

1974

State Farm Mutual Insurance Company v. JACK B. HOLT, ROMA K. HOLT, TSOSIE B. YAZZIE, ROBERT A. ROWLEY, SR., ROBERT A ROWLEY, JR., ERLE T. JONES, VIVIAN TWITCHELL, KENT PENDLETON, MRS. KENT PENDLETON, JOSE GAONA, JOHNNIE GAONA YAKI, GILBERT JOHNSON and TONI KEE BAHE : Brief of Appellant

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Ray H Ivie for: Ivie and Young; Attorneys for Plaintiff-Appellant.

Reed L Martineau for: Worsley, Snow and Christensen; Attorneys for Defendants-Respondents Rowley, Jones and Pendleton .

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

DEC 6 1975

BYHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

STATE FARM MUTUAL INSURANCE COMPANY,
Plaintiff and Appellant,

vs.

JACK B. HOLT, ROMA K. HOLT,
TSOSIE B. YAZZIE, ROBERT A.
ROWLEY, SR., ROBERT A. ROWLEY,
JR., ERLE T. JONES, VIVIAN
TWITCHELL, KENT PENDLETON,
MRS. KENT PENDLETON, JOSE
GAONA, JOHNNIE GAONA YAKI,
GILBERT JOHNSON and TONI
KEE BAHE,
Defendants and Respondents.

Case No.
13691

BRIEF OF APPELLANT

An appeal from the Judgment of the Fifth Judicial District Court in and for Iron County, State of Utah, before the Honorable J. Harlan Burns, Judge.

RAY H. IVIE, for:
IVIE & YOUNG
48 North University Avenue
Provo, Utah 84601

*Attorneys for
Plaintiff-Appellant*

REED L. MARTINEAU, for:
WORSLEY, SNOW & CHRISTENSEN
7th Floor, Continental Bank Bldg.
Salt Lake City, Utah 84101

*Attorneys for Defendants-Respondents
Rowley, Jones and Pendleton*

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DEC 6 1975

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

STATE FARM MUTUAL INSURANCE COMPANY,
Plaintiff and Appellant,

vs.

JACK B. HOLT, ROMA K. HOLT,
TSOSIE B. YAZZIE, ROBERT A.
ROWLEY, SR., ROBERT A. ROWLEY,
JR., ERLE T. JONES, VIVIAN
TWITCHELL, KENT PENDLETON,
MRS. KENT PENDLETON, JOSE GAONA,
JOHNNIE GAONA YAKI, GILBERT
JOHNSON and TONI KEE BAHE,
Defendants and Respondents.

Case No.
13691

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Plaintiff, State Farm Mutual Insurance Company, originally sued defendants for a declaratory judgment.

The Fifth Judicial District Court of Iron County, State of Utah, decreed:

“That plaintiff’s automobile insurance policy No. 4241 145 44A be and it hereby is, declared to have been in full force and effect on October 3, 3, 1970, to cover the liability of defendants Jack B. Holt and Roma K. Holt and Tsosie B. Yazzie, arising out of the operation of a 1963 Chevrolet 4-door station wagon automobile, Serial No. 31635L 108880 on that date and to cover the liability of any other persons responsible for the use of said station wagon, and that said defendants be awarded their costs.”

The judgment of the Fifth Judicial District Court of Iron County, State of Utah, was affirmed by the decision of the Supreme Court of the State of Utah on November 27, 1972, Supreme Court No. 12697.

Defendants on November 9, 1973, moved the Court for an order requiring State Farm Mutual Insurance Company to pay interest and attorney’s fees.

State Farm Mutual Insurance Company on the 27th of November, 1973, moved the Court to dismiss defendants’ Motion. The Court on the 22nd of April, 1974, made Findings of Fact, Conclusions of Law and a Judgment. Said Judgment read as follows:

“It is hereby ORDERED, ADJUDGED and DECREED that defendants Robert A. Rowley, Sr., Robert A. Rowley, Jr., Vivian Rowley, formerly Vivian Twitchell, Mr. and Mrs. Kent Pendleton and Erle T. Jones, be and they hereby are awarded the proceeds of plaintiff’s policy of insurance, No. 4241 145 44A, in the sum of \$20,000.00 bodily injury in favor of the foregoing

defendants to be distributed among said defendants in accordance with the formula heretofore approved by this Court in its Order in March, 1973, and in the further sum of \$1500.00 property damage in favor of Robert A. Rowley, Sr., together with interest on said amounts at the rate of 6% per annum from and after the 23rd of October, 1970, until paid, and it is FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff's said Motion to Dismiss dated November 27th, 1973, be and the same hereby is, denied."

DISPOSITION IN LOWER COURT

The Court, on defendants' Motion for an Order Requiring plaintiff to Pay Interest and Attorney's Fees and on plaintiff's Motion to Dismiss, entered its Judgment in the following words:

"... it is FURTHER ORDERED, ADJUDGED and DECREED that plaintiff's said Motion to Dismiss dated November 27, 1973 be, and the same hereby is, denied."

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the trial court's Judgment of April 22, 1974 awarding the proceeds of the insurance policy and interest to defendants.

STATEMENT OF FACTS

Plaintiff, State Farm Mutual Insurance Company, originally sued defendants for a declaratory judgment.

Defendant, Tsosie B. Yazzie has never been served in this action.

The Fifth Judicial District Court of Iron County, State of Utah, decreed:

“That plaintiff’s automobile insurance policy No. 4241 145 44A be and it hereby is, declared to have been in full force and effect on October 3, 1970, to cover the liability of defendants Jack B. Holt and Roma K. Holt and Tsosie B. Yazzie, arising out of the operation of a 1963 Chevrolet 4-door station wagon automobile, Serial No. 31635L 108880 on that date and to cover the liability of any other persons responsible for the use of said station wagon, and that said defendants be awarded their costs.”

The judgment of the Fifth Judicial District Court of Iron County, State of Utah, was affirmed by the decision of the Supreme Court of the State of Utah on November 27, 1972, Supreme Court No. 12697.

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State Farm Mutual Insurance Company on the 27th of November, 1973, moved the Court to dismiss defendants’ Motion. The Court on the 22nd of April, 1974, made Findings of Fact, Conclusions of Law and a Judgment. Said Judgment read as follows:

“It is hereby ORDERED, ADJUDGED and DECREED that defendants Robert A. Rowley,

Sr., Robert A. Rowley, Jr., Vivian Rowley, formerly Vivian Twitchell, Mr. and Mrs. Kent Pendleton and Erle T. Jones, be and they hereby are, awarded the proceeds of plaintiff's policy of insurance, No. 4241 145 44A, in the sum of \$20,000.00 bodily injury in favor of the foregoing defendants to be distributed among said defendants in accordance with the formula heretofore approved by this court in its Order in March, 1973, and in the further sum of \$1500.00 property damage in favor of Robert A. Rowley, Sr., together with interest on said amounts at the rate of 6% per annum from and after the 23rd of October, 1970, until paid, and it is FURTHER ORDERED, ADJUDGED and DECREED that plaintiff's said Motion to Dismiss dated November 27th, 1973, be and the same hereby is, denied."

ARGUMENT

POINT I.

DEFENDANTS' MOTION FOR INTEREST AND ATTORNEY'S FEES WAS NOT WELL FOUNDED FOR THE REASON THAT THE LIABILITY OF PLAINTIFF'S INSURED HAD NEVER BEEN DETERMINED AND, THEREFORE, THE EXTENT OF PLAINTIFF'S RESPONSIBILITY WAS MOOT. DEFENDANTS' PROCEDURE FOR SUPPLEMENTAL RELIEF IS NOT IN ACCORDANCE WITH UTAH CODE ANNOTATED, 1953, SECTION 78-33-8.

The judgment of the District Court and affirmed by the Supreme Court provided:

“that the Motion for Summary Judgment of Defendants Robert A. Rowley, Sr., Robert A. Rowley, Jr., Erle T. Jones, Kent Pendleton and Mrs. Kent Pendleton be and it hereby is, granted and that said defendants be and they are, awarded Summary Judgment against plaintiff and it is

FURTHER ORDERED, ADJUDGED that plaintiff's automobile insurance policy No. 4241 145 44A be and it hereby is, declared to have been in full force and effect on October 3, 1970 to cover the liability of defendants Jack B. Holt and Roma K. Holt and Tsosie B. Yazzie arising out of the operation of a 1963 Chevrolet 4-door station wagon automobile, Serial No. 31635L 108880 on that date and to cover the liability of any other persons responsible for the use of said station wagon, and that said defendants be awarded their costs.”

Utah law providing for declaratory judgments does not give the Court power or jurisdiction to allow a declaratory judgment upon a judgment. See Utah Code Annotated, 1953, Section 78-33-2 and 445 P. 2nd 701, *Crofts vs. Crofts*.

Defendants are attempting to commence an action without service of process as provided in Rules 3, 4, 5, and 6 of the Utah Rules of Civil Procedure.

POINT II.

TSOSIE B. YAZZIE WAS NAMED AS A DE-

FENDANT BUT WAS NEVER SERVED AND, THEREFORE, IS NOT A DEFENDANT OR A PARTY TO THIS LITIGATION AND ANY FINDINGS AGAINST HIM OR JUDGMENT WOULD BE WITHOUT JURISDICTION.

Tsosie B. Yazzie is the alleged tort feisor in this matter and if defendants other than Yazzie have a right to recover in tort, it is against Yazzie. It would seem that Yazzie would be a necessary party in a tort alleged to have been committed by only Yazzie. The alleged tort was committed by Yazzie who was an insured of State Farm Mutual Insurance Company. State Farm Mutual Insurance Company did not commit the alleged tort as against defendants Robert A. Rowley, Sr., Robert A. Rowley, Jr., Mrs. Robert A. Rowley, Jr., (Formerly Vivian Twitchell), Mr. and Mrs. Kent Pendleton and Erle P. Jones.

POINT III.

STATE FARM MUTUAL INSURANCE COMPANY HAS NO PRIVACY OF CONTRACT, WHATSOEVER, WITH DEFENDANTS ROBERT A. ROWLEY, SR., ROBERT A. ROWLEY, JR., VIVIAN ROWLEY (FORMERLY VIVIAN TWITCHELL), MR. AND MRS. KENT PENDLETON AND ERLE T. JONES.

Tsosie B. Yazzie becomes an insured of State Farm

Mutual Insurance Company in accordance with the Decree of this Court because Yazzie was driving the car with the permission of the insured owner. A duty therefore exists to protect Yazzie as defined by the policy. The judgment of the District Court entered on the 22nd day of April, 1974, does not define the extent of liability as it relates to the alleged tortfeasor, Tsosie B. Yazzie.

It is difficult to see how the judgment could in any way be res judicata between the defendants and Tsosie B. Yazzie who has never been served in this action and by which the Court at no time has had jurisdiction.

State Farm Mutual Insurance Company respectfully represents to the Court that their position is that a duty is now owed to Tsosie B. Yazzie to defend him and protect him in accordance with the terms of the insurance policy but, as to the defendants other than Yazzie, there is no privity of contract and therefore no duty is owed to them.

POINT IV.

DEFENDANTS ARE ATTEMPTING TO COMMENCE AN ACTION WITHOUT SERVICE OF PROCESS AS PROVIDED FOR IN RULES 3, 4, 5, AND 6 OF THE UTAH RULES OF CIVIL PROCEDURE, AND STATE FARM INSURANCE COMPANY IS NOT A PROPER PARTY TO THE TORT ACTION.

Utah Rules of Civil Procedure 3, 4, 5, and 6 provide the method of commencing a tort action. State Farm

Mutual Insurance Company, plaintiff herein, respectfully contends that the attempt of defendants to join a tort action and a contract action is an improper joinder. The declaratory judgment action was concluded by Decree of this Court on November 27, 1972.

The present defendants, if they had a tort against the alleged tortfeasor, would in accordance with the usual procedure have filed their Summons and Complaint either prior to the declaratory judgment or thereafter. If an attempt in the tort action was made to join State Farm Mutual Insurance Company, the insurer of Yazzie, a motion to dismiss as to State Farm Mutual Insurance Company would appear to be in order.

The proceedings against State Farm Mutual Insurance Company would constitute an improper joinder of the parties and a misjoinder of remedies and would be contrary to the law of the State of Utah as set forth in the case of *Christensen vs. Peterson*, 483 P. 2nd 447 and *Young vs. Barney*, 433 P. 2nd 846 and *Utah Farm Bureau vs. Chugg*, 315 P. 2nd 277.

CONCLUSION

Plaintiff, State Farm Mutual Insurance Company, respectfully represents to the Court that the Judgment entered by the Fifth Judicial District Court of Iron County, State of Utah, on the 22nd of April, 1974, is in error for the following reasons:

1. State Farm Mutual Insurance Company has committed no tort whatsoever against defendants Robert A.

Rowley, Sr., Robert A. Rowley, Jr., Mrs. Robert A. Rowley, Jr. (formerly Vivian Twitchell), Mr. and Mrs. Kent Pendleton and Erle T. Jones.

2. Tsosie B. Yazzie has never been served with process and, therefore, this Court is without jurisdiction as to render a judgment as to his liability.

3. State Farm Mutual Insurance Company has no privity of contract, whatsoever, with defendants Robert R. Rowley, Sr., Robert A. Rowley, Jr., Mrs. Robert A. Rowley, Jr. (formerly Vivian Twitchell), Mr. and Mrs. Kent Pendleton and Erle T. Jones.

4. State Farm Mutual Insurance Company is not a proper party to the necessary Court action which has not been filed as yet.

Respectfully submitted,

RAY H. IVIE, for:

IVIE & YOUNG

48 North University Avenue
Provo, Utah 84601

Attorneys for

Plaintiff-Appellant