permanently deprive the owner of its custody, the Courts have concluded that this provision should be liberally construed so as to give the owner coverage in every case where the general language of the policy might reasonably apply to the fact situation. For example, in the case of Pennsylvania Indemnity Fire Corporation vs. Aldrich, 1941, 117 Fed 2nd, 774; 133 ALR, 914, the insured's automobile was taken without authority by a boy employed by the insured to wash and simonize the car. The boy took several of his friends for a ride and upon his return accidentally wrecked the car about a mile and a half from the insured's home. The court instructed the jury that under a theft policy, because of the absence of the taker's intent criminally to deprive the owner of his property, it would permit the insurance company, by

using the word "theft", to evade liability in many cases in which, under prevailing laws, they would be liable if he word "larceny" had been used. Such a situation was described as in conflict with general principles that an insurance policy is to be construed against the insurer and its terms are to be given the meaning which common speech imports.

Another case is the case of Baker v. Continental Insurance Company (1942), 155 Kan. 26, 122 P.2d 710. Here a boy, without the knowledge or consent of the insured, took the car of the insured for a ride, picked up other boys and drove it around the area for a little while. He then allowed one of his friends to drive the car and the car was wrecked. The fact that the boy appropriated the car for his own personal use without the owner's consent for as long as he saw fit was viewed as being a loss to the insured within the coverage of the policy notwithstanding the boy did not intend to permanently deprive the owner of his property.

The case of Toms v. Hartford Fire Insurance Company (1945) 146 Ohio State 39, 63 NE 2d 909, stated that theft is of a broader scope than larceny and comprehends essentially the wilful taking or appropriation of one person's property by another wrongfully and without justification and with the design to make use of such property in violation of the right of the owner. In this case, an employee of the insured, without authorization from the insured and over the protests of a co-employee, drove from the insured's garage and was involved in an accident whereby the automobile was damaged. In this case the court determined that the insurance company was responsible for the loss.

Other cases to the same effect are Donges vs. American Auto and Fire Insurance Company, 97 NE 2d 108; Hoyne v. Buckeye Union Casualty Company, 69 NE 2d 163.

The appellant respectfully submits that the only reasonable interpretation of the contract rider was that it was to apply to situations where the insured voluntarily let a person under the age of 25 years drive the vehicle in derogation of the terms of the policy. Any other interpretation would be a distortion of the general intent of the parties and an injustice.

(b) **Comprehensive.** There are a limited number of cases that interpret this type of a fact situation. Of the cases that have so considered the situation, perhaps the most analogous are the following: In the case of Unkelsbee v. Homestead Fire Insurance Company, 1945, Municipal Court Appeals, District of Columbia, 41 Atlantic 2nd, 168, the situation was that the plaintiff had parked his automobile facing downhill with the right front wheel turned at an angle against the curb, the handbrake on, the gears engaged, the ignition locked, and the keys thereto in the personal possession of the Plaintiff, and the car doors unlocked. Without the knowledge or consent of the plaintiff and in his absence, a 3½ year old child entered the car, caused it to start down the hill, and attempted to steer it so that it proceeded across an intersection street and bus route and into the next block, a total distance of more than one city block, wherein it was stopped and damaged by colliding with another automobile which was parked at the curb. The Court was of the opinion that the proximate cause of the loss was the act of vandalism

on the part of the child, that this came within the comprehensive coverage for theft or vaidalism and not within the provision excluding loss caused by collision.

Another case of similar import is the case of Great American Insurance Company v. Dedmon, 260 Ala. 30, 70 Southern 2nd 421. This was an action against the insurance company brought under the automobile comprehen-- sive coverage including vandalism. It appeared that the automobile was upset by one having a past history of dementia praecox. The Plaintiff had left his automobile parked in front of a hotel with the ignition locked and the key in his pocket. Sometime after 11:00 o'clock on the night of July 13, 1952, the plaintiff's 20 year old son, Larry Dedmon, came to the place where the car was parked and in some way started the engine and drove the car to the place where it was overturned and badly damaged. Larry Dedmon, the plaintiff's son, previously had been suffering from a mental disorder. The Court stated:

> "It is generally conceded that the collision clause in such policies, like all insurance contracts, should be construed most strongly against the insurer; this upon the sound basis of reason that the form of contract is made by him intended to the public."
>
> * * *
>
> "We do not feel that we should here construe the word vandalism in its narrowest sense, but hold that the proper construction should be such as is considered in the proper mind."

In this case, the Court concluded that the act of Dedmon's son was an act of vandalism and came within the purview of his policy.

The appellant believes that the cases generally support the conduct of the appellant's son in this case to be an act of vandalism that would come within the comprehensive coverage provisions of the policy if it were not for the exclusion of drivers under the age of 25 years.

Assuming that we have established the area in which the policy would apply we must then address ourselves to the question of the application of the exclusion provision. In this field there are few, if any, cases in point for reason that most policies do not carry such exclusion provision and there has been very little litigation on the subject. As mentioned above, all of the cases that interpret this exclusion clause, so far as the appellant could discern, are cases wherein the insured has voluntarily parted with the possession of the car to a person within the age exclusion. Even in these cases, the Courts have made a strenuous effort to impose liability on the insurance company wherever the facts could be interpreted to impose liability. Cases in support of this view are as follows: Aetna Casualty and Surety Company, APPT v. Habib Etoch, 174 Arkansas, 409; 295 SW, 376. In this case, the driver of a delivery truck took with him an 11 year old boy as a companion. At one time during the course of his deliveries he left the 11 year old boy in charge of the truck while he entered a building on business. A stranger had requested the boy to move the truck and the boy attempted to move the truck in compliance with the request of the stranger and thereby damaged the truck. The policy carried an exclusion provision for persons operating the truck under the age of 16 years. The Court, in interpreting the policy, had the following to say:

"The purpose in taking out the insurance was to provide indemnity against damages caused by the operation of the truck, of course, and since it was left standing temporarily by the regular driver, while he went into the hotel or barber shop to attend to some duties there, and since the boy who was requested to watch the truck had no authority whatever from him or his employer to move it, the owner of the truck is no more liable to the payment of damages caused by the unauthorized movement nor the insurance company any less liable to the payment of indemnity therefor than if the truck had been accidentally started by some other car bumping against it and the damage thereby caused; in other words, that within the meaning of the provisions of the policy the truck, while standing at the curb until the driver could discharge the necessary duties inside the building, was being operated by him within the meaning of that clause in the policy."

It is easily seen from the language of the Court that possession of the truck was not given to the boy for the purpose of driving it and that the boy had no permission or authority to drive the truck. The key to the decision, therefore, was permission or authority. This case is identical to the instant case from this standpoint.

The Court has, in other cases, overcome the exclusion provision of the contract for the benefit of the insured. Those cases are Bailey v. USF & G Company, 185 SC 169; 193 SC 638; Raptis v. USF&G, _____West Virginia_____, 156 SE 53; Johnson v. Travelers Insurance Company, 147 Oregon 345, 32 P2d 587.

The purpose of exclusion clauses are to reduce the cost of coverage in situations where the insured agrees not

to let persons under specific ages drive the vehicle. The entire tenor of this agreement is based upon the voluntary letting of the vehicle to drivers of a youthful age. This is because statistics have proven that the chances of accident are greater in the case of youthful drivers. The provision was never intended to apply to cases oftheft and comprehensive damage. In this situation, the owner has no control over the act of vandalism, malicious mischief or theft of a minor or juvenile. The purpose of these exclusion provisions is set forth in 5 Am. Jur., 33, Sec. 31. In this treatise nowhere is there any suggestion that the exclusion provision is to apply to theft or comprehensive coverage or situations beyond the control of the insured.

POINT II

THE COURT ERRED IN FAILING TO FIND AN ACCORD BETWEEN THE APPELLANT AND RESPONDENT.

The appellant herein contends that Finding of Fact No. 5 of the Court's amended Findings of Fact and Conclusions of Law is wholly in derogation of the facts proven. It is the opinion of the appellant that the admissions of the respondent's agents show conclusively an accord and that under the circumstances therein the appellant would be entitled to judgment by this reason alone.

The appellant called one Donald Kind (Tr. 50) who testified that he was a claim adjuster for the United Pacific Insurance Company on September 10, 1962. He testified that he had authority to settle the claim of Mr. Joyner's, the appellant herein, and that it had been assigned to him to handle.

Mr. Kind admitted, (Tr. 52) that at the time he wrote a letter, Exhibit 7, that he believed the insurance company would pay the bill charged by the Plaintiff, P. E. Ashton Company. They, in that letter, stated that they had received the final billing from P. E. Ashton Company and asked him to sign the release. This, the appellant takes to be an accord concerning the issue of liability. Mr. Joyner did not sign the release because the release was for collision coverage in the amount of $1,013.49 and not in the amount of $1,121.47 which would be the amount of his coverage under comprehensive. (Tr. 43) He so advised Mr. Kind.

Mr. Kind testified that it was not until he had received a copy of Mr. Berry's letter of February 11, 1963, (Defendant's Exhibit 8) that he had any reason to believe that the claim of the appellant would not be paid. (Tr. 52)

It should be noted as a matter of admitted fact that Raymond M. Berry, the attorney for the appellant, is also the local claims manager for the appellant. Up until the time of Mr. Berry's letter, both Mr. Kind, the adjuster for the company, and Mr. Joyner felt that there was an agreement as to liability and the issue is one of whether it was covered by the collision aspects of the policy or the comprehensive aspects of the policy.

Mr. Joyner testified that he had conversations with Mr. Albert Bowen who was the sales agent for the company and through whom the company dealt from time to time in conveying messages to Mr. Joyner. Mr. Bowen's insurance agency was at Pleasant Grove, Utah. (Tr. 53) Mr. Joyner testified that Mr. Bowen had told him in September of 1962, shortly after the accident, to have the

truck repaired and for him to take it to P. E. Ashton Company. Mr. Joyner testified that he assumed that Mr. Albert Bowen had authorized P. E. Ashton Company to repair the truck. The testimony is undisputed that P. E. Ashton Company sent the bill to the respondent when the truck was repaired as a result in information that was given to it by someone other than the appellant. (Tr. 24 and 25) In this respect, Mr. Neil Kershner, P. E. Ashton's foreman, said that the information concerning the billing and where it was to be sent was given to him or to his company by Mr. Don Kind, the insurance adjuster. (Tr. 25) In any event, Mr. Kershner, Mr. Joyner, Mr. Kind, and Mr. Bowen all admit contact with P. E. Ashton Company concerning the repair of the truck.

Mr. Bowen, the agent of the respondent company, testified that before the truck was repaired, he had a telephone conversation with Mr. Kind concerning the repair of Mr. Joyner's truck and that the conversation was in substance as follows: (Tr. 56)

"Q Will you tell us in substance the conversation?

"A Well, all I can remember, asked me if it was all right for me to go ahead and start the repairs and indicated it was.

"Q Start the repairs on the truck?

"A Yes.

"Q He told you that it was, is that correct?

"A To the best of my knowledge it's correct.

"Q What did you do as a result of this conversation? By that, I am asking did you call P. E. Ashton Company and tell them?

"A I can't remember for sure. I know I told Russ

it was all right to go ahead, though. I can't remember if I called P. E. Ashtons or not.

"Q But you did inform Mr. Joyner it was all right to get the truck repaired?

"A Yes."

On cross-examination Mr. Bowen testified as follows in response to questions asked him by Mr. Berry: (Tr. 57)

"Q The phone conversation you are referring to was with Mr. Kind in Salt Lake from your office in Pleasant Grove?

"A Yes.

"Q That was along in September right after the accident?

"A It would have been soon after, because the reason I made the phone call and the reason I wanted to get something done on it was because Mr. Joyner wanted to get the truck fixed to take hunting if he possibly could.

"Q Did you find out if an appraisal had been made on the vehicle? Actually isn't that what—

Mr. Howard: Just a minute. You asked him a question. Let him answer if he can.

"A Would you state that again?

"Q (By Mr. Berry) Did you find Mr. Kind and find out if there had been an appraisal made on the truck?

"A No, I can't remember."

The respondent did not introduce any evidence contrary to the testimony of Joyner, Kind and Bowen to the effect that the respondent admitted liability and would have the truck repaired, except the letter of Mr. Berry

dated February 11, 1963, Defendant's Exhibit 8. The truck was repaired in September and October of 1962, and delivered to the appellant in October of 1962. The appellant believes that the record is absolutely devoid of any evidence to refute an accord. The law in respect to what is an accord is rather fundamental, and, therefore, the appellant cites to the Court text material for definition purposes only. The substance of the material is that an accord is an agreement for giving and taking a thing in satisfaction of an existing debt or claim. The satisfaction is the actual giving and taking of such thing. 1 Am. Jur. 215, Sec. 1, Re-statement of the Law of Contracts, Sec. 417, Corbin on Contracts, page 1041, Sec. 1276.

Under the law, the appellant believes that an accord was established when the respondent agreed to repair the vehicle of the appellant and the only issue was whether the coverage would be under the collision provisions of the policy or the comprehensive provision of the policy. All other disputes were resolved by this agreement. The appellant relied upon the agreement, delivered his car to the plaintiff for repair, incurred obligations of $1,121.44, and is entitled to satisfaction from the respondent in this amount.

CONCLUSION

The appellant respectfully requests that the Court reverse the judgment of the trial court and order that judgment be entered in favor of the appellant in the amount of $1,121.44.

Respectfully submitted,

JACKSON B. HOWARD, for
HOWARD AND LEWIS
Attorneys for Appellant
120 East 3rd North
Provo, Utah