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Barbara Lyon v. Hartford Accident and Indemnity Company v. Yosemite Insurance Company : Brief of Amicus Curiae

Utah Supreme Court

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 AMICUS CURIAE

**Appeal from a Judgment of the Third District Court
In and For Salt Lake County, State of Utah
The Honorable Gordon R. Hall, Judge**

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LEONARD W. BURNINGHAM and DAVID B. DEE, attorneys representing numerous clients whose interests coincide with the issues herein, were granted leave by order of the above-entitled Court on the 31st day of July, 1970 to appear as Amicus Curiae. For the sake of brevity, the Amicus Curiae accepts statement of the case and facts as set forth in respondent's Brief and will limit its discussion to matters which

it feels merit additional consideration to assist the Court in determinintg the ultimate liability of Appellant to Respondent.

ARGUMENT

POINT I

ASSUMING THE EXISTENCE OF AN UNINSURED MOTORIST INSURANCE POLICY WITH THE REQUISITE LIABILITY HAVING BEEN ESTABLISHED BY A SHOWING THAT THE DAMAGES INCURRED WERE THE RESULT OF THE NEGLIGNCE OF AN UNINSURED MOTORIST AS DEFINED THEREIN, AN INJURED PARTY SHOULD BE ENTITLED TO THE BENEFIT OF ALL AVAILABLE INSURANCE COVERAGE UP TO THE AMOUNT OF HIS INJURIES.

Recent decisions which have construed standard form insurance contract clauses which limit uninsured motorist insurance coverage have held them void as against the public policy of the respective states involved in that their import is to limit the insurer's liability under the uninsured motorist provisions of its policy in a manner which is against the avowed policy expressed in the legislative enactment of required offerings of uninsured motorist coverage. The leading cases in this area which have struck down various limiting insurance clauses whether the form

be "prorata", "excess insurance", or "excess-escape" are *Sellers vs. United States Fidelity and Guaranty Co.*, 185 So. 2d 689 (Sup. Ct. Fla. 1966), *Geyer v. Reserve Insurance Co.*, 8 Ariz. App. 464, 447 P.2d 556 (1968), and *White v. Nationwide Mutual Insurance Company*, 361 F.2d 785 (4th Cir. 1966).

In *Sellers*, the specific issue before the Supreme Court of the State of Florida was whether an automobile insurance carrier required to provide coverage against injury by an uninsured motorist in accordance with the requirements of the Florida Uninsured Motorist Statute could deny such coverage on the grounds that the insured had other similar insurance available to him after having accepted a premium for the uninsured motorist coverage. The statutory provisions of the State of Florida which require the offering of uninsured motorist coverage provide that insurance companies must make available to every prospective insured uninsured motorist coverage in dollar amounts not less than $10,000.00. The Court held that the insurance carrier could not deny the insured party the benefit of uninsured motorist coverage on the basis of limiting clauses in its insurance contract where to do so would allow the insurance company to invalidate the minimum liability coverage set forth in the Florida statutory provisions. In construing the statute in light of the purpose for which it was enacted, the Court stated that all clauses in the insurance policy which were in derogation of the policy behind the statute must be rejected, and further that said clauses were inconsistent with the public policy of the state of Florida.

The Court reasoned that in all situation where insurance is available from one or more insurers, one of the insurance company's contracts must be violated because ordinarily each contains clauses limiting its availability where other similar insurance exists, with each company claiming the other's policy to be primary insurance and its own to be secondary. The Court felt that in light of this necessity, its only alternative was to reject all clauses of a limiting nature in favor of the insured's position. The Court's holding is supported by the reasoning in *University of Florida Law Review* 4, at 455. The Court concluded by stating:

> "It is further our view that the statute does not intend that an insured shall pyramid coverages under separate automobile policies so as to recover more than his actual bodily injury, loss or damage. By way of illustration, if his loss amounts to $30,000.00 because of bodily injury inflicted upon him by an uninsured motorist, we see no reason why, if he is the beneficiary of three automobile liability insurance policies, he may not recover the maximum allowed under each policy." 185 So. 2d at 692.

Geyer v. Reserve Insurance Co., supra, a 1968 case handed down by the Supreme Court of the state of Arizona, supports the reasoning of *Sellers* and the position of the respondent in the case at bar. In *Geyer*, plaintiff was a passenger in a vehicle which was involved in an accident with an uninsured vehicle. The vehicle in which plaintiff was riding was covered by a $10,000.00 liability insurance policy and a $10,000.00 uninsured

motorist policy, both of which included plaintiff in the event injuries resulted due to the negligence of the owner of the vehicle and/or an uninsured motorist. The sole question before the Court was if both the driver of the vehicle plaintiff was riding in and the uninsured motorist were at fault, could plaintiff recover up to the limits of both insurance policies, provided her injuries were, in fact, $20,000.00 or in excess thereof. The Court held plaintiff could recover up to the limits of both policies if the driver of the vehicle and the uninsured motorist were both at fault. The Court stated that the insurer was responsible to the insured up to her total legal damages so long as such coverage did not effect a double recovery in favor of the insured. This conclusion is supported by the reasoning set forth in the *Sellers* case, *supra.*

The position of the Florida Supreme Court and the Arizona Supreme Court set forth in the two decisions hereinabove referred to is supported by *White v. Nationwide Mutual Insurance Company, supra.* In that case, the Fourth Circuit Court stated that clauses in the insurance company's policies which limit the insurance company's liability should be applied to limit and reduce the damages of the insured or injured party, but not the exposure of the insurer. The Court further stated that to reduce the liability of the insurer on the basis of "excess' or "other insurance" clauses when the injuries of the insured exceed all available insurance coverage, was against public policy.

The avowed purpose for the enactment of the Utah

Uninsured Motorist Statute, Section 41-12-21.1, UCA (1953), is to give people carrying such coverage protection from those who cause injury but because of their uninsured status, are not able to compensate the insured party. This Court has heretofore held that it must consider the purpose of the entire act when construing a statute and that it will attempt to promote the intent of the legislature in its application. *Western Auto Transport v. Reese*, 104 Utah 393, 140 P.2d 348 (1960).

This Court stated in *Martin v. Christensen*, 22 Utah 2d 415, 454 P.2d 294 (1969), that ordinarily, the language in an insurance contract is to be given its plain, common meaning. However, this Court has held that where ambiguity exists, the contract will be strictly construed against the insurer so as to give the insured the broadest protection he could have reasonably believed the terms of the insurance contract afforded him. *P. E. Ashton v. Joyner*, 17 Utah 2d 162, 406 P.2d 306 (1965). The insurer, by its own argument set forth in Appellant's Brief, admits that it is guaranteeing the insured a maximum amount of insurance, in this case $20,000.00. The statutory provisions in Section 41-12-21.1 specifically state that the insured shall receive a minimum of $10,000.00 in uninsured motorist coverage. The insurance contract of the appellant as written offers the respondent not a minimum amount of insurance written in the face value of the policy, but a maximum amount of insurance by limiting its liability to respondent as a secondary type of insurance, and then only if the policy limits of its insured exceed those of all other available

insurance. Certainly this Court cannot be persuaded that what the respondent thought she was buying was a maximum amount of insurance, regardless of who was at fault in the event an accident occurred. Any individual purchasing insurance in his narrowest belief would expect that his own insurance coverage was his minimum, and not his maximum, to be added to any other insurance which was available in the event an accident occurred in which he was not at fault. Based upon the underlying purpose for the enactment of the Utah Uninsured Motorist Statute and the reasoning set forth by this Court in *Joyner, supra*, the clauses in appellant's insurance contract which limit its liability should be struck down as void and against the public policy of the state of Utah.

This Court struck down similar provisions of an insurance contract when uninsured motorist coverage was at issue in *Barnhart v. Civil Service Employees Insurance Co.*, 16 Utah 2d 223, 398 P.2d 873 (1965). The Court stated:

> "The insured of not required to read, nor to understand, nor to sign anything, but only to pay his premium. The practical reality is that the lay purchaser is in an inferior bargaining position and simply accepts unilaterally the policy as prepared by the company." 16 Utah 2d at 229.

The Courts have struck down clauses in insurance policies which limit the liability of the insurer on the grounds of public policy, but the cases set out above also support the proposition that to allow the insurance com-

panies to limit their liability by way of contract where uninsured motorist statutes require a minimum amount of coverage, is to allow the insurers to act in derogation of the statutory language. The Utah statute requires a minimum amount of uninsured motorist coverage to be offered to the insured in a dollar amount no less than $10,000.000. Therefore, since the clauses in the insurance contract of appellant attempt to reduce that minimum required amount, they should be struck down. This Utah statute is remedial in nature, and where the appellant, as in this case, was required to offer uninsured motorist coverage to the insured and to collect a premium for said coverage in the amount of $20,000.00, it should not be allowed to limit its liability by any clauses in its contract. It is respectfully submitted that if these clauses in appellant's insurance contract are to be given effect, this Court should follow the reasoning set out in *White, supra*, and hold that such clauses should be applied to limit and reduce the damages of the insured, but not the exposure of the insurer.

Appellant's policy states that it shall be responsible to the insured for "all legal liability" of the uninsured motorist, and as such, the contract should be read in a light most favorable to the insured. Giving effect to appellant's insurance policy clauses which limit its liability would create a windfall in favor of appellant at the expense of respondent. Therefore, appellant should be liable to respondent for the total face amount of its uninsured motorist coverage without any setoff. In no case, however, should appellant be liable to respondent

for less than $10,000.00 without setoff for medical payments coverage, because such would be to alter the statutory provisions of the Utah Uninsured Motorist Statute which must be considered a part of every policy of uninsured motorist coverage. See *Geyer, supra.*

Appellant relies on this Court's language in *Martin v. Christensen, supra.* In that case, this Court stated that the clauses in an insurance company's contract must be given effect and upheld unless such holding would be against the public policy of this state. This writer submits that where the total damages to respondent far exced all available insurance coverage, and where appellant's insurance policy is in direct contradiction to the statutory language of the Utah Uninsured Motorist Statute, this Court should hold that the clauses in appellant's policy which limit its liability are null and void as against the public policy of this state. The *Christensen* case, in other particular points relied upon by appellant, is not material to the issues of the case at bar because no statute was involved and the holding of this Court therein did not violate any recognized public policy of the state of Utah.

POINT II

AN INSURER'S LIABILITY UNDER UNINSURED MOTORIST PROVISIONS OF ITS INSURANCE CONTRACT SHOULD NOT BE REDUCED BY SUBROGATION RIGHTS ACQUIRED PURSUANT TO THE "MEDICAL

PAYMENT COVERAGE" PROVISIONS OF ITS POLICY.

In *Phoenix Insurance Company v. Kincaid,* 199 So. 2d 770 (Fla. App., 1967), the Court had under consideration an offset provision similar to the one contained in the case at bar. In *Kincaid*, the insurer was attempting to set off payments it had made to the claimant under the uninsured motorist endorsement of that same policy. The Court held that the clause in the insurer's contract which in effect permitted such setoff was void and against public policy, because the Florida statute (see Section 627.0851, F.S.A.) required uninsured motorist coverage in not less than a certain minimum amount. The endorsement permitting the setoff of medical pay benefits against amounts payable under the uninsured motorist coverage would have had the effect of reducing the statutory minimum coverage below that prescribed by the legislature, thus violating the established public policy of the state. In *Geyer, supra*, the Supreme Court of the state of Arizona made the same observations with respect to setoff claims by the insurer against payments due under the uninsured motorist provisions of its policy. The Court stated that to allow the insurer to set off payments made pursuant to medical payments provisions against payments due and owing as a result of uninsured motorist coverage in the same policy, would be against the public policy of the state of Arizona. It further stated that the insurer cannot reduce the minimum coverage as set forth in the Arizona State Statute by setoff clauses or subrogation provisions.

See also *Southeast Furniture Company and the State Insurance Fund v. Dean L. Barrett and the Industrial Commission of Utah,* .... Utah 2d ...., 465 P.2d 346 (1970).

Appellant argues that the contractual provisions of its insurance contract are clear and unambiguous, but this writer is of the opinion that appellant's insurance contract should be construed in light of the policies expounded by this Court in *Joyner* and *Barnhart, supra.*

Appellant should not be allowed to plead the position of acceptance of two premiums for two different types of insurance coverage for the benefit of the insured, and then claim against the proceeds of the insurance policy as a third party beneficiary to the detriment and expense of the insured. The public policy of the state of Utah as expressed in the enactment of the Utah Uninsured Motorist Statute by our legislature should be upheld by this Court and appellant should be denied any setoff pursuant to its subrogation provisions of its insurance contract against funds due and owing respondent as a result of the uninsured motorist coverage in dispute herein.

POINT III

IF AN INSURER IS ALLOWED TO SET OFF PAYMENTS MADE PURSUANT TO ITS "MEDICAL PAYMENTS COVERAGE" PROVISIONS OF ITS POLICY AGAINST FUNDS

DUE AND OWING AS A RESULT OF UNINSURED MOTORIST COVERAGE, THEN THE INSURER SHOULD BE LIABLE TO THE INSURED FOR A REASONABLE ATTORNEY'S FEE.

The general rule in the state of Utah as espoused by this Court is that attorney's fees are not collectible in a legal action unless done so pursuant to contract or unless authorized by statute. This writer is of the opinion that an insurer should be liable for a reasonable attorney's fee in all subrogation matters where liability is contested, but if that is not the present view of this Court, it should certainly be the rule of law in the state of Utah with respect to setoff against payments made pursuant to uninsured motorist provisions of an insurer's policy.

In *Feltonv. Finley*, 69 Idaho 381, 209 P.2d 899 (1949), the Supreme Court of Idaho awarded attorney's fees to an attorney who had prosecuted a will contest for a partial number of the heirs of a decedent against nonparticipating heirs of the decedent when the latter heirs voluntarily accepted the benefits of the attorney's work by accepting additional sums of money. During the pendency of the legal action, the heirs of the decedent who were not participating in the suit refused to cooperate with the contesting heirs in any manner whatsoever and refused to be responsible for any facet of the lawsuit, including payment of a reasonable attorney's fee. The Court held that the attorney was not undertaking the

work gratuitiously and that since the benefits of his work were accepted voluntarily by each nonparticipating heir, each was liable to the attorney for a reasonable attorney's fee. The Court stated:

> "The rule is well established that the acceptance of the services rendered by an attorney may raise an implied promise to pay therefor, which will supply the place of a contract of employment. If an attorney renders valuable services, as in the case at bar, to one who has received the benefit therefor, a promise to pay the reasonable value of such services is presumed unless the circumstances establish the fact that such services were intended to be gratuitous". 209 P.2d at 901.

A more recent Idaho case which supports the same proposition is directly on point. In *Cedarholm v. State Farm Mutual Insurance Companies and Farmers Mutual Insurance Company*, 81 Idaho 143, 338 P.2d 93 (1959), the Court was asked to decide whether or not an insurer should be liable to the insured for a reasonable attorney's fee when the insured is compelled to expend attorney's fees to effect a recovery of funds claimed by the insurer pursuant to subrogation provisions of its policy. In this direct action by the insurer against the insured, the Court held that the insured was liable to the insurer for the amount of its subrogation rights, subject, however, to a reduction by the amount expended by the insured for collection of the funds. The Court cited the following excerpt from Am. Jur. as the controlling authority:

> "The general rule is that the insured may retain out of the funds recovered from the wrongdoer, after the payment of the policy, the costs and reasonable expenses incurred in the litigation, for it would be unjust to require him to incur expenses for the recovery of money for the benefit of the insurer, without being allowed to reimburse himself". 29 Am. Jur., Section 1346 at page 1008.

In the case at bar, neither of the defendants would admit liability, and respondent was forced to proceed with legal action to recover for her injuries. As the appellant has stated in its Brief, the insurer is in a peculiar position with respect to its insured's status when the insured may have a claim against it pursuant to the uninsured motorist provisions of its policy. In this situation, the insurer has a conflict of interest, on one hand being a plaintiff in the shoes of its insured by way of subrogation, and on the other hand being a defendant in the shoes of the uninsured motorist because of the uninsured motorist coverage. For this reason, if the Court is willing to allow the insurer setoff by way of subrogation against payments due pursuant to uninsured motorist coverage, the insurer should be liable to the insured for a reasonable attorney's fee. That is certainly the case in a situation where neither of the defendants are willing to admit liability and the injured party is forced to seek redress through litigation.

CONCLUSION

Amicus Curiae respectfully submits that appellant is and should be liable to respondent for the total face amount of the uninsured motorist policy written by it without setoff for medical payments made as a matter of public policy. Furthermore, if appellant is allowed setoff pursuant to its right of subrogation, appellant should be liable to respondent for a reasonable attorney's fee for the collection thereof. In light of the statutory language of the Utah Uninsured Motorist Statute, in no event should appellant be liable to respondent for less than $10,000.00, without setoff in any manner whatsoever which might tend to reduce the statutory minimum.

Respectfully submitted,

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