1974

State Farm Mutual Insurance Company v. JACK B. HOLT, EOMA 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 Respondent

Ray H Ivie for: Ivie and Young; Attorneys for Plaintiff-Appellant.
Reed L Martineau and Michael R Carlston for: Worsley, Snow and Christensen; Attorneys for Defendants-Respondents Rowley, Jones and Pendleton .

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 RESPONDENT

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.

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NATURE OF THE CASE

This is an action for declaratory relief in which the plaintiff-appellant, hereinafter referred to as plaintiff, in its Complaint sought (1) "a determination of coverage" afforded by its auto insurance policy and (2) a further determination as to the "legal relationships of the parties" to the action.

DISPOSITION IN LOWER COURT

The lower court determined with respect to the coverage question that plaintiff-appellant's insurance policy applied to the accident in question and that deter-

mination was affirmed on appeal by this Court. Following affirmance of the coverage question the injured defendants-respondents, hereinafter referred to as respondents, moved, on the basis of the undisputed facts in the record, for a determination that they are entitled to the proceeds of the insurance policy together with interest and attorney's fees. The lower court ruled that the respondents are entitled to the insurance proceeds and interest but awarded no attorney's fees.

RELIEF SOUGHT ON APPEAL

The respondents seek affirmance of the trial court's Judgment filed April 22, 1974 in which they were awarded the insurance proceeds together with interest but denied an attorney's fee.

STATEMENT OF FACTS

On October 3, 1970, an automobile driven by Tsosie B. Yazzie crossed over the center line of the roadway at the crest of a hill on the outskirts of Enterprise, Utah and collided head-on into an automobile owned by respondent Robert A. Rowley, Sr. and driven by respondent Erle T. Jones and in which respondents Robert A. Rowley, Jr., Vivian Twitchell (now Mrs. Robert A. Rowley, Jr.) and Erle T. Jones, as well as Cindy Pendleton, daughter of respondents Mr. and Mrs. Kent Pendleton, were riding. (R. 1, p. 4)

As a result of the collision, Cindy Pendleton was killed and respondents Rowley, Jr., Twitchell (now Mrs. Rowley) and Jones suffered severe injuries for which they have incurred aggregate expenses of approximately $14,000.00 for necessary medical treatment and related attention. (R. 18, pp. 2-4) Also as a result of the collision, the automobile of Robert A. Rowley, Sr., having a market value of $1500.00, was totally destroyed. (R. 18, p. 2)

The investigating officer's report of the accident (R. 18, Exhibit "A") shows, and it is without dispute in the record, that Erle T. Jones, the driver of the car in which Rowley, Jr., Twitchell and Jones and the deceased Cindy Pendleton were riding, did not see that the car operated by Yazzie was on the wrong side of the road, because of the obstruction posed by the crest of the hill, until immediately before the accident. The report further shows that Jones immediately applied the brakes upon discovering the Yazzie vehicle on the wrong side of the road but was not able to avoid the accident. Plaintiff State Farm has not questioned the accuracy of the investigating officer's report or Yazzie's responsibility for the accident. Nor has plaintiff asserted that Jones was in any way at fault in the accident. The facts set forth in the affidavit filed in support of repondents' Motion (R. 18) are not controverted or questioned in any way.

This suit for declaratory relief was filed by plaintiff just two and one-half months after the accident.

The Complaint contains not only detailed allegations regarding insurance coverage but also refers to the accident, the consequent bodily injuries and property damage and the wrongful death of Cindy Pendleton. Further, the Complaint specifically refers to the *"claims for bodily injury, wrongful death and property damage"* against plaintiff's insured driver, Tsosie B. Yazzie, and recites that "it is essential that a determination of coverage be made by this Court and that the *legal relationships of the parties to this action and under the written contract* of automobile insurance be determined." (R. 1, p. 3) (Emphasis added.)

The Answer and Counterclaim filed by the respondents specifically admits that "the legal relationships of the parties (should be) determined." (R. 2, p. 2) In reference to the accident and the resulting injuries and wrongful death, the Counterclaim alleges that *"all conditions precedent to the liability of plaintiff under said policy (of insurance) have been performed."* (R. 2, p. 3) (Emphasis added.) Plaintiff has filed no reply to the Counterclaim and the record contains no allegation or claim by plaintiff disputing this latter allegation.

Both plaintiff and the injured respondents moved for Summary Judgment on the issue of coverage under the insurance policy issued by plaintiff. At the hearing on the respective Motions for Summary Judgment plaintiff's counsel represented to the Court that the only issue

between the parties was that of coverage. He offered, in the event it were determined that the policy afforded coverage for the accident in question, to pay the policy proceeds of $20,000.00 into court. (R. 22)

A determination by the lower court, following argument, that the policy afforded coverage for the accident in question (R. 9, 10) was affirmed by this Court on appeal in a unanimous decision. (R. 15; 28 Utah 2d 426, 503 P.2d 1205)

The issue of coverage thus having been determined, counsel for respondents requested through plainiff's counsel that payment be made of the policy amount. Plaintiff's counsel in turn suggested that since payment was only a formality it should be arranged directly through plaintiff's agent at Cedar City, Utah, Mr. Paul S. Searcey. (Transcript of hearing on Dec. 11, 1973, p. 11) This contact was made as suggested by counsel.

In the expectation that the payment would be received as requested, and as intimated by opposing counsel, Mr. Winder, and the agent, Mr. Searcey, counsel for respondents worked out an agreed division of the insurance proceeds among the injured respondents and submitted the same to the lower court for approval. (R. 17; transcript of hearing on Dec. 11, 1973, pp. 6-9)

After considerable delay without receiving payment from plaintiff, respondents' counsel requested that interest and attorney's fees be added to the sums due under plaintiff's policy. Soon thereafter plaintiff engaged new counsel, Mr. Ivie. Surprisingly, he advised that the plaintiff would pay nothing unless respondents first gave a complete release of all claims and abandoned their claim to interest and attorney's fees. Plaintiff refused respondents' written offer to accept payment under plaintiff's policy and reserve for later determination the claims of respondents for interest and attorney's fees. (Transcript of hearing on Dec. 11, 1973, pp. 6, 11, 14)

Thereupon respondents moved, on the basis of the files and records before the Court and with an Affidavit and a Memorandum in support, for a Judgment requiring that plaintiff pay to the respondents the sums due under its policy together with interest and attorney's fees.

Following argument on the Motion, and nothing having been submitted or claimed in opposition to the undisputed facts in the record upon which respondents relied, the Lower Court ruled in favor of respondents, except as to attorney's fees, (R. 22) and entered its Findings of Fact, Conclusions of Law and Judgment accordingly. (R. 25) The Court's Findings of Fact recite the undisputed fact that

> From the time of the accident it was readily apparent to persons making reasonable inquiry that the injuries and expenses incurred by the defendants Rowley, Twitchell, Pendleton and Jones would far exceed the $20,000.00 bodily injury coverage and applicable property damage coverage of $1500.00, being the fair market value of the Rowley vehicle, provided under plaintiff's policy.

and the further undisputed fact that

> This action was commenced by plaintiff in order to obtain a determination as to whether or not its policy of insurance afforded coverage for said accident and the Counterclaim filed therein fairly raised the issue of liability as between plaintiff and these moving defendants.

Now, for the second time in this case, plaintiff has appealed to this Court.

ARGUMENT

POINT I

UNDER THE DECLARATORY JUDGMENT ACT DISTRICT COURTS MAY SETTLE AN ENTIRE CONTROVERSY AND ENTER BOTH DECLARATORY AND COERCIVE DECREES.

Appellant's position that the lower court was empowered to determine only the narrow coverage question in this case is not only inconsistent with the allegations

of its own Complaint and the Answer and Counterclaim, as noted above, but is contrary to applicable cases and authorities as will be noted below.

The Complaint, as noted above, seeks not only a determination of the narrow coverage question, but specifically prays in the broadest of terms for a determination of "the *legal relationships of the parties* to this action *and under the written contract* of automobile insurance." (Emphasis added.) The Complaint refers, moreover, to the very same *"claims for bodily injury, wrongful death and property damage,"* which are involved in this appeal.

It is surprising and disturbing, in view of the fact that these issues are raised in plaintiff's own Complaint, and specifically assented to by the respondents in their Answer and Counterclaim, that the plaintiff should claim, as it now does, that the lower court had no power or authority to determine the very issues raised by the pleadings and as to which there is still no factual dispute in the record. This position is not only inconsistent with plaintiff's own pleadings and the conduct of its first counsel and its agent but it is unjust. Even now, plaintiff makes no claim that on the merits respondents are not entitled to the insurance proceeds. Rather, it claims that, notwithstanding the lack of any factual dispute, the respondents must go through the time-consuming and costly process of a separate and useless proceeding against its insured before they can reach the proceeds

they are clearly entitled to. Coming as it does after the plaintiff has already forced these innocent victims, involuntarily and at considerable expense, to resist in prior proceedings in the lower court and in this court its attempt to escape liability altogether, plaintiff's position borders upon the unconscionable. Plaintiff has spoken out of one side of its mouth through its first counsel and out of the other side of its mouth through its more recently hired counsel.

Aside from the serious practical handicaps plaintiff seeks to fasten upon the undeserving respondents, plaintiff's position is unsound from a strictly legal point of view. Utah Code Annotated § 78-33-1 (1953) provides:

> The District Courts . . . shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. . . .

As the statutory language above cited shows, the Court's latitude in an action for declaratory relief is not limited to the determination of a single, narrow issue as plaintiff suggests. Rather the Court may in a proper case such as the present one grant subsequent relief on other material issues in further proceedings in the same case. Contrary to plaintiff's position it has long been established under Utah law that declaratory and coercive relief may be granted in the same action. *Gray v. Defa,* 103 Utah 339, 135 P.2d 251 (1943). When declara-

tory relief is sought, it is proper under Utah law to permit the defendant to set up his side of the controversy by counterclaim even where this may involve relief of a nature different from the declaratory relief initially sought. *Gray, supra,* 103 Utah 339, 135 P.2d at 254. Such a rule promotes judicial economy and expedites justice by avoiding the necessity of separate suits on claims arising out of the same occurrences and transactions and allows the Court to accord full relief to the parties. In *Gray, supra,* 103 Utah 339, 135 P.2d at 255-256, this Court rejected the contention that separate suits in cases such as this are necessary and stated in language fully applicable to the present case:

> We see no merit in the argument that the Court in this case should permit the plaintiff to bring one action to secure a declaration that contracts do or do not give the defendants an interest in the land and require the defendants to bring a separate action, based on the same contracts, and practically same factual matter, to determine whether or not either party is entitled to a decree of specific performance or to damages.

After a declaratory judgment is entered, the parties may obtain supplemental relief under Utah Code Annotated § 78-33-8 (1953), to obtain enjoyment of the rights obtained in the declaratory suit. Declaratory and coercive relief may also be sought or obtained, at different times in the same action.

Consistent with the policy of the foregoing authorities, plaintiff State Farm filed this suit for declaratory relief seeking a determination not only on its narrow claim that the insurance policy did not cover Yazzie but a very broad determination of "the legal relationships of the parties to this action and under the written contract." The respondents properly counterclaimed, establishing their side of the controversy, and readily conceded that the Court should make a determination on the coverage question and also that "the legal relationships of the parties (should be) determined." Further, the respondents alleged that all conditions precedent to the liability of the plaintiff under its policy (of insurance) have been performed. This latter allegation has not been disputed by plaintiff.

Admittedly the lower court's initial determination and the prior appeal to this Court purposely involved only the limited coverage question. But the coverage question having been resolved it was then appropriate for the respondents to request the lower court, on the basis of the undisputed facts, to grant the complete relief they are entitled to. Consideration of respondents' request by the lower court was not a proceeding for supplemental relief on the coverage question nor a request for an interpretation of an earlier judgment as the plaintiff claims. Thus the case of *Crofts v. Crofts,* 21 Utah 2d 332, 445 P.2d 701 (1968), can have no effect as authority here. Respondents properly sought to have the Court make a determination on the separate and

distinct question of plaintiff's liability which had been raised by plaintiff in its Complaint and by respondents in their Counterclaim. Respondents also sought the equitable assistance of the Court to obtain compensation from plaintiff for the unwarranted delay caused them by plaintiff's conduct. Under the circumstances the lower court was clearly empowered and authorized under the undisputed facts in the record to consider and dispose of the issue of plaintiff's liability to respondents. It is in fact surprising that the plaintiff should now contend otherwise where it made no attempt to raise any factual issue or to dispute *any* of the facts relied upon by the respondents.

POINT II

ALL NECESSARY PARTIES WERE BEFORE THE COURT AND RESPONDENTS PROPERLY RAISED THE ISSUE OF PLAINTIFF'S LIABILITY.

A. The question of plaintiff's liability was properly before the trial court.

Under Utah law when there is a question concerning the coverage of an automobile insurance policy, it is proper for the insurer to maintain an action for declaratory relief against the insured to have the issue resolved. *E.g., Western Casualty & Surety Company v. Transamerica Insurance Company,* 26 Utah 2d 50, 484 P.2d 1180 (1971).

Those claiming injuries as a result of the tortious acts of the insured are not proper parties to an action to determine the legal effect of the terms of the insurance policy. *Utah Farm Bureau Insurance Company v. Chugg,* 6 Utah 2d 399, 315 P.2d 277 (1957).

Where, however, an insurance carrier on its own initiative joins the tort victims without their consent or approval in an action for declaratory relief involving not only the question of coverage under its policy but, in addition, seeks a broad determination of the "legal relationships of the parties . . . and under the contract" it is evident that absent an objection by the innocent tort victims the court may proceed to determine liability of the insurance company for the damages caused to the tort victim. In *Chugg, supra,* 6 Utah 2d at 406, 315 P.2d at 281, the Court explained:

> An injured party should have the right, if he desires, to have his action tried with dispatch and without regard to any dispute between the person who injured him and the latter's insurer or insurers. However, in this suit the trial court had jurisdiction of the subject matter and since Larsen (the tort victim) failed to object to his joinder as a party in that suit and the issue was triable upon appeal being taken, the issues were properly before us for review.

In the matter before the Court respondents were all victims of the negligence of plaintiff's insured driver and were not proper parties to the dispute between plain-

tiff State Farm and Yazzie on the issue of coverage. The respondents, however, elected not to object to being joined by State Farm but instead determined to permit the lower court in this suit to dispose of the entire dispute between the parties as was properly their right to do so.

After voluntarily joining the respondents, the plaintiff now objects to full resolution of the controversy in one lawsuit claiming such action constitutes an improper joinder of parties and a misjoinder of remedies. However, in joining the respondents plaintiff has voluntarily waived any right it may otherwise have had to object to the determination in this single lawsuit of all issues in dispute between it and the respondents.

Having elected to join the respondents in this suit and proceed in this fashion plaintiff is estopped to now object to a full determination of its rights vis-a-vis respondents.

Rule 18(b), Utah Rules of Civil Procedure, permits the joining of two claims in one action in situations where one claim is cognizable only after the other claim has been prosecuted to a conclusion. Rule 20(a), Utah Rules of Civil Procedure, permits the joining of two claims if relief is sought or if a claim is asserted against parties jointly, severally or, in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, if any question of law or fact common to all of them will arise in the action.

This Court has held that an attempt by the injured party to join an insurance carrier and the insured in the same action will not be permitted, when a timely objection is raised despite the liberal terms of the above rules, because of well-established public policy. *Christensen v. Peterson,* 25 Utah 2d 411, 483 P.2d 447 (1971); *Young v. Barney,* 20 Utah 2d 108, 433 P.2d 846 (1967); *Utah Farm Bureau v. Chugg, supra.*

These cases, however, indicate two essential policy reasons for the above rule: (1) the well-established policy against intentionally notifying a jury in a personal injury action of the existence of insurance which may cover the claim; and (2) joining two claims with separate bases in the law such as a claim in negligence with a claim in contract. *Young v. Barney, supra.* Neither of those policy considerations has any application in the present case.

The fact that had respondents attempted to join plaintiff in an action it could have properly objected on either of the above bases is not material since such is not the case here. Instead, having on its own initiative joined the respondents without their objection plaintiff may not now object in this case. The respondents did not join the plaintiff but rather the plaintiff itself brought the respondents in. By so doing it waived any claim it may otherwise have had to object. In the present context of the case, moreover, there is no possibility that

a jury will be influenced by the existence of the insurance so as to prejudice plaintiff's rights or the rights of its insured.

Nor may plaintiff argue as it does that there has been a misjoinder of remedies. The courts are understandably concerned where multiple claims are filed with distinctly different bases in the law since in such actions the complexity of issues may confuse the jury and may require that evidence be received on facts supporting certain of the claims which have no relevance so far as the other claims are concerned. Such procedure is not prohibited but must be reviewed by the courts as a matter of sound judicial policy. Here there are technically two claims, one resulting from the tort and one arising under a contract. There is, however, no dispute concerning the tort or the facts surrounding it. Plaintiff has made no claim that Yazzie was not responsible for the accident nor any claim that the respondent Jones contributed in any way to the accident. Yazzie's responsibility for the accident is clearly established. As the record shows without question, any claim that Yazzie was not responsible would be devoid of merit. Additionally, because of the great damage that the respondents have suffered, no claim can be made that respondents' damages do not exceed the amount of the policy. Such claims have not been made here, but if made, would be frivolous and would tax heavily the credibility of anyone making such a claim. Thus, although as a matter of policy, tort and contract claims are often tried separately, the reasons for doing

so do not apply here. In this case, where the facts are undisputed, where the pleadings of both the plaintiff and the respondents clearly raise the broad issues of liability and where the plaintiff insurance company has waived any claim by itself joining the respondents and raising the very issues involved in this appeal, the competing policies of judicial economy and the provision of an expeditous and complete resolution of the litigants' claims must predominate. Under the present facts it is proper for all claims arising out of this accident to be considered in this single lawsuit.

B. All conditions precedent to plaintiff's liability under the insurance policy were fulfilled.

In addition to its agreement with plaintiff that the broad issues involved in the "legal relationships of the parties . . . and under the written contract" should be determined, it should be noted that in answering plaintiff's Complaint the respondents stated in their Counterclaim that:

> All conditions precedent to the liability of plaintiff under said policy have been performed.

This pleading to which plaintiff filed no reply properly puts plaintiff on clear notice of the claims which the respondents submitted to the lower court and which are now involved in this appeal. Despite this

notice and despite the opportunity to deny the contention and despite every opportunity given the plaintiff to dispute the facts in the record on which respondents relied and upon which the lower court based its ruling, plaintiff has never chosen to do so. The conclusion is inescapable that the respondents' position, accepted by the lower court, is sound. Plaintiff's objections to the lower court's ruling rest not on the merits but on technical procedural grounds which are unsupported by applicable authorities as noted above.

Long after the coverage issue was resolved plaintiff has attempted to claim that Yazzie, the only indispensable party to its original action for declaratory judgment, was never properly served. Not only is this assertion untimely, but the record is devoid of any support for this claim. In any event plaintiff itself named Yazzie as a party and it should have had him served.

Plaintiff State Farm represents that it is pursuing this appeal to protect Yazzie's interests. Such is not so. Respondents have repeatedly offered, in exchange for the payment to them of the insurance proceeds, to give plaintiff a general release subject only to a reservation of its limited claims for interest and attorney's fees. This offer, if accepted, would terminate any further exposure of Yazzie to liability from respondents. Plaintiff has consistently refused this offer, in an ap-

parent attempt to coerce respondents into waiving these claims as to which they desired to obtain a determination. Plaintiff's concern therefore cannot be for its insured as it claims. Rather, it seeks to avoid its duty to compensate the respondents for its unreasonable delay in settling these obviously meritorious claims.

The record clearly indicates, and respondents have never disputed the fact, that driver Yazzie has no defense and his liability for this accident is clear. For plaintiff to represent that its obligation to Yazzie prevents it from paying the proceeds to respondents in exchange for a general release, reserving only the claims of interest and attorney's fee demonstrates a lack of responsibility not only to its insured but a disregard of its duties to the public. The parties were properly before the Court as a result of the plaintiff's own initiative and because the issue of plaintiff's liability was clearly and properly raised, as noted above, and there being no dispute concerning plaintiff's insured's responsibility for the accident, the trial court properly determined plaintiff's liability. The record, without dispute, shows that all conditions precedent to plaintiff's liability under its policy have been performed. These innocent victims of the accident should not be forced to take further, needless procedures to obtain payment. Such a useless procedure would merely be a mockery and an elevation of form over substance.

POINT III

UNDER LEGAL AND EQUITABLE PRINCIPLES RESPONDENTS ARE ENTITLED TO RECOVER INTEREST FROM OCTOBER, 1970 ON THE FACE OF THE POLICY.

The coverage afforded under plaintiff's policy is $20,000.00 plus property damage. It cannot be seriously argued that this amount is even near sufficient to cover the damages caused by the accident to the respondents Rowley, Twitchell (now Mrs. Rowley), Pendleton, and Jones. Thus, it is manifest that from the time of the accident these respondents were entitled to receive at least the full amount of the policy. The plaintiff resisted payment and instituted this declaratory action in which its denial of coverage was determined to be without merit. The decision of the lower court, affirmed by this Court, makes this clear.

In Utah the right to interest is not dependent upon whether the damages are liquidated or unliquidated but upon whether the injury and consequent damages are complete. *Wilson v. Salt Lake City,* 52 Utah 506, 174 P. 847 (1918); *Fell v. U. P. Railway Company,* 32 Utah 101, 88 P. 1003 (1907). See also *Golden West Construction Company v. United States,* 304 F.2d 753 (10th Cir. 1962), and *Wunderlich Contracting Company v. United States,* 240 F.2d 201 (10th Cir. 1957). In the *Fell* case, *supra,* for example, the defendant railroad negligently delayed its transportation of plaintiff's sheep resulting

in the sheep being left for a long period of time without food or water. Many of the sheep died and the others shrank in weight. The lower court found damages in favor of the plaintiff and awarded interest from the date of the injury.

On appeal the defendant railroad argued that since the action was for unliquidated damages sounding in tort, interest could not be allowed until the loss or damage had been ascertained at the trial. In *Fell, supra,* 32 Utah 101, 88 P. at 1007, this argument was rejected by the Supreme Court as follows:

> The true test to be applied as to whether interest should be allowed before judgment in a given case or not is, therefore, not whether the damages are unliquidated or otherwise, but whether the injury and consequent damages are complete and must be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount, rather than be guided by their best judgment in assessing the amount to be allowed for past as well as for future injury, or for elements that cannot be measured by any fixed standard of value.

Although, technically speaking, the *Fell* case involves a claim for injury to personal property (livestock) rather than for personal injuries the reasons stated for awarding interest in that case apply even more strongly

in the present case. That State Farm was obligated under its policy to pay the full policy limit was obvious from the time of the accident since the damages and expenses so far exceeded the available insurance. In this sense the amount to be paid, insofar as State Farm is concerned, was clearly ascertainable, set and complete. In no sense could it be said that the $20,000.00 due was unliquidated or unacertained. In this respect this case is much stronger than the *Fell* case where damages remained uncertain until sales were made and market prices reviewed to determine actual losses and there was no limit on what could be recovered as is the case here.

Another important difference exists between the ordinary personal injury case and the facts of this case. Rather than categorizing this case as a claim for personal injuries, since Yazzie's liability for the accident remains uncontested, it should be properly categorized as a contract action, as was the situation in *Fell.* Plaintiff has guaranteed to pay the limit of its policy in the event that its insured incurs liability up to that amount. Were this a case where the amount of damages might be less than the policy limit plaintiff could have justified its refusal to pay until a judgment fixed the amount. However, where plaintiff's insured's liability is clearly established and where damages are clearly so overwhelmingly more than the policy limit the claim as to the policy limit is complete.

An additional reason for the court to award interest is the fact that plaintiff resisted payment and caused the declaratory judgment to be filed all without any basis in law. It should therefore suffer the detrimental consequences which the delay imposed upon the innocent injured parties. As is stated in 22 Am. Jur. 2d, *Damages,* § 190, p. 268:

> The allowance of interest rates on an attempt by courts to award compensation to the plaintiff for the delay involved between the date of the injury (the time that the plaintiff was entitled to compensation) and the date of the award or judgment. Since the plaintiff was deprived of compensation for his injury during this period to the same extent in tort cases as in actions for breach of contract, the general rule is that where interest is awarded in tort cases, it is awarded as a matter of right.

While it was the right of plaintiff to force a legal determination as to its policy coverage such right should not unduly injure or prejudice the injured parties. The case here is analogous to one involving a burned building. At the time the building is burned an immediate loss is incurred. If the insurance company chooses to bring a declaratory judgment to question its coverage and it is later determined that coverage existed under Utah law the owner of the building is entitled to interest from the date of loss on the amount due him under applicable insurance coverage. Here, the injured parties are equally entitled to the insurance proceeds and should likewise be entitled to interest from the date their loss was sus-

tained where their injuries so far exceed the available insurance proceeds.

Consistent with the foregoing, the Utah Supreme Court has stated that a tort victim has a right to have his action tried with dispatch without regard to disputes which may exist between the person who injures him and that person's insurer. *Utah Farm Bureau Insurance Company v. Chugg, supra.* To disallow interest in a clear-cut case such as the present one would only encourage the bringing of declaratory judgment actions in even questionable cases thereby necessarily involving substantial expense and delay to innocent victims such as the injured respondents in this case. For this reason, the injured respondents should not be penalized in the loss of use of money which has been undisputably owed to them merely because of a plaintiff's refusal to pay arising out of nonmeritorious coverage dispute between the plaintiff and its insured. If interest is not awarded, it is obvious that in a very real sense the plaintiff insurer will be permitted to benefit from its unjustified denial of coverage and its institution of proceedings against the injured respondents if it can merely avoid payment of interest on its obligations through the period of the delay incident to the formal judicial rejection of its invalid position. The insurer in such a case is rewarded to the extent of its continued use without penalty of the policy amount during the lower court determination and the appeal. The innocent, injured parties on the other hand must absorb not only the legal expense inci-

dent to the suit which is forced upon them but also the loss of the use of the money they are entitled to receive for the same substantial period. In a case such as this where liability of the insured is clear from the outset, and where the respondents have obviously suffered damages far in excess of the policy limits, thus insulating the plaintiff insurance company from ever compensating the respondents for the unwarranted delay, the Lower Court's award of interest should be affirmed.

For the foregoing reasons, both law and equity dictate that interest be allowed from the date of the injury up until the time of actual payment.

CONCLUSION

When a declaratory judgment action is filed District Courts have authority to settle the entire controversy giving rise to the action. A defendant in a declaratory judgment action may properly counterclaim and seek both declaratory and coercive relief. Such relief may be sought at such times and in such manner as will properly protect the interests of the parties and resolve the entire dispute in question.

Although it is not generally permissible to join the insured and insurance company as parties to the same lawsuit, where the insurance company elects to join the victims of the insured's action to a lawsuit against its insured, such rule does not apply. By electing to join the innocent victims in the lawsuit without their per-

mission the insurance company waived any right it may have had to claim that potential prejudice would result from this procedure. If there is no dispute on the facts the tort action and contract action may proceed in the same lawsuit where it is evident that such procedure cannot confuse a jury and will aid in obtaining an expeditious and complete resolution of the dispute.

Where, as here, the amount of damages to the respondents is clearly established in the record to be far in excess of the insured's liability, and where the facts giving rise to such liability were not in dispute, respondents are entitled on legal and equitable principles to recover interest on the insurance proceeds. Plaintiff insurance company has and claims no meritorious defense to liability. Plaintiff's attempts to prolong this dispute through further useless proceedings raises serious questions concerning its good faith, particularly in view of its own pleadings in the case and the conduct of its attorney and its agent.

Respectfully submitted,

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