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

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 CO.,
*Defendant.*

Case No. 12068

## REPLY BRIEF OF DEFENDANT AND APPELLANT

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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This brief is in reply to the brief of Barbara Lyon and the Brief of Amicus Curiae. We will treat the points raised by each separately:

### POINT I

### PASSAGE OF THE UNINSURED MOTORIST LAW DID NOT ABROGATE THE RULE ESTABLISHED IN RUSSELL v. PAULSON.

*Russell v. Paulson,* 18 Utah 2d 157, 417 P.2d 658 (1966), involved these facts. Russell was injured while a passenger in a car driven by Gritton which was struck

by a car driven by Mitchell, an uninsured motorist. Russell obtained a $10,000 default judgment against Mitchell. Gritton's insurer, United Pacific, paid $4,500 in settlement. Summary judgment was entered against Russell's insurer, Factory Mutual, for $5,000 from which the appeal was prosecuted.

Both policies had "other insurance" clauses making the owner's (Gritton's) coverage primary to the passenger's (Russell).

This court held that since the limits of the Russell poilcy ($5,000.00) did not exceed the limits of the Gritton policy ($5,000.00) the Russell policy did not apply and reversed the Summary Judgment.

Because *Russell v. Paulson, supra,* is a controlling decision contrary to the position of Miss Lyon, she argues that the rule of that decision was abrogated by the passage of the 1967 Uninsured Motorist Coverage Requirement Act.

That statute provides in substance that after July 1, 1967, no automobile liability insurance policy shall be issued in Utah unless it provides uninsured motorist coverage with limits of $10,000 per injury and $20,000 per accident unless the insured rejects such coverage in writing. Section 41-12-21.1, U.C.A., 1953. This statute is in no way inconsistent with the rule of *Russell v. Paulson.* That statute makes no reference whatever to "other insurance" clauses. The legislative intent is obvious. The legislature wanted to make certain that Utah

insureds have uninsured motorist coverage with basic limits available to them unless they expressly reject such coverage.

The legislature intended that a person involved in an automobile accident with an uninsured motorist be in no worse position than if he were involved in an accident with a person having basic limits. The legislative intent does not support the argument made by Miss Lyon. She seeks no basic limits but cumulative limits.

It is a firmly established principle of statutory construction, clearly stated in the case of *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959), that:

> "No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." *Id.* at 304.

In *Green Mountain School District v. Durkee,* 351 P.2d 525 (Wash. 1960), the Supreme Court of Washington refused to accept the contention that a statute relating to schools was a substitute for the common law proceeding of quo warranto, saying that it must be presumed that the legislature intended to make any innovation on the common law without clearly manifesting such intent.

Our research indicates that this court has never ruled directly on this point. However, in the case of *In Re Utah Savings & Loan Assn.*, 21 Utah 2d 169, 442

P.2d 929 (1968), this court held that where there is an apparent conflict between two statutes, enacted for particular purposes, each should be looked at with a view to reconciling the conflict and giving each statute its intended effect. The same principle should apply where the alleged conflict is between a statute and a judicial opinion.

We see no conflict between the *Russell* case and the Uninsured Motorist statute. But, if conflict exists, it can be resolved without the necessity of one nullifying the *Russell* case. It is presumed that the legislature in enacting law is aware of the existing judicial decisions that bear on the subject. *Bishop v. City of San Jose*, 1 Cal.3d 56, 81 Cal. Rptr. 465, 460 P.2d 137 (1969). If the legislature had chosen to nullify the *Russell* case, it could have done so easily.

Miss Lyon places principal reliance upon an annotation found at 28 A.L.R. 3d 551 entitled "Uninsured Motorist Insurance: Validity and Construction of 'Other Insurance' Provision." That annotation is contrary to Miss Lyon's position in this case.

The annotator makes it clear that in a majority of jurisdictions, including Utah, "other insurance" provisions are valid and enforceable, it being the purpose of legislation requiring insurers to provide uninsured motorist coverage to put a motorist injured in a collision with an uninsured vehicle in the same position that he would have been in had the motorist been properly insured. *Id.* at 556.

Miss Lyon has recovered $10,000 under the uninsured motorist coverage of the owner of the vehicle in which she was riding. She has been placed in the position she would have been had the uninsured motorist had basic limits. The purpose of the legislation has been served.

The rationale of *Sellers v. United States Fidelity & Guaranty Co.,* 185 So.2d 869 (Fla. 1966), and *Geyer v. Reserve Ins. Co.,* 8 Ariz. App. 464, 337 P.2d 556 (1968), relied upon by Miss Lyon is, that as a matter of public policy, the insurer will not be permitted to collect a premium for uninsured motorist coverage and then claim the benefit of "other insurance."

This rationale was rejected in *Martin v. Christensen,* 22 Utah 2d 415, 454 P.2d 294 (1969), where the Utah Supreme Court observed that insurance premiums are calculated on the basis of the coverage provided, including other insurance clauses.

*Southeast Furniture Co. and The State Insurance Fund v. Dean L. Barrett and The Industrial Comm. of Utah,* 24 Utah 2d 24, 465 P.2d 346 (1970), cited by Miss Lyon, does not support her position in this case. That case holds only that uninsured motorist benfits cannot be used to reduce amounts due under the Workmen's Compensation Act. The decision is based squarely upon an interpretation of the Workmen's Compensation Act, not upon an overriding public policy.

In *Martin v. Christensen,* 22 Utah 2d 415, 454 P.2d 294 (1969), it was held expressly that Section 41-12-21.1,

U.C.A., 1953, did not prevent an insurer from issuing a policy limiting its coverage to the statutory requirement.

This decision expressly rejected the argument that by accepting a premium, the limitation was waived. The court said:

> "In contending that despite the provisions of paragraph 7 they should have the maximum coverage under both policies, the plaintiffs urge two points: that by issuing a second policy and accepting a premium therefor, the defendant should be deemed to have waived the limiting provision of said Paragraph 7; and that Sec. 41-12-21.1, U.C.A., 1953 (1967 Supp.), which provides that automobile insurance policies shall have limits of not less than $10,000 for death or injury to one person in one accident and not less than $20,000 for two or more persons, should apply to each policy separately. Plaintiffs argue that this statute fixes the minimum coverage under each policy separately, and that they are therefore entitled to the maximum amount under both policies.
>
> "We are unable to see merit in the plaintiffs' arguments. We consider them in reverse order. The statute referred to simply provides that such a policy shall give a coverage of not less than $10,000 for injury or death to one person in one accident, or $20,000 for two or more. The policies owned by the Martins conformed to that requirement. The important fact would seem to be that, under one policy or two, the insured was protected against uninsured motorists to the extent the statute prescribes. So long as that coverage is provided, there is nothing in the statute which would prevent an insurer, in issuing a second policy, from limiting its coverage to the statutory requirement. It is the Company's position that

said Paragraph 7 under scrutiny here was expressly designed to provide that 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 further, that its premiums are based on the total exposure of risk on the entire policy as written, including the limitations in paragraph 7. This impresses us as reasonable and as providing the answer to plaintiffs' other contention that by acceptance of the premium on the second policy the defendant should be deemed to have waived the limitation in question.

"On the basis of what we have said above it is our conclusion that the trial court was correct in its ruling that the defendant Company was liable only for the one maximum coverage of $20,000 as provided for in the policies.

"Affirmed. Costs to defendants (respondents)." *Id.* at 295.

## POINT II

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

The thrust of Miss Lyon's argument under this point is that Hartford is trying to collect a full premium for uninsured motorist coverage and provide less than statutory minimum by seeking recoupment of amounts paid under the medical payments coverage.

The inherent fallacy becomes obvious upon a statement of the proposition.

Hartford is not seeking to pay less than the statutory minimum. It is trying to avoid paying more, the precise question involved in *Martin v. Christensen, supra.*

Here again, to avoid a controlling decision of this court, namely, *State Farm Mut. Ins. Co. v. Farmers Ins. Exch.*, 22 Utah2d 183, 450 P.2d 458 (1969), Miss Lyon appeals to public policy saying that the insured is entitled to recover the same amount she would have recovered had the offending motorist maintained liability insurance.

This is precisely what we are saying. If Nickel had had $10,000 liability insurance, Hartford would have been entitled to recover its $2,000 medical payments back and Miss Lyon would not have had recourse to her uninsured motorist coverage because she would not have been injured in an accident with an uninsured motorist.

Miss Lyon's attorney says that it is unconscionable that Hartford should be permitted to sit idly by and accept the benefits of his work in making the recovery against Butcher's insurer. This is another one of those situations in which what seems unconscionable depends upon one's point of view.

It seems unconscionable to the insurance industry that lawyers can sue them and recover attorneys' fees

based upon the allowance of offsets to which they were entitled as a matter of law. A similar ploy was involved in *Draper v. Travelers Insurance Co.*, 429 F.2d 44 (1970). In that case attorneys' fees were sought against Travelers on the theory it benefited from the settlement action. District Judge Ritter had granted summary judgment for the plaintiffs. On appeal, the Tenth Circuit reversed with directions to enter judgment for the defendant, although on more limited grounds than here asserted.

Mr. McRae has never admitted that Hartford was entitled to reimbursement of the $2,000 of medical payments. His position has at all times been adverse to that of Hartford.

How can he make claim that he was representing the interests of Hartford in seeking recovery of that sum?

## POINT III

### INTEREST RUNS FROM THE DATE OF THE JUDGMENT AGAINST THE UNINSURED MOTORIST.

Until Miss Lyon's claim against the uninsured motorist was established, she could not have recovered interest against him. *Nichols v. Union Pac. Ry. Co.* 7 Utah 510, 27 P. 693 (1891).

The policy provides:

> "The company will pay all sums which the insured shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle . . . . "

If Miss Lyon could not have recovered interest against the uninsured motorist, it seems self-evident that she cannot recover interest against The Hartford under her policy.

## POINT IV

## HARTFORD WAS NOT UNDER A DUTY TO SETTLE THE UNINSURED MOTORIST CLAIM OF MISS LYON AGAINST IT.

Miss Lyon urges that Hartford is liable to her for refusal to settle. She bases this claim upon cases where liability companies have been liable for refusing to settle with third parties within policy limits.

There is no analogy. In the liability insurance case the insured suffers a loss as a result of the insurance company's refusal to settle, namely, a verdict in excess of policy limits. In this case, Miss Lyon obtains a benefit by reason of the insurance company's refusal to settle. She gets all, rather than part, of her claim.

If she is entitled to legal expenses occasioned by reason of Hartford's refusal to pay what she claims is due under her policy, then every litigant suing on a contract is entitled to his expenses if the other party refuses to settle. In other words, attorneys' fees becomes recoverable in all contract cases despite the absence of a provision or statute to that effect. The law of Utah is otherwise. *Blake v. Blake,* 17 Utah 2d 369, 412 P.2d 454 (1966).

## CONCLUSION

The claims against Hartford in this case are based upon an insurance policy. The terms of that policy are clear and unambiguous and under that policy Hartford has no liability in this case.

The public policy of the State of Utah, evidenced by legislation requiring uninsured motorist coverage unless expressly rejected, has been fully served by Miss Lyon having been permitted to recover all that she would have recovered had the uninsured motorist had the basic limits required by Utah law. The judgment against Hartford should be reversed and Hartford held not liable in any amount.

But in any event, if the court concludes that some amount is payable, under no reasonable view of this case can that amount exceed $10,000 less than the $2,000 paid under the medical payments coverage.

Respectfully submitted,

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