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Barbara Lyon v. Hartford Accident and Indemnity Company v. Yosemite Insurance Company : Brief of Defendant and Appellant

Utah Supreme Court

IN THE SUPREME CO
OF THE STATE OF

BARBARA LYON,
Plaintiff and Respondent,

vs.

HARTFORD ACCIDENT AND
INDEMNITY COMPANY,
Defendant and Appellant,

and

YOSEMITE INSURANCE
COMPANY,
Defendant.

Brief of Defendant

Appeal from a Judgment of the
In and For Salt Lake C
The Honorable Gordon

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IN THE SUPREME COURT OF THE STATE OF UTAH

BARBARA LYON,
Plaintiff and Respondent,
vs.
HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Defendant and Appellant,
and
YOSEMITE INSURANCE COMPANY,
Defendant.

Case No. 12068

Brief of Defendant and Appellant

NATURE OF THE CASE

This is an action for benefits under the Uninsured Motorists Coverage of an automobile insurance policy.

DISPOSITION IN THE LOWER COURT

The case was heard in the District Court of Salt Lake County, Utah, The Honorable Gordon R. Hall, District Judge, Presiding, on cross motions for summary judgment. The motion of plaintiff (Miss Lyon) was granted in part and denied in part. The motions of de-

fendant and appellant (The Hartford) and Yosemite were denied. The Hartford appeals from the judgment denying its motion and granting Miss Lyon's.

RELIEF SOUGHT ON APPEAL

The Hartford seeks reversal of the judgment and judgment in its favor on its Motion for Summary Judgment.

STATEMENT OF FACTS

Miss Lyon was a passenger in a car driven by Bernie Alex Martinez when that automobile was involved in an accident caused by the joint negligence of Scott Gould Nickel and Robert G. Butcher in the operation of automobiles by them. (R. 2). Miss Lyon obtained a judgment against Nickel and Butcher in amount of $70,083.75. (R. 1).

Nickel did not have a nickle's worth of liability insurance. Butcher had liability insurance but the policy limit was $10,000. He paid $8,000 of that to Miss Lyon and $2,000 into court because of a claim by The Hartford that it was entitled to reimbursement of $2,000 paid under the Medical Payments Provision of its policy. (R. 1).

Yosemite Insurance Company had issued an insurance policy covering Mr. Martinez and the automobile in which Miss Lyon was riding at the time of the accident which policy provided Uninsured Motorists Coverage of $10,000. (R. 16).

Yosemite refused payment initially, claiming that it was entitled to credit for the $10,000 paid by Butcher, but the trial court was not persuaded and Yosemite paid rather than appeal. (R. 138).

ARGUMENT

POINT I

NO AMOUNT IS PAYABLE UNDER APPELLANT'S POLICY.

This is an action in contract.

The contract between the parties provides that any amount otherwise payable under the Uninsured Motorists Clause shall be reduced by all sums paid on account of the injury by or on behalf of either the operator of the uninsured highway vehicle or any other person jointly or severally liable for such injury. The precise language of The Hartford's policy is:

> "COVERAGE D — PROTECTION AGAINST UNINSURED MOTORISTS: The company will pay all sums which the insured . . . shall be legally entitled to recover as damages from the . . . operator of an uninsured highway vehicle because of bodily injury . . . caused by accident . . . and arising out of the . . . use of such uninsured highway vehicle." (R.42).
>
> * * *
>
> "LIMITS OF LIABILITY
> (C) The limit for Coverage D — Uninsured Motorists stated in the declarations as applicable to "each accident" is the total limit of the company's liability for all damages because of bodily injuries sustained by one or more persons as the result of any one accident.

Any amount payable under Coverage D — Uninsured Motorists because of bodily injuries sustained in an accident by a person who is an insured under this coverage shall be reduced by

(1) All sums paid on account of such bodily injury by or on behalf of (i) the owner or operator of the uninsured highway vhicle and (ii) any other person or organization jointly or severally liable together with such owner or operator for such bodily injury . . ." (R. 44).

The limits stated in the declarations is $20,000. (R. 54).

There was paid on account of this injury $10,000 on behalf of Butcher, a person jointly or severally liable with Nickel, the uninsured motorist. (R. 138).

The amount payable after application of the above provision, would therefore, be $10,000.

However, the policy also provides that where the insured person (Miss Lyon) is occupying a non-owned automobile (Martinez) the Uninsured Motorists Coverage is excess over any other similar insurance available to such insured. The provision is:

"OTHER INSURANCE: * * *

"With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, the insurance under Coverage D — Uninsured Motorists shall apply only as excess insurance over any other similar insurance available to such insured and application to such automobile as primary insurance, and this insurance shall

then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other coverage." (R. 44).

The respondent was occupying an automobile not owned by her father or herself, but rather owned by Martinez. Similar insurance was available to her under Martinez' policy, namely, $10,000 of Uninsured Motorist's Coverage provided by Yosemite Insurance Company.

This clause is clear and unambiguous. Similar language was held in *Russell* v. *Paulson,* 18 Utah 2d 157, 417 P.2d 658 (1966), to preclude recovery under both the owner's and the passenger's policy. In that case the passenger's policy, issued by Factory Mutual provided:

"Other Insurance.* * *

With respect to bodily injury to an insured while occupying an automobile *not owned by the named insured* the insurance hereunder shall apply only as excess insurance over any other *similar insurance available* to such occupant, and this insurance shall then apply only in the amount by which the applicable limit of this part exceeds the sum of the applicable limits of liability of all such other insurance." (Emphasis added.)

The Supreme Court said:

"Factory contends that its excess clause obligates it to pay only that amount by which the limits of its policy exceed the limits of all other available insurance. If applied to the facts of this case, this contention would allow Factory to avoid all liability. In support of this position Factory

cites Appleman, Insurance Law and Practice, Vol. 8, p. 400:

> '* * * Where the owner of an automobile or truck has a policy with an omnibus clause, and the additional insured also has a non-ownership policy which provides that it shall only constitute excess coverage over and above any other valid, collectible insurance, the owner's insurance has the primary liability.' '' *Russell* at 660.

The court adopted this view, saying:

> "The language is free and clear of ambiguity, that since the limits of [the passengers] policy did not exceed [the owners] excess coverage cannot be applied to [the passengers] policy." p. 662.

In this case, the Hartford undertook to make certain that Miss Lyon would receive $20,000 if injured to that extent by an uninsured motorist. Its undertaking was not to pay that amount in addition to sums received from other sources. On the contrary, its undertaking was to be reduced by sums received from other sources.

In *National Indemnity Co.* v. *Lead Supplies, Inc.,* 195 F. Supp. 249, 255 (1960), it was said:

> "An insurance company, like any other obligor under a contract, cannot be held responsible for more than it became obligated to perform. Such obligations can only be determined from the insuring agreements."

See also *Ephraim Theatre Company* v. *Hawk,* 7 Utah 2d 163, 321 P.2d 221 (1958).

POINT II

IN NO EVENT COULD RESPONDENT BE LIABLE FOR MORE THAN $10,000 IN THIS CASE.

If we ignore the fact that Miss Lyon has recovered $10,000 from one of the wrongdoers, we have a case where the policy issued by The Hartford is excess and applies only in the amount which the limit of its liability ($20,000) exceeds the limit of the other coverage ($10,000) extended by Yosemite. The controlling provision is:

> "OTHER INSURANCE: * * *
>
> "With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, the insurance under Coverage D — Uninsured Motorists shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automoblie as primary insurance, and that insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other coverage." (R.44).

Miss Lyon was injured while occupying an automobile not owned by her or her family. Other similar insurance was available to her through Yosemite. That insurance is primary and The Hartford's can be liable only in the amount by which its limit ($20,000) exceeds Yosemite's limit ($10,000). *Russell v. Paulson, supra.*

In *Martin, et al.* v. *Christensen, et al.*, 22 Utah 2d 415, 454 P.2d 294 (1969), the court had before it a pro-

vision to the effect that no payment should be made which would result in a total payment in excess of the highest application limit of liability under two or more policies applicable to a loss.

The company urged that the paragraph was designed to provide coverage under one policy and to avoid the effect of cumulative or multiple limits on a single accident where an insured has more than one policy and the premiums are based upon the total exposure of risk on the entire policy as written including the limitations.

This court said:

> "There appears to be no ambiguity or uncertainty in the provision just quoted. It being thus set forth as part of the insurance contract, in clear and understandable terms, that where the Company has issued more than one policy to an insured, it will be liable only up to the maximum coverage of its highest limit on any one policy for any one accident or loss, it is the duty of the courts to give it effect. This is true unless considerations of equity and justice, or of public policy, dictate that the contract should not be enforced because of fraud, duress, mistake, unconscionability, illegality or some other such cogent reason. No such considerations are present here."

There is no way to sustain the lower court's judgment that The Hartford is liable for $20,000 without writing a new contract for these parties.

POINT III.

IF APPELLANT HAS LIABILITY UNDER COVERAGE D — UNINSURED MOTORISTS, IT IS ENTITLED TO SET-OFF THE $2,000 PAID UNDER THE MEDICAL PAYMENTS COVERAGE WITHOUT ALLOWANCE OF ATTORNEYS' FEES.

It is uncontroverted that a recovery was made against one of the persons responsible for the accident. If The Hartford is liable to Miss Lyon under the Uninsured Motorist Coverage, that liability should be reduced by the amount paid under the medical payments coverage.

The pertinent policy provisions are:

> "COVERAGE B — MEDICAL EXPENSE: The company will pay all reasonable medical expense incurred within one year from the date of accident for bodily injury caused by accident and sustained by the named insured or a relative . . ." (R.42).
>
> Subrogation: "In the event of any payment under Coverage B — Medical Expense of this policy, the company shall be subrogated to all the rights of recovery therefor in which the injured person or anyone receiving such payment may have against any person . . . " (R. 47).

In *State Farm Mutual Insurance Co.* v. *Farmers Insurance Exch.*, 22 Utah 2d 183, 450 P.2d 458 (1969), this court held that such provision was valid. Judge Hall correctly awarded $2,000 to The Hartford but erron-

eously allowed attorneys' fees of $500 to Miss Lyon's attorneys.

There was no showing that Butcher's insurer was not willing to pay the limit of its policy to whomever was entitled to receive it. There was no showing that The Hartford accepted the benefits of Mr. McRae's efforts under circumstances implying an obligation to pay. Mr. McRae was adverse to The Hartford.

To allow attorneys' fees in such a situation would be to subsidize Mr. McRae's efforts to recover against The Hartford without either rule of law or contractual provision so providing contrary to the decision of this court in *Blake* v. *Blake,* 17 Utah 2d 369, 412 P.2d 454 (1966).

CONCLUSION

The Hartford's policy provides that if Miss Lyon is involved in an automobile accident with an uninsured motorist and sustains injuries as a result, it will see that she can collect any judgment up to $20,000. She has collected $20,000. This is the extent of The Hartford's undertaking.

This intent is expressed by clear and unambiguous language. The $20,000 limit is to be reduced by the $10,000 received from Butcher's insurer. The applicable limit, as so amended, is $10,000. The coverage is excess over the $10,000 extended by Yosemite. Therefore, no amount is payable under The Hartford's policy.

But if the court concludes that some amount is payable, under no interpretation of the policy can this amount exceed $10,000 less the full $2,000 paid by The Hartford under its Medical Payments Coverage.

Respectfully submitted,

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