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Insurance: Construction of Employee-Exclusion Clause in Automobile Liability Policy

James Wehle

The Florida Court has in the past recognized that the right to pursue a lawful business is a valuable property right[26] and has implied that interference with property rights by false statements, acts of coercion, or threatened injury may be enjoined;[27] yet it has also indicated that an injunction will lie only when there is a breach of trust or contract.[28] By the instant decision, however, it has adopted the doctrinaire view. This result may perhaps be explained by the fact that the complainant pleaded in terms of injury to personal rights rather than property rights and by the Court's greater concern with freedom of speech than with protection of property rights when the two policies clash. The decision does not necessarily foreclose the right to injunctive relief in future cases.

There is no one solution that will guarantee the desired result, for the cases in this area lack uniformity and often seem irreconcilable.[29] Although pleading should not control the case,[30] the possibilities of obtaining injunctive relief will be greatly enhanced by pleading within the exceptions and methods of avoidance that other courts have set up rather than in terms of libel and slander, personal rights, or personal reputation.

JOHN WOOLSLAIR SHEPPARD

INSURANCE: CONSTRUCTION OF EMPLOYEE-EXCLUSION CLAUSE IN AUTOMOBILE LIABILITY POLICY

National Surety Corp. v. Windham, 74 So.2d 549 (Fla. 1954)

Plaintiff minor was engaged by insured, who was under the influence of alcohol and in need of medical attention, to drive him 200 miles to a sanitorium. The automobile was furnished by insured. During the trip, insured, in a drunken attempt to climb over the seat,

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Ala. 1909).

[26]State *ex rel.* Davis v. Rose, 97 Fla. 710, 744, 122 So. 225, 238 (dictum).

[27]Paramount Enterprises, Inc. v. Mitchell, 104 Fla. 407, 418, 140 So. 328, 333 (1932) (dictum).

[28]Reyes v. Middleton, 36 Fla. 99, 17 So. 937 (1895); Moore v. City Dry Cleaners & Laundry, Inc., 41 So.2d 865, 873 (Fla. 1949) (dictum).

[29]2 HIGH, A TREATISE ON THE LAW OF INJUNCTIONS §1015 (4th ed. 1905).

[30]Pound, *supra* note 6, at 668.

seized the steering wheel and caused a collision, in which plaintiff was injured. Judgment was recovered by plaintiff against the insurance company on insured's automobile liability policy, although the company contended that plaintiff was an employee within the employee-exclusion clause of the policy. On appeal, HELD, plaintiff was an independent contractor and not an employee within the meaning of the clause. Judgment affirmed, Justices Terrell, Thomas, and Mathews dissenting.

The insured's policy contained the following standard automobile liability clause:

> "This policy does not apply . . . to bodily injury or to sickness, disease or death of any employee of the insured while engaged in the employment, other than domestic, of the insured or in domestic employment if benefits therefor are either payable or required to be provided under any workmen's compensation law . . . ."

One reason for the exclusion of an insured's employees from the protection of a policy is the strict liability that workmen's compensation laws impose upon employers for injuries arising out of and in the course of employment.[1] Indemnification of both workmen's compensation payments and common law judgments at the current premium rate would be actuarily unsound.[2] But, since workmen's compensation payments are specifically excluded by another clause of the standard policy,[3] the purpose of the employee-exclusion clause is to exclude employees not covered by workmen's compensation. Thus an insured whose car is driven by an employee not entitled to workmen's compensation benefits is left completely unprotected from liability for the employee's injuries.[4] To avert the hardships that unwary car owners might incur, some courts have restricted the meaning of *employee* as used in the exclusion clause. Persons who have been

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[1]See FLA. STAT. §440.09 (1) (1953).

[2]See *A Guide to the Automobile Policy*, 1949 INS. L.J. 789.

[3]*Ibid.*

[4]Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Harrill, 106 F. Supp. 332 (W.D.N.C. 1952); Employers' Liab. Assur. Corp. v. Owens, 78 So.2d 104 (Fla. 1955); Jewtraw v. Hartford Acc. & Indemnity Co., 280 App. Div. 150, 112 N.Y.S.2d 727 (3d Dep't 1952). *Contra*, Home Indemnity Co. v. Village of Plymouth, 146 Ohio St. 96, 64 N.E.2d 248 (1945); Narloch v. Church, 234 Wis. 155, 290 N.W. 595 (1940).

held to be covered despite the clause include temporary and incidental employees,[5] gratuitous volunteers,[6] and independent contractors.[7]

In the instant case the Court excluded the plaintiff from the effects of the clause by classifying him as an independent contractor. Although the insured exercised some control over the plaintiff, the Court stated that he did not, in his condition, have that "right of control" that a master has over his servant.

The distinction between a servant and an independent contractor emanates from the theory of respondeat superior, under which the employer is liable for the servant's tortious conduct if committed within the scope of his employment[8] but not for that of an independent contractor.[9] Most workmen's compensation acts exclude independent contractors from coverage.[10]

Many courts, when faced with cases involving this distinction, strain the facts to accomplish a particular result. If the court wishes to hold the insurance company liable despite an employee-exclusion clause, the injured person will be classed as an independent contractor. In a similar factual situation, however, the "servant" label may be applied in order that the benefits of the workmen's compensation statutes may be utilized. Although the results of the individual case may be just, the end result is a hopeless maze of conflicting law.[11]

In the instant case the Court, by disregarding the plaintiff's statement that he understood he would be subject to the insured's orders, found sufficient control in the plaintiff to justify holding him to be an independent contractor. This classification was not essential to the plaintiff's case, because the Court stated further that the employment was of the casual or incidental type to which the exclusion clause does not apply. The Court analyzed the facts in a manner that enabled it to reach a just result. This case, in its disregard for precedential rul-

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[5]*Cf.*, Daub v. Maryland Cas. Co., 148 S.W.2d 58 (Mo. Ct. App. 1941), *aff'd sub nom.* State *ex rel.* Maryland Cas. Co. v. Hughes, 349 Mo. 1142, 164 S.W.2d 274 (1942).

[6]Bean v. Gibbens, 175 Kan. 639, 265 P.2d 1023 (1954). *But see* Clinton Cotton Oil Co. v. Hartford Acc. & Indemnity Co., 180 S.C. 459, 186 S.E. 399 (1936).

[7]Sills v. Sorenson, 192 Wash. 318, 73 P.2d 798 (1937); *cf.* Hardware Mut. Cas. Co. v. Hilderbrandt, 119 F.2d 291 (10th Cir. 1941).

[8]RESTATEMENT, AGENCY §219 (1933).

[9]*Id.* §220, comment *c.*

[10]*E.g.*, FLA. STAT. §440.02 (2) (1953).

[11]*E.g.*, in a factual situation similar to that of the instant case the North Dakota court held the relationship to be that of master and servant, La Bree v. Dakota Tractor & Equip. Co., 69 N.D. 561, 288 N.W. 476 (1939).

ings, represents the typical approach to the problem of distinguishing between a servant and an independent contractor.[12]

JAMES WEHLE

LANDLORD AND TENANT: OPTION TO RENEW AS CONTEMPLATING A NEW LEASE

Leibowitz v. Christo, 75 So.2d 692 (Fla. 1954)

Plaintiff, successor to lessee of a ten-year lease, sought a declaratory decree determining the rights of the parties. The lease gave lessee the option of "additional annual renewals" for fifteen years beyond the original term. Plaintiff submitted proper notice of his election to renew, as required by the lease, and continued in possession of the premises after the expiration of the original term. Defendant lessor contended that plaintiff had no rights under the lease, since no new lease was executed. On appeal from a decree for plaintiff, HELD, use of the word *renewal* does not require the execution of a new lease. Decree affirmed.

From an early date courts have recognized a distinction between an option to renew a lease and an option for its extension.[1] It has been almost universally held that, in the absence of a contrary provision in the lease, an option to extend may be exercised by merely holding over after expiration of the term and paying the stipulated rental.[2] The original lease is then a present demise of the combined terms.[3]

One aspect of an option to renew has not received universal sanction. The technical definition of *renew* is "to make new again,"[4]

[12]See Magarian v. Southern Fruit Distributors, 146 Fla. 773, 1 So.2d 858 (1941).

[1]Delashman v. Berry, 20 Mich. 292, 4 Am. Rep. 392 (1870); Orton v. Noonan, 27 Wis. 272 (1870).

[2]*E.g.*, Nicklis v. Nakano, 118 Colo. 317, 195 P.2d 723 (1948); Fragomeni v. Otto Gratzel Signs, Inc., 121 Ind. App. 167, 96 N.E.2d 275 (1951); Klein v. Auto Parcel Delivery Co., 192 Ky. 583, 234 S.W. 213 (1921); Quinn v. Valiquette, 80 Vt. 434, 68 Atl. 515 (1908).

[3]McClelland v. Rush, 150 Pa. 57, 24 Atl. 354 (1892); Murray v. Odman, 1 Wash.2d 481, 96 P.2d 489 (1939).

[4]WEBSTER, NEW INTERNATIONAL DICTIONARY 2109 (2d ed. 1949).