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IN THE SUPREME COURT OF THE STATE OF UTAH

DOROTHY CHRISTENSEN and ANN MARIE LARSEN,
Plaintiffs and Appellants,

vs.

CARLA BETH PETERSON and ALLSTATE INSURANCE CO.,
Defendants and Respondents.

Case No. 12065

BRIEF OF RESPONDENT ALLSTATE INSURANCE COMPANY

Appeal from the Order of the Third Judicial District Court in and for Salt Lake County
Honorable Merrill C. Faux, Judge

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

DOROTHY CHRISTENSEN and ANN MARIE LARSEN, *Plaintiffs and Appellants,* vs. CARLA BETH PETERSON and ALLSTATE INSURANCE CO., *Defendants and Respondents.*	Case No. 12065

BRIEF OF RESPONDENT ALLSTATE INSURANCE COMPANY

STATEMENT OF THE KIND OF CASE

This is an action by plaintiffs against Carla Beth Peterson, tort feasor and uninsured motorist, and against Allstate Insurance Company, uninsured motorist insurance carrier of plaintiffs, wherein plaintiffs seek to recover damages from both defendants by reason of injuries sustained in an automobile accident.

DISPOSITION IN THE LOWER COURT

Upon the filing of plaintiffs' Complaint naming both Carla Beth Peterson and Allstate Insurance Company as defendants, Allstate Insurance Company filed its Motion

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to Dismiss plaintiffs' Complaint as against it on the ground if improper joinder of parties and misjoinder of remedies. Defendant's Motion was granted by the trial court, and its Order was entered to that effect. It is from that Order that the plaintiffs appeal.

RELIEF SOUGHT ON APPEAL

Defendant, Allstate Insurance Company, seeks to have the Order of the trial court affirmed which dismissed it as a party in the above-entitled action.

STATEMENT OF FACTS

On the 4th day of February, 1969, plaintiff, Ann Marie Larsen, was driving an automobile owned by her husband, Orville S. Larsen, and in which plaintiff, Dorothy Christensen, was riding as a passenger when they were involved in an automobile accident with defendant, Carla Beth Peterson, at or near the intersection of Sixth North and Redwood Road in Salt Lake City, Utah. (R.1)

Both plaintiffs claim to have sustained bodily injury as a result of the collision, plaintiff, Dorothy Christensen, seeking to recover damages against defendant, Carla Beth Peterson, for past and future medical expenses, past and future loss of earnings and general damages in the sum of $25,000.00, and plaintiff, Ann Marie Larsen, seeking to recover damages against defendant, Carla Beth Peterson, for past and future medical expenses, for past and future loss of earnings and general damages in the sum of $25,000.00.

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Both plaintiffs seek to recover damages against defendant, Allstate Insurance Company, in the amount of any judgment rendered against the individual defendant up to and including the sum applicable to the policy limits of $10,000.00 per person and $20,000.00 per occurrence. (R. 3)

Defendant, Allstate Insurance Company, had issued its policy of automobile liability insurance to Orville S. Larsen, husband of plaintiff, Ann Marie Larsen, which policy provided for protection against bodily injury by uninsured automobiles with applicable limits of coverage of $10,000.00 per person and $20,000.00 per accident (R. 29), the vehicle covered being a 1966 Valiant automobile and the policy period being from June 10, 1968, to June 10, 1969. (R. 29)

Plaintiffs filed their Complaint against defendants, Carla Beth Peterson and Allstate Insurance Company, which Complaint sounded in three causes of action, the first cause of action being the claim of Dorothy Christensen against Carla Beth Peterson, the second cause of action of the Complaint being the claim of Ann Marie Larsen against Carla Beth Peterson, said causes of action sounding in tort. The third cause of action is the claim of the plaintiffs' jointly against defendant, Allstate Insurance Company, which cause of action sounds in contract. (R. 1-3)

Upon the filing of plaintiffs' Complaint and service of process on both defendants, Allstate Insurance Company, by and through its counsel, made a Motion to Dis-

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miss plaintiffs' Complaint as against it on the ground that the Complaint against the individual defendant and insurance company was improper in that it involved an improper joinder of parties and a misjoinder of remedies. The Motion was argued before the Honorable Merrill C. Faux on the 9th day of March, 1970, and after hearing argument of counsel for the respective parties, the Motion was granted; however, the Order of Dismissal as against Allstate Insurance Company was signed by the Honorable Gordon R. Hall, one of the Judges of the Third District Court. (R. 13) It is from the action of the trial court in dismissing plaintiffs' Complaint against defendant, Allstate Insurance Company, that this appeal was prosecuted.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW IN DISMISSING PLAINTIFFS' COMPLAINT AGAINST DEFENDANT, ALLSTATE INSURANCE COMPANY.

The applicable provisions of the automobile liability insurance policy issued by defendant, Allstate Insurance Company, to Orville S. Larsen are as follows:

> "Section II. Protection Against Bodily Injury by Uninsured Automobiles.
>
> Coverage S—Bodily Injury Benefit Insurance:

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Allstate will pay all sums which the insured shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury sustained by the insured caused by the accident and arising out of the ownership and maintenance or use of such automobile.

The following persons are insured under this Section:

1. The named insured and his relatives while residents of his household; and

2. Any other person while in or upon, entering into or alighting from the owned automobile provided the actual use thereof is by or with the permission of the named insured." (R. 29, p. 6)

"Action Against Allstate:

No action shall lie against Allstate until after full compliance with all the terms of this policy nor, as respects insurance afforded under Section I, until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and Allstate.

Any person or organization or the legal representative thereof having secured such judgment or written agreement, shall be entitled to recover under this policy to the extent of the insurance afforded, but this policy shall not give any right to join Allstate in any action to determine the insured's liability, nor shall Allstate be impleaded by the insured or his legal representative. Bankruptcy or insolvency of the insured or his estate shall not relieve Allstate of any obligations." (R. 29, p. 16)

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The policy of insurance in question also contains an arbitration provision at page 8 under the heading "Determination of Legal Liability and Amount of Damages." The defendant concedes that the provision of the insurance policy under Section II, Coverage S. Protection Against Bodily Injury by Uninsured Automobiles to the effect that:

> " * * * the determination as to whatever the insured shall be legally entitled to recover damages and if so the amount thereof shall be made by agreement between the insured and Allstate.
>
> In the event of disagreement and upon written demand of the insured, the matter or matters upon which the insured and Allstate do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association, * * * "

is not binding on the parties by virtue of a decision of the Supreme Court of the State of Utah in the case of *Barnhardt v. Civil Service Employees Insurance Co.*, 16 Utah 2d 223, 398 P.2d 873 (1965). In that case the court held that a provision requiring arbitration as to whether or not the assured was legally entitled to recover and if so the amount of his damages which was substantially identical to the provision contained in the policy issued by Civil Service Employees Insurance Company was invalid and stated as follows:

> " * * * Accordingly, the trial court was correct in ruling that the plaintiff should not be precluded from having the court adjudicate their contention that the defendant has agreed to reimburse them for damages *that they are legally entitled to re-*

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cover from the uninsured motorist [Welcker]." (Emphasis added) 16 Utah 2d at p. 230.

Therefore, it seems clear that before the plaintiff is entitled to be reimbursed from the defendant, there must have been a legal determination that he comes within the scope of the policy providing for uninsured motorist coverage and in order for this to be done, the following must be proven:

1) Liability on the part of the tort feasor, i.e. negligence on behalf of the tort feasor or any persons jointly or severally liable with him and an absence of contributory negligence on the part of the plaintiff.

2) The amount of the damages, if any, which the plaintiff has sustained.

3) The fact that the tort feasor or any persons jointly or severally liable are uninsured.

The contention that the plaintiff must establish liability on the part of the tort feasor is supported by the following language from the *Barnhart* case, supra:

> "Defendant has also assailed the judgment on the ground that, in any event the plaintiffs were not entitled to recover against the uninsured motorist [Welcker] because the evidence does not support a finding of the latter's negligence, and also that it showed that Mrs. Barnhart was herself guilty of contributory negligence as a matter of law, which would preclude her recovery. We deem it sufficient to say that we have given consideration to these contentions, and that under

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traditional rules, viewing the evidence in the light most favorable to the findings and judgment, the evidence supports them and they should not be disturbed. * * * " 16 Utah 2d at p. 230.

The *Barnhart* case also supports the contention that the plaintiff must initiate legal action against the tort feasor to determine the amount of his damages, and the court stated as follows:

> " * * * Whether plaintiffs are legally entitled to recover from Welcker [the uninsured motorist], and, if so, the amount of damages, could only be determined between the plaintiffs and Welcker. * * * " 16 Utah 2d at p. 229

Plaintiffs contend that the *Barnhart* case is authority for the joining of their uninsured motorist carrier in a direct action with the tort feasor. Defendant, Allstate Insurance Company, could not disagree more with the plaintiffs. The action against the insurance carrier in the *Barnhart* case was not based upon that plaintiff's uninsured motorist claim, but was an action to test the validity of the arbitration clause. Inasmuch as the two parties to the policy of insurance were Mrs. Barnhart and Civil Service Employees Insurance Company, the carrier would have had to be joined as a party for determination of the issue presented.

In the recent Oklahoma case of *Holt v. Bell,* 392 P.2d 361 (1964), the court held that an insured plaintiff would not be allowed to join plaintiff's insurer as a co-defendant in an action against an allegedly uninsured tort feasor defendant on the basis of uninsured motorist coverage contained in plaintiff's insurance policy.

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In this regard, it should be noted that the policy provision in the uninsured motorist part of the policy which states that, "* * * the insured or his legal representative shall be legally entitled to recover as damages * * *" is substantially the same as the provision contained in the policy involved in the *Barnhart* case, and the court relied upon that provision in holding that the arbitration provision was invalid and that the issue of legal liability and the amount of damages should be determined by a court and stated as follows:

> "In addition to the foregoing considerations, there are others arising from the context of the contract itself which also have a bearing on the conclusion we reach. It recites that the defendant's liability is to pay the amount the insured 'shall be *legally* entitled to recover as damages' from the operator of an uninsured automobile. The reasonable import of that language would seem to be that the amount plaintiffs may recover should be determined by the *process of law* and thus by a court rather than by an arbitrator." 16 Utah 2d at p. 228.

It also seems clear that the policy contemplates that an action must be filed against the alleged uninsured motorist and the issues of liability and damages and lack of insurance must be determined in a separate proceeding based upon the provisions of the policy quoted above under Conditions, No. 3, which in effect states that if an action is filed against the uninsured motorist by the insured that a copy of the summons and complaint or other process serviced in connection with that action must be forwarded to the insurance company.

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In addition to the foregoing provision of the policy and quotations of applicable law from the *Barnhart* case, there is another compelling reason why the plaintiffs' Complaint against the defendant, Allstate Insurance Company, should be dismissed and they should be required to adjudicate the issue of legal liability, damages and lack of insurance in a separate proceeding. This reason is that the plaintiffs have a substantial advantage if they are able to name the insurance carrier as a defendant when the issues of legal liability and damages are decided by a jury.

Our Supreme Court has repeatedly recognized that the issue of insurance should not be injected into a trial by jury which is to decide the issue of legal liability in a negligence action and the amount of damages, if any. The following quotation from the case of *Young v. Barney,* 20 Utah 2d 108, 443 P.2d 846 (1967), clearly sets this forth:

> "* * * The safeguarding against disclosure to a jury of insurance coverage in personal injury trials is a very touchy subject which lawyers and judges have always been obliged to handle such caution as to justify use of the metaphor 'walking on eggs'. The understanding has always been that it was prejudicial error to deliberately inject insurance into such a trial."

Thus, our court in stating that the issue of insurance coverage should be injected into a jury trial of a personal injury case has inherently recognized that to do so would give the plaintiff an unfair advantage in that the verdict may be based upon the fact that there is insur-

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ance coverage available rather than the rules of law relating to the issues of legal liability and damages.

To hold that the plaintiffs in this action are entitled to maintain their suit against their insurance carrier would allow the plaintiffs to have the issue of insurance injected into the trial of a personal injury action where it clearly does not belong. To allow a plaintiff to maintain such an action to a conclusion would place him in a different and more favorable category than a plaintiff who was injured by a tort feasor who was covered with a policy of liability insurance coverage.

It should also be noted that the primary issue in the *Young* case was whether or not it was proper to join the insurance carrier of the alleged tort feasor as a party defendant in a personal injury action under the provisions of Rules 18(b) and 20, U.R.C.P., relating to joinder of remedies and permissive joinder of parties respectively. The court clearly stated that the insurance carrier was not a proper party to the proceedings and ordered the Complaint against it dismissed.

CONCLUSION

It seems clear to respondent herein from the provisions of the insurance policy quoted and the applicable Utah law that it is improper for plaintiffs to join in a single Complaint, causes of action and remedies based in contract and in tort, and that the proper procedure for the plaintiffs to follow in this case is to file their action against the alleged tort feasor and have the issues

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of liability and damages decided by a judge or a jury or a court of competent jurisdiction as mandatory conditions precedent to an action against the insurance company under the coverage afforded by the insurance contract with respect to uninsured motorists. After the liability of the tort feasor has been established, if that should be the case, then the question of lack of insurance of the tort feasor could be established and if that were established, they then, of course, would respond by payment of the judgment to plaintiffs up to the amount of the applicable limits of liability coverage for uninsured motorist protection.

Defendant, Allstate Insurance Company, respectfully contends that the action of the trial court in dismissing plaintiffs' Complaint as against defendant, Allstate Insurance Company, on the ground that said Complaint involved a misjoinder of parties and misjoinder of remedies was correct and proper, and that the action of the trial court should be affirmed.

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