1970

Gordon Berlant v. John S. Mcallister, Adminis-Trator of the Estates of Grant Kimball Mower and Altha Mower, His Wife, Deceased : Brief of Appellant

Utah Supreme Court

In the Supreme Court of the State of Utah

GORDON BERLANT,

Plaintiff and Appellant,

vs.

JOHN S. MCALLISTER, Administrator of the Estates of Grant Kimball Mower and Altha Mower, his wife, deceased,

Defendant and Respondent.

Case No. 12076

BRIEF OF APPELLANT

Appeal from Judgment of the Seventh Judicial District Court for Sanpete County, Honorable Ferdinand Erickson, District Judge

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STATEMENT OF THE CASE

On December 22, 1965, an automobile driven by B.Y.U. student, Gordon Berlant, collided with an automobile being driven by Grant Kimball Mower on a public highway in Sanpete County, Utah. Gordon Berlant and one of his passengers were seriously injured and another of his passengers was killed. Grant Kimball Mower and his wife, Altha Mower, who was a passenger in the Mower car, died of injuries received in the collision. On November 1, 1968, the Plaintiff, Gordon Berlant, brought suit in Sanpete County against John S. McAllister as administrator of the estate of Grant Kimball Mower to recover damages for his injuries.

DISPOSITION IN LOWER COURT

Following service of Plaintiff's complaint, McAllister filed an answer and counterclaim. Berlant tendered the defense of the counterclaim to his liability insurer which thereupon filed a reply to McAllister's counterclaim alleging as a defense a certain release previously procured by Berlant's insurer from McAllister. McAllister then filed a motion for summary judgment. The trial court granted Defendant's motion and entered a summary judgment of no cause of action in favor of the Defendant McAllister and against the Plaintiff and dismissed the action with prejudice.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the order dismissing his complaint.

STATEMENT OF FACTS

Gordon Berlant, a resident of San Mateo, California (See (R. 3), and his two passengers, Linda Richardson Jasperson and Marilyn Lamoreaux, all B.Y.U. students, were all injured in a head-on automobile collision with a vehicle owned and operated by Grant Mower. (R. 88) Berlant's liability insurer, Farmers Insurance Exchange, was notified of the accident and, acting under Berlant's policy, effected a settlement of claims asserted for the

deaths of Grant Kimball Mower and Altha F. Mower in April of 1966 by paying Defendant, John S. McAllister, the administrator of the Mower estates, the sum of $5,-150.00 and taking a release from McAllister. The settlement and release was approved by the Probate Division of the District Court of Sanpete County. (R. 21-24, 79) This settlement took place although Berlant and his surviving passenger, Linda Richardson Jasperson, had previously informed Berlant's insurer that Berlant was on his own side of the road at the time of the collision. (R. 74) The settlement was effected without Berlant's prior knowledge or consent. He did not participate therein and later, upon learning of the settlement, objected thereto. (R. 66, 74-75, 78)

Some time prior to November, 1968, J. Rulon Morgan, of the law firm of Morgan and Payne, commenced two separate actions in Sanpete County on behalf of Berlant's passengers against Defendant, John S. McAllister. Civil No. 5682 was filed on behalf of Linda Richardson Jasperson; the other; Civil No. 5681, on behalf of Alan R. Morgan as administrator of the estate of Marilyn Lamoreaux. Until the latter part of 1967 Berlant thought he was also being represented by J. Rulon Morgan. (R. 75) However, in the latter part of 1967 Mr. Morgan advised Berlant that a conflict of interest prevented such representation and that Berlant should contact Attorney Don Hanson, counsel for Berlant's liability insurer. (R. 75) Berlant did so and was informed by Don Hanson in 1968 that the latter would not undertake Berlant's representation ex-

cept to defend. (R. 75, 76) There was some discussion by Berlant and Mr. Morgan regarding the possibility of settlement of the claims of Berlant's passengers and Berlant's claims together; and prior to November 17, 1968, J. Rulon Morgan undertook to draft and send a form of complaint to Berlant which Berlant signed and filed without an attorney's signature. (R. 3, 64)

Mr. Morgan assisted Berlant in appropriately responding to a motion to quash and to a demand for the posting of security for costs. (See R. 4, 8, 10, 11, 13) McAllister thereafter filed an answer and counterclaim (R. 14-17) in which he pleaded the settlement as an "accord and satisfaction agreement" in his fourth defense and as working an estoppel in his fifth defense. The counterclaim was presented to Berlant's insurer who referred the representation to the attorney normally handling insurance defense work for the company, Mr. Don Hanson. Mr. Hanson appeared for Berlant and filed a reply. (R. 19-20, 79) The reply so filed pleaded the settlement and release as one affirmative defense. (R. 20) The order of the probate division of the court approving the settlement and form of release and a copy of the release were made exhibits to the reply. (R. 20-24) McAllister thereupon filed a motion for summary judgment urging that the reply which pleaded the release was a conclusive showing that "as a matter of law the parties entered into a conclusive and binding arrangement to settle the dispute between them in April of 1966." (R. 25)

Berlant was unable to secure independent representation until after the hearing on McAllister's motion for summary judgment but soon thereafter employed Attorney Udell R. Jensen. (R. 75, 76) Mr. Jensen had attended the hearing on McAllister's motion for summary judgment at Berlant's request. At the hearing, all counsel there present apparently acquiescing, a decision was postponed so as to allow Berlant to find counsel and determine his position as to the reply. (R. 77) Mr. Jensen then conducted a factual investigation and on September 7, 1969, found two Sanpete County residents, LaRell Larsen and Reva Larsen, his wife, with knowledge of the facts who had not been located or interviewed by the investigating officers or Berlant's insurer even though they were present at the scene of the accident until the injured were removed. (R. 78, 83-85) The Larsens reported that the northbound Mower vehicle had passed their vehicle while they were traveling north following a snow plow which was casting up a great cloud of snow and that the collision occurred as the Mower vehicle traveled north on the west (wrong) side of the road and moved into the snow cloud near the snow plow where it met the southbound Berlant vehicle head on. (R. 83-85)

On September 2, 1969 (five days before Udell R. Jensen located the Larsen witnesses), the trial court entered an order finding that McAllister's motion for summary judgment should be granted. (R. 68-70)

Thereafter, Berlant's attorney, Udell Jensen, filed a motion to vacate the order and to permit Berlant to amend his complaint and the reply filed by Berlant's insurer. This motion was never directly acted on.

On March 12, 1970, the trial court entered summary judgment in favor of Defendant McAllister, no cause of action, and dismissed the entire action with prejudice as to all parties.

The position Berlant's insurance carrier concerning McAllister's motion, the settlement and release taken by it, and the effect of the reply it filed on behalf of Berlant which raised the release as a defense is set forth in a memorandum which appears in the record at pages 79 to 81. Berlant's policy of insurance was not presented to the trial court and so is not a part of the record. It is a standard printed form policy, however. The material portion thereof provides that the insurer is obligated

> "to pay all damages which the insured becomes legally obliged to pay because of (A) bodily injury to any person and/or (B) damages to property arising out of the ownership, maintenance or use of the described automobile or a non-insured automobile, and to defend, at its expense, any suit against the insured for such damages; but the company may make such settlement of any claim or suit as it deems advisable." (R. 49)

Berlant's insurer contends that under the policy it had "a right to investigate, defend or settle any claims . . . against Berlant"; that acting pursuant to its authority it settled claims made by McAllister as administrator of the estates of Grant Kimball Mower and Altha Mower; that "the Plaintiff may elect to rely on and take advantage of the settlement which the insurance carrier effected; and that if he has so elected, or does so elect, this case should be dismissed in its entirety"; and that, in any event, the settlement made discharges all of its obligations under the policy so that if the action under the counterclaim should proceed, it would have no obligation to defend nor to pay any judgment above the amount of the settlement previously made.

ARGUMENT

POINT I

THE SETTLEMENT BERLANT'S INSURER MADE WITH MCALLISTER AND THE RELEASE GIVEN BY MCALLISTER EVIDENCING THE SAME HAVE NO APPLICATION TO NOR EFFECT ON BERLANT'S CLAIM AGAINST MCALLISTER.

A. *The Release Does Not Constitute an Admission of Liability on the Part of Berlant in Causing the Accident.*

The Plaintiff Berlant's complaint having been dismissed on a motion for summary judgment, Plaintiff is entitled to have this Court view the evidence and all inferences arising therefrom in the light most favorable to him; and if it appears that Plaintiff could establish a right to recovery, the judgment dismissing the action should be set aside. *Reliable Furniture Co. v. Fidelity & Guar. Ins. Underwriters, Inc.*, 16 Utah 2d 211, 398 P.2d 685 (1965) and *Thompson v. Ford Motor Co.*, 16 Utah 2d 30, 395 P.2d 62 (1964).

Here there is no transcript and the material facts are disclosed solely by the pleadings in the record. While certain of the physical facts concerning the cause of the accident itself may be disputed by the Defendant, if the facts as to how the accident occurred described by Berlant and particularly LaRell Larsen and Reva Larsen are true, a verdict for Plaintiff must follow. (See R. 83-85)

This notwithstanding, the trial court dismissed Plaintiff's complaint on the basis of the release executed by Defendant McAllister obtained by Berltant's insurer in settling with McAllister without Berlant's knowledge and contrary to what Berlant had previously informed his insurer and which was plead by the insurer as a defense to McAllister's counterclaim.

The basic issue thus presented is whether a motorist's liability insurance carrier compromises, settles and dis-

charges its insured's claims for bodily injury arising out of an accident by the mere process of paying a sum to the other party to the accident in settlement of any claims he might have against the insured and by procuring a release from such other party.

Plaintiff submits that it certainly does not; that the insurer had no authority to do so and did not do so (despite the memorandum of position with contrary implications filed by the insured). (R. 79-81) In the event it did do so or attempt to do so, it must respond in damages to its insured; and in no event could such a purported discharge by the insurer bind Berlant under the undisputed facts of this case.

Plaintiff can conceive of only three theories upon which the subject release might have been held to bar Plaintiff's suit. First, it may be claimed to constitute a conclusive admission of causative, contributory negligence on Plaintiff's part as a matter of law. Second, it may be argued that such settlement was a mutual, agreed release of claims constituting an undertaking by each party not to sue the other for claims arising from the accident. Third, it might be the basis for the application of the doctrine of promissory estoppel. The second and third of these possibilities are discussed below.

As to the first possible theory of the effect of the release on Berlant's claims, the question is: Does the re-

lease constitute a conclusive admission of causative negligence on the part of the insured so as to require dismissal of the insured's suit against the representative of the Defendant? The obvious answer is no. It is readily apparent from the language of the release that there is no statement as to who was to blame or even that McAllister had a legitimate claim. It expressly provided that the settlement did not constitute an admission of any fault whatever on the part of Berlant. (R. 23-24) Thus, the release provides in the third paragraph that the surviving Mower children "may" have a cause of action against Berlant by reason of the claimed wrongful death of the Mowers. In the fifth paragraphMcAllister acknowledged receipt of $5,150.00 in full satisfaction of "any claims" which the children and heirs "may" have against Berlant and released Berlant and his representatives from claims McAllister and the children and heirs "may have." In the sixth paragraph McAllister acknowledged that the settllement was made for the purpose of making "a full and final compromise, adjustment and settlement of any and all claims, disputed or otherwise, on account of the deaths, injuries and damages above mentioned." The sole and only deaths, injuries and damages mentioned anywhere in the release are "the deaths of Grant Kimball Mower and Altha Mower, including any and all claims for their deaths or personal injuries and property damage . . ." as set forth in the last part of the fifth paragraph and also as mentioned in the first and third paragraphs.

*Even if the release had not contained the last paragraph disclaiming any admission of negligence, neither it nor the settlement could be urged as an admission of liability under Section 31-1-15, Utah Code Annotated (1953): "Liability insurance--Settlement of claim not admission of liability.--settlement or partial settlement of a claim against any ins

The final paragraph of the release re-emphasizes the purpose and intent of the settlement and expressly and positively disclaims and repudiates any possible inference of an admission of liability on the part of Berlant in the following language:

> "It is further understood and agreed that by the payment of said sum of money Gordon Berlant does so by way of compromise of the claims and demands aforesaid *and without prejudice or admitting any liability therefor by himself or his successors.*" (Emphasis added) (R. 24)

It would be extremely difficult to state more plainly that the settlement was to compromise a matter in dispute only and that no liability of any sort was admitted. Unless the latter provision must be altogether stricken from the release by some heretofore unsuspected rule of law and the whole tenor of the release altered and its intent corrupted, its plain, unambiguous language is finally dispositive, not only of Defendant's defenses based on the release, but of Defendant's counterclaim as well.

In short, the release itself makes abundantly clear that in executing it McAllister agreed that no admission against Berlant's interest whatever clung to the settlement made. This plain and unambiguous feature of the settllement and release, whether good, bad or indifferent, was acceptable to McAllister, to Don Tibbs, his personal attorney, and to the judge who expressly approved it on May 16, 1966. (R. 22) ✗

der a liability insurance policy shall be construed as an
mission by either the insured or the insurer of liability of
e insured with respect to any claims arising from the same
ent or set of facts whether the settlement is made by the
sured, the insurer or any other person on behalf of the
sured or the insurer."

Defendant did not explain to the court below why it should in effect strike the last paragraph of the release and force into or upon it an admission contrary to its terms, as though all parties drafting or approving it, including the probate court, somehow acted incompetently or without authority or contrary to law. Perhaps Defendant will enlighten this Court in this regard.

The general policy of the law is precisely the opposite to Defendant's contentions and the result below, as evidenced by the rule that offers of compromise and settlement are generally inadmissible in evidence. 29 Am. Jur. 2d, Evidence, §§ 624, 629 and 632; *Annot.*, 20 ALR 2d 304.

The subject release would clearly be inadmisible, even in any suit by Berlant's passengers against McAllister and Berlant. *City Transportation Company of Dallas v. Vasures,* 278 S.W. 2d 373 (Tex. 1955). In the City case a passenger sued the taxi company in whose taxi she was riding and the owner and operator of the vehicle with which the taxi collided. The taxi company sought to introduce evidence of a settlement made with it by the insurer of the owner of the other vehicle which had acted unilaterally and without informing its insured. The court observed that even though payment of a claim in full can be offered as an admission against or of liability against the party paying the claim, payment by an

insurer obviously cannot be used as an admission of liability against an insured who has had nothing to do with the settlement.

> "Certainly, it cannot be said that actions taken without his knowledge or consent can constitute admissions against interest or of liability as to him." 278 S.W.2d at 375.

The court further observed that since a party may explain why he paid a claim, this would bring the fact of the existence of insurance before the jury, which the law disfavors. It held that when the insurer paid the claim of the taxi company, it did so acting in its own interest and such could not be used against the insured as an admission against interest or of liability.

To the same effect is *Jackson v. Clark*, 351 S.W.2d 292 (Tex. 1961) where the insurer conducting its insured's defense had paid a third party in a three-car accident. Such could not be shown as an admission against interest against the insured who had not participated in the settlement.

Berlant's policy, like other standard policies, gives or purports to give the insurer discretion, whether or not to settle or try claims. Consequently, an insurer's unilateral settlement of a claim is irrelevant to a suit brought by the insured for injuries suffered in the same accident. *Wieding v. Krisch*, 271 S.W.2d 458 (Tex. 1954).

In 6 BERRY, *Law of Automobiles,* § 623, cited in the *Wieding* case, the rule is stated as follows:

> "The fact that the company's adjuster settled a claim made against the insured for damages to a machine which collided with the insured's machine, the accident being due to the fault of the claimant, does not bar insured from recovering from him for damages to his machine, insured having nothing to do with making the settlement, and being prohibited by the policy from interfering therewith."

However, counsel for Defendant's insurer and counsel for Plaintiff's insurer both blandly presume (although they have yet to forthrightly argue) that insurance companies are omniscient and infallible and would never settle unless their insured was very clearly legally liable and that the courts should therefore defer and adhere to the insurer's conclusions, binding all the world thereto. including objecting insureds, as a matter of law. Nothing whatever was cited to the lower court from the insurance code or otherwise endowing insurers with omniscience or otherwise justifying such a presumption. To the contrary, Plaintiff respectfully suggests that an insurer may well neglect adequately or properly to investigate an accident. Often a new investigator or adjuster will overlook or fail to find obviously relevant data. Insurers are operated by fallible humans and an insurer may simply base a settlement on false facts or assumptions or incomplete data or may even allow itself to be misled by the other party.

In view of the fact that the most believable evidence on hand, which comes from two lifetime residents of the small county where the Mowers resided, shows that the tortfeasor in the accident was the releasor, Grant Mower, and not Berlant, there appears ample reason for a court of equity to set the release aside as based on a gross fundamental mistake of underlying fact. Also the sum paid in settlement of McAllister's claims might have been procured by a misrepresentation of fact or other misconduct, so the settlement should be voided. See *Vial-let v. Consolidated Ry. & Power Co.,* 30 Utah 260, 84 Pac. 496 (1906) and *Kirchgestner v. Denver & R.G.W.R. Co.,* 118 Utah 20, 218 P.2d 685 (1950), (rev'd on other grounds, 118 Utah 41, 233 P.2d 696 (1951)).

Instead of proceeding to set the settlement aside so as to recover its $5,150.00 as one would expect, Plaintiff's insurer has sided with the insurer representing Defendant for reasons best known to itself. (See R. 79-81.) Perhaps it is worth all of the $5,150.00 and more to Plaintiff's insurer to establish in Utah a rule as to settlements whereby both parties' claims are automatically settled by a small payment to one by an insurer, regardless of the terms of the release taken.

Regardless of this, for the reasons set forth above, the fact a settlement is made does not, and should not, logically carry any inexorable legal inference of legal fault on the part of the party making the settlement and

this is particularly true when the person actually making the settlement is someone besides the party actually involved, i.e., the party's insurer. *Schledewitz v. Consumers Oil Cooperative, Inc.*, 357 P.2d 63 (Colo. 1960).

In *Schledewitz,* a car driven by the son of the owner and in which the daughter of the owner was riding as a passenger collided with a semi-trailer and tractor truck owned by Consumers Oil Coop. Consumers settled the claims the children might have for $1,600.00, which was paid with the approval of the court, and a release was executed which stated it was not an admission of liability on the part of Consumers Oil. Consumers than sued the car owner for property damage and the owner sought to raise the release as a defense. The defense was stricken. The Colorado court noted that the release was limited by its terms to a release of Consumers' potential liability to the children and did not admit liability. There was no release of any rights Consumers had against the owner.

> "[W]hat then could be the basis for holding that the release in question amounts to a defense in the instant action? No mental gymnastics will serve to expand its terms and provisions to the extent that it could be considered a release by Consumers of its right to recover for damages to its property, the only release being that of the children to sue for damages for personal injuries. If this instrument be deemed such that it may be pled as a bar to the instant action, such a status must be based upon some ground other than an actual 'release' as disclosed by the terms of the

instrument. The only such ground, and that ethereal, is a possible contention that the release amounts to an admission by Consumers of facts which would affirmatively establish the defense of contributory negligence. We are not impressed with such a contention.

* * *

"We cannot agree with the general premise that any release amounts to an admission of negligence, thereby precluding the party accepting the release from bringing an action to recover his damages.

"The better view is that the acceptance or procurement of a release is not an admission by the releasee of liability on his part. . . .

"It is to be noted that the release here contains the language 'It is further understood and agreed that this settlement is the compromise of a doubtful and disputed claim, and that the payment of said sum is not to be construed as an admission of liability on the part of the said Consumers Oil Company, by whom liability is expressly denied.' It would indeed be difficult to construe this language as an admission of liability. At best, it might be classified as a manifestation of awareness that potential liability might exist. As such, it should be classified with other offers of compromise as inadmissible evidence." 357 P.2d 63 at 66-67.

The subject release is, in all respects, the same as the release dealt with in *Schledewitz*. It does not carry any

admission of negligence at all, let alone one usable against Berlant, particularly in view of its last paragraph which expressly negates any such admission. The lower court clearly gave the release a wholly improper effect in disregard of law and its plain terms and must be reversed.

B. The Release is Unilateral and Not Mutual; and While It Releases McAllister's Claims Against Berlant, It Does Not Release Berlant's Claims Against McAllister.

The release says nothing whatever about Berlant's claims against McAllister, but only refers to McAllister's claims against Berlant. It simply provides that McAllister's claims against Berlant are relinquished for $5,150.00 and nothing more. McAllister did not exact, nor did Berlant's insurer purport to grant, any equivalent relinquishment of Berlant's claims.

Such a unilateral release should be enforced according to its terms and should not be extended into a mutual release by operation of law. *Brazell Bros. Contractors v. Hill,* 138 S.E. 2d 835 (S.C. 1954). In *Brazell* the Brazell Brothers, a partnership, sued Hill for damage to a truck. Hill denied negligence and filed a counterclaim. Brazell's insurer then settled with Hill for $475.00 and procured a release discharging Brazells from all Hill's claims. Hill alone signed the release which provided that the payment made on behalf of Brazell Brothers was not an admission of liability. Hill's counterclaim was then dismissed. Counsel for Hill then sought leave to amend

Hill's answer to claim the settlement and release was an overall accord and satisfaction between the parties so that Brazells' complaint should be dismissed. The trial court refused to allow the amendment, holding it insufficient to constitute a defense in light of the undisputed facts. On appeal Hill contended Brazell had ratified the release and this constituted ratification of the compromise and an accord and satisfaction.

The court observed:

> "The written release is the sole evidence of the terms of the compromise and settlement between Hill and the carrier. No attempt whatever has been made to vary, enlarge or contradict its terms, which are clear and unambiguous. It would be useless to quote it or further expound its provisions. It is a classic example of a unilateral contract; a promise by Hill only, the consideration on the other side being executed by the payment of a sum of money."

Proceeding to its holding, the court further stated:

> "The release here evidences . . . the relinquishment of a claim by one party in consideration of a payment by the other. With an action for damages pending against him in which he had filed a counterclaim, Hill simply released his claim for damages without exacting in return an acquittal from the claims asserted against him. The ratification of the compromise and settlement by the Brazells cannot raise a promise on their part to forego

> something which the carrier did not renounce for them. In short, there was no attempted compromise and settlement of the Brazells' claim by the carrier to which they could be bound by ratification" 138 S.E. 2d at 837-838.

The lower court, in effect, provided McAllister with a release of Berlant's claims — something McAllister and his counsel and the probate court did not see fit to require in the first place and which, as is pointed out in more detail below, Berlant's insurer had no authority whatever to give and for which McAllister paid nothing, all without Berlant's consent. It erred in so doing as shown by the *Brazel* case, *supra,* and should be reversed.

C. *Berlant's Insurer Has No Authority To Release Berlant's Claims Against McAllister.*

Assuming, contrary to the actual facts and for purpose of argument only, that Berlant's insurer did purport to contribute Berlant's claims along with the $5,150.00 cash to the McAllister settlement, the legal question of the insurer's authority to do so would remain. Although the policy is not in the record, it is a standard printed form of liability policy which contains all the usual provisions. At least there has been no contention to date that it is otherwise.

Nowhere does the policy state that the company will represent or has the authority to represent or be agent

for the insured in making or releasing the insured's own claims against third parties responsible for injuries suffered by the insured. This is simply not the insurer's business.

An insurance company has three basic duties under its policy recognized and enforced by the law, none of which involve it in its insured's own claims against others. These duties are: (1) to pay the sums for covered claims its insured is legally obligated to pay; (2) to defend suits against the insured; and (3) to investigate claims properly and otherwise represent the interests of its insured in good faith. *Simmons v. Jeffords,* 260 F. Supp. 641 (E.D. Pa. 1966). The requirement of good faith applies to all of these duties. See *State Automobile Ins. Co. v. York,* 104 F.2d 730 (4th Cir. 1939); *Traders & General Ins. Co. v. Rudco Oil & Gas Co.,* 129 F.2d 621 (10th Cir. 1942); *American Fidelity & Casualty Co. v. Greyhound Corp.,* 258 F.2d 709 (5th Cir. 1958) and *Ivy v. Pacific Automobile Insurance Company,* 320 P.2d 140 (Cal. 1958).

Contributing the insured's own claims to a settlement without his consent and over his objection is the very antithesis of the foregoing duties of an insurer and far beyond the scope of its authority. *Fikes v. Johnson,* 248 S.W. 2d 362 (Ark. 1952); *Hurley v. McMillan,* 268 S.W.2d 229 (Tex. 1954); *Burnham v. Williams,* 194 S.W. 751 (Mo. 1917); *Radosevich v. Pegues,* 292 P.2d 741 (Colo. 1956) and *Faught v. Washam,* 329 S.W.2d 588 (Mo. 1959).

In *Hurley v. McMillan* the defendant sought to prove that plaintiff's insurer had settled the damages defendant claimed resulted from plaintiff's negligence. Such was not permitted.

> "It is manifest that an insurance company, if it admits that its insured is liable, without its insured's knowledge or consent, is acting in its own interest, and not as agent of the insured. The insurer cannot bar its insured's right to recover $24,000 damages for injuries received in the collision, by settling the claim of the other party to the collision for $1,325." 268 S.W.2d at 234.

In *Burnham v. Wiliams, supra,* the plaintiff informed his insurer of the facts of the collision and that plaintiff was not liable. The defendant proceeded with a claim for $5,000.00 which plaintiff's insurer settled for $200.00, procuring a release which provided no admission of liability was made. Plaintiff was unaware of such settlement until afterwards. Defendant sought to set up the settlement in bar of plaintiff's suit. The court held defendant's contentions that contributory negligence was an absolute defense and that compromises are favored and that the act of agent binds principal were irrelevant and that sole question was whether the insurance company "was acting as an agent for the plaintiff in the capacity of settling a damage claim which he might have against the defendant." 194 S.W. at 752. The policy contained all the usual provisions, including obligations of the insurer to indemnify the insured against property

damage and injuries from accidents caused by the ownership or use of the insured automobile and to investigate accidents, negotiate and settle claims and defend suits. The policy contained the usual language obligating the insured not to assume liability or interfere with negotiations for settlement, but to secure evidence and to aid and cooperate.

> "As we understand such a contract, it is one where, being properly notified of an accident or damage covered by the policy, the insurance company agrees to step into the assured's shoes so far as handling the claim or effecting settlement or defending suits is concerned, and *that attitude that it requires an assured to take when a claim is made against him is rather one of agent to the company than a principal far whom the company is acting. Besides, the contract is to handle only such business as is brought against the assured and none of the provisions of the policy can be construed as giving the insurance company power to settle any claims which the assured may have against some third party.*" (Emphasis added) 194 S.W. at 753.

The court vigorously repudiated the contention the settlement by the insurer necessarily and conclusively determined whose negligence proximately caused the damage, was res judicata of that issue and determined the liability of the insured, and held it had no effect to bind or estop the plaintiff from asserting his claim for damages arising out of the collision.

In *Radosevich v. Pegues,* 133 Colo. 148, 292 P.2d 741 (1956), the Pegues sued Radosevich and Radosevich insurer's attorney filed an answer and counterclaim. Settlement negotiations followed and finally Radosevich's insurer paid Pegues $1,500.00 and obtained a release in favor of Radosevich. Radosevich did not participate in the settlement. The release excluded a subrogation claim of Radosevich's insurer and provided it was made in compromise of a dispute and was not an admission of liability. The parties did not act to release Radosevich's counterclaim and his attorney stated he had no authority to dismiss or settle the counterclaim. The Pegues were told their acceptance of the settlement money and their execution of the release did not affect Radosevich's counterclaim. Nevertheless, the trial court dismissed the counterclaim, holding the settlement was to be treated as a compromise of the whole action.

The Colorado Supreme Court held the question was whether Radosevich's attorney had authority to compromise his counterclaim without his knowledge or consent. The answer was no because an attorney must have express authority to settle or compromise his client's claim.

> "It would be strange logic indeed to hold that though a lawyer definitely intended no to compromise his client's cause, yet the law would imply an intent to do the very thing which it holds he was without power to do, and would work a result exactly opposite to that which was intended."

The court remanded the case for trial on the counterclaim.

It is abundantly clear from the foregoing that Farmers Insurance Exchange had no authority to settle Berlant's claim and that, even if Farmers had attempted to do so, Berlant would not be prejudiced in maintainng his claim.

D. *Even If Berlant's Insurer Had Purported To Release Berlant's Claim in Settling With McAllister, Such Action Was Not Adopted or Ratified by Berlant and Does Not Bind Berlant.*

The record is clear that after learning of the settlement, Berlant objected to his insurer for making it.

Appellee nonetheless argued below that the reply filed by Farmers in Berlant's name which plead the release as a defense constituted ratification of the release which Appellee wrongly assumes included a discharge of Berlant's rights. This contention was properly answered in *Brazell Bros. Contractors v. Hill,* 138 S.E.2d 835 (S.C. 1964), discussed above, and in *Faught v. Washam,* 329 S.W.2d 588 (Mo. 1959). Although the court making the latter decision mistakenly assumed the ratification rule was applicable, it went on to hold, and properly so, that ratification requires that the principal first have actual knowledge of the unauthorized act of its agent and, sec-

ond, have an actual intent to adopt or ratify it. Both of these elements were lacking there, as in the instant case, because the reply raising the release as a defense to the counterclaim was filed by the plaintiff's insurer without plaintiff's knowledge or participation. *Faught v. Washam* also held that there was no reason why the insurer should not plead the release because the insurer's economic interest was at stake and was properly to be defended.

The release in the instant case did not give away Berlant's claims in the first place and there was no other such action which could have been ratified by pleading the release or any other matter in Berlant's reply. The doctrine of ratification is simply irrelevant.

However, since Berlant did not know about or participate in the reply contended to constitute ratification by him, the whole foundation for any supposed adoption or ratification is missing as demonstrated by *Faught v. Washam, supra.*

Appellee may urge the reply pleading the release was a waiver by Berlant of Berlant's claims against McAllister, but any such contention must also fail because of two of the four essential requisites for waiver are lacking. The four requisites are: (1) an existing right benefit or advantage; (2) knowledge of its existence; (3) an intent to relinquish it; and (4) relinquishment of the right by a distinct act. *American Sav. & Loan Assn. v. Blomquist,* 21 Utah 2d 289, 445 P.2d 1 (1968). Berlant had

no intent to relinquish his claim, but the opposite intent, and he did nothing to relinquish it. The only claim waived or relinquished was that of McAllister, and Berlant's insurer had the duty to defend against it and every right to plead the release taken as a bar to its prosecution.

E. *The Doctrine of Accord and Satisfaction Does Not Apply To Bar Berlant's Claim Against McAllister.*

The burden of proving an accord and satisfaction is on he who asserts it. *Lenchitsky v. H. J. Sandberg Co.,* 343 P.2d 523 (Ore. 1959) and *Clay v. Rossi,* 108 P.2d 506 (Idaho 1940).

Appellee has aserted the release was an accord and satisfaction as to Berlant's claims, even though the only claim satisfied under the plain terms of the release was that of McAllister. The elements of an accord and satisfaction as to Berlant's claims were not shown by Appellee to exist. These are: (1) a meeting of the minds and an intent to satisfy the particular obligation in question, and (2) consideration. *Barton v. Welker,* 341 P.2d 1037 (Kan. 1959); *Bellingham Securities Syndicate v. Bellingham Coal Mines*, 125 P.2d 668 (Wash. 1942) and *Weaver v. Williams*, 317 P.2d 1108 (Ore. 1957).

Berlant's mind could hardly have met with McAllister's when he was denied participation in the settlement negotiations. Further, he received no consideration for any purported satisfaction of his claim.

Additionally, an accord and satisfaction is voidable where one party labors under a fundamental mistake and there is a complete difference between what he supposed he was receiving or giving and what was, in fact, received or given. *Metropolitan State Bank v. Cox,* 302 P.2d 188 (Colo. 1956).

Under the plain terms of the settlement, all that Berlant gave up was money (through his insurer) for which he received a release of McAllister's claims. If he actually also gave up his claims against McAllister, he did so only constructively through his insurer. This was a fundamental mistake since there was a complete difference between what he would have supposed he was giving up and what Appellee contends he gave up. If an accord and satisfaction was accomplished, it must therefore be voided and set aside to prevent its working a gross injustice.

F. *The Doctrine of Promissory Estoppel Does Not Apply To Bar Berlant's Claim Against McAllister.*

The burden of proving an estoppel is on the party asserting it. This defense is not easily shown and will not be held sustained by inference. *State v. Charlton,* 430 P.2d 977 (Wash. 1967), but only if substantiated in every particular. *Bear Creek Co. v. James,* 252 P.2d 723 (Cal. 1953).

While Appellee did not clarify below the nature of the estoppel claimed by him to exist, it would appear that he claimed something in the nature of promissory estoppel.

This doctrine requires: (1) full awareness of the facts; (2) full awareness of the promise made; (3) knowledge of reliance of the promisee on the promise; (4) a loss resulting from such reliance. Only when all these elements are present will the law prevent withdrawal of the promise. *Union Tank Car Co. v. Wheat Bros.*, 15 Utah 2d 101, 387 P.2d 1000 (1964).

Not a single one of these elements is present in the instant case. Berlant made no promise to release his claims or not to sue; he was unaware of what his insurer may have done to raise such a promise; McAllister does not even claim he relied on any promise not to sue, and McAllister has suffered no loss.

Nothing more than some uncertainty in the promise reasonably putting the promisee on inquiry, which he fails to make, prevents application of the doctrine. *Petty v. Gindy Mfg. Corp.*, 17 Utah 2d 32, 404 P.2d 30 (1965).

In short, no estoppel was or could possibly have been raised by the subject settlement and Appellee's fifth defense asserting estoppel should have been stricken under Rule 12(f), Utah Rules of Civil Procedure.

POINT II

IF THE RELEASE OF MCALLISTER'S CLAIM AGAINST BERLANT OBTAINED BY BERLANT'S INSURER WILL BAR BERLANT'S CLAIM AGAINST MCALLISTER IF RELIED ON BY BERLANT IN DEFENSE OF MCALLISTER'S COUNTERCLAIM, BERLANT SHOULD BE PERMITTED TO AMEND THE REPLY FILED ON HIS BEHALF BY HIS INSURER TO DISAFFIRM SUCH RELEASE.

Should it be determined that Berlant will lose his right to proceed against McAllister if he relies on the release filed by his insurer in defense of McAllister's counterclaim, then the case should be remanded so that Plaintiff, who now has independent counsel, can amend the reply on file and disaffirm the release. Berlant's motion for permission to do so (R. 66) was never acted on by the trial court except insofar as a denial of the motion is implicit in the lower court's dismissal of Plaintiff's complaint. The record is clear that Plaintiff's insurer both obtained and plead the release without Berlant's knowledge or participation. As a minimum, Berlant has the right to disavow the release so as to preserve his own claims.

Rule 15, Utah Rules of Civil Procedure, provides that leave to amend "shall be freely given when justice so requires." Since the instant case has not proceeded past the

pleading stage, the greatest liberality should be exercised in allowing amendments. See *Johnson v. Peck,* 90 Utah 544, 63 P. 2d 251 (1936). Under the circumstances the trial court's implicit denial of Plaintiff's motion to amend was a clear abuse of discretion.

CONCLUSION

The below court improperly entered summary judgment against Plaintiff for the following reasons:

1. The subject release did not constitute an admission of negligence or liability on the part of Berlant, but expressly negatived any such possible inference.

2. The release did not purport to release Plaintiff's claims against Defendant, but only Defendant's claims against Plaintiff.

3. The law should not import mutuality into a freely contracted, unilateral settlement and release by operation of law, particularly one previously approved by the releasor's attorney and by a court.

4. The release was effected by Plaintiff's insurer without Plaintiff's knowledge, acquiescence or participation; and Plaintiff's insurer was without authority to release, settle or discharge Plaintiff's claims in connection therewith.

5. If Plaintiff's insurer had purported to release Plaintiff's claims, such action was never adopted, ratified or approved by Plaintiff, but, on the contrary, was expressly disapproved by him.

6. The subject settlement and release constituted neither an accord and satisfaction as to Berlant's claims, nor the basis of a promissory estoppel since under the facts the essential elements of both of these doctrines are lacking.

Should the legal effect of pleading the release in Paintiff's reply be as Defendant contends, the case should be remanded and Plaintiff allowed to amend the reply since it was filed by his insurer without his knowledge or consent.

This Court should reverse the summary judgment and remand the case for trial.

Respectfully submitted,

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