

1954

Kenneth Friedman and Virginia E. Friedman v. Mountain Fuel Supply Company : Brief of Plaintiffs and Respondents

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

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KENNETH FRIEDMAN and VIRGINIA
E. FRIEDMAN, his wife,

Plaintiffs and Respondents,

— vs. —

MOUNTAIN FUEL SUPPLY COM-
PANY, a corporation,

Defendant and Appellant,
and

C. LESLIE WHEELER, JOHN H.
TEMPEST, and JOHN H. TEMPEST,
JR., d.b.a. WHEELER & TEMPEST,
et al.,

Defendants.

Case No.
8236

BRIEF OF PLAINTIFFS AND RESPONDENTS

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NOV 10 1954

Clerk, Supreme Court, Utah

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BRIEF OF PLAINTIFFS AND RESPONDENTS

STATEMENT OF FACTS

The statement of facts which appears in the appellant's brief under that portion labeled "The Complaint" which recites certain allegations in the plaintiff's complaint, is substantially accurate. No point would be served by repeating those allegations.

Under the heading "Facts Established by the Evidence", the appellant reviews certain portions of the evidence and testimony. These also are essentially accurate and correct, except for repeated statements by

appellant's counsel that the evidence is thoroughly conclusive that there is no possible negligence on the part of Mountain Fuel Supply Company and no evidence whatever upon which liability might be imposed upon that company. These statements are, of course, self-serving, and upon reading them one wonders how such a law suit could have arisen at all. Respondents take a completely contrary view, of course, and feel it necessary to call to the attention of the Court certain matters alleged in this portion of the appellant's brief.

On page 5 of the appellant's brief the statement is made that the gas furnace, gas water heater, gas service line, gas meter and gas regulator were all examined and none showed any signs of leakage. In the argument, under Point I, the respondents will contradict this statement and point to evidence which shows otherwise.

On page 7 of the appellant's brief the statement appears that all of the evidence points to the fact that the gas main was struck and kinked by a mechanical digger. In the argument under Point I testimony from the record will be set forth in direct contradiction of this statement. Further, upon page 7 of the appellant's brief, the statement is made that the defendants, Lundberg and Todd, and their witnesses were evasive and never denied that they had kinked or bent the gas main with a mechanical digger. In the argument respondent will set forth their testimony in direct contradiction of this statement.

Further, the Court's attention is invited to the jury verdicts (R. 43-50), in which the jury found in favor of Todd and Lundberg and against the plaintiffs.

The material under the heading "Proceedings Following Close of Evidence" the respondents feel is essentially correct.

STATEMENT OF POINTS

POINT I.

THERE WAS SUFFICIENT COMPETENT EVIDENCE TO SUPPORT THE JURY VERDICT AND RESULTING JUDGMENT, AND THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

POINT II.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL.

POINT III.

THE TRIAL COURT PROPERLY PRECLUDED THE APPELLANT FROM INTRODUCING EVIDENCE IN SUPPORT OF THE SECOND DEFENSE SET FORTH IN ITS ANSWER.

ARGUMENT

POINT I.

THERE WAS SUFFICIENT COMPETENT EVIDENCE TO SUPPORT THE JURY VERDICT AND RESULTING JUDGMENT, AND THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

In support of Point I, in the appellant's brief certain Utah cases are cited and the legal principles therein set forth respondents feel are correct. We feel it worthwhile to comment upon a portion of a quotation from *Seybold v. Union Pacific Railroad Company*, 239 P. 2d 174, which appears in appellant's brief. The Court says, among other things, the following:

“If there is any substantial competent evidence upon which a jury acting fairly and reasonably could make the finding, it should stand.”

The only problem, therefore, is in the application of this principle to the evidence adduced at the trial. The burden of the respondents is to point out wherein sufficient competent evidence was presented from which the jury could have acted as it did.

Counsel for the appellant makes the statement at page 5 of the brief that the only conflict in the evidence is whether gas escaping from the break in the gas main entered the basement of the Friedman home through the East wall or at the South end of the house near the entrance of the gas service line, and that such conflict is immaterial. With this statement the respondents completely disagree.

A portion of the evidence presented to the jury was Exhibit 33, a section of the gas main which was bent and broken and from which gas escaped.

Let us assume, for purposes of argument, that the source of gas which exploded in the basement of the Friedman home was from the break in the gas main in the street. The appellant vigorously disclaims any culpability for the break, although the jury verdicts (R. 43-50) clearly show otherwise and that the jury felt that the primary responsibility for the condition of the gas main was that of the appellant, Mountain Fuel Supply Company.

The testimony of Todd and Lundberg and their witnesses should be called to the attention of the Court.

Todd, who was an excavating contractor, testified respecting his work in the area and that his machine and his employee probably excavated for the water service line at the Friedman home. Todd specifically and clearly denied (R. 500, Tr. 366) that his machine or his employee ever hit the gas main or touched it in any way. Clyde Boggess, an employee of Todd, testified that the mechanical digger was never used to dig a trench completely to the water main, but that the excavation for the last few feet was done by hand with a shovel. Boggess testified that he did the shovel work and specifically denies (R. 510, Tr. 376) that the mechanical digger ever hit the gas main.

Lundberg, one of the defendants, testified that he is a plumbing contractor and that he laid the water service lines in the area and also for the Friedman home. Lundberg testified (R. 487, Tr. 353), that the last portion of the excavation to the water service main was done by hand. Lundberg further specifically denied that he or any of his employees (R. 292, Tr. 158), ever excavated for the water line or ever touched or bent the gas main. Respondents feel that this is certainly evidence from which the jury could have found as it did, that the gas main was not bent by either of the defendants, Todd or Lundberg.

It should be pointed out that no other solution to the bent pipe or theory as to how it happened was ever offered by the appellant.

Let us now assume for purposes of argument that the gas main was laid perfectly and without a bend or

break, as the appellant clamorously contends (although the jury apparently didn't believe it). Does that fact alone relieve Mountain Fuel Supply Company from the charge of negligence or responsibility? The respondents feel that it does not necessarily have that result.

In the first place, a high degree of care is imposed upon persons handling dangerous substances. Natural gas sold and dispensed by the appellant falls in that category.

With respect to the degree of care imposed, the following statement appears in Volume 24, American Jurisprudence, page 682-3, paragraph 24, under the heading "Gas Companies":

"It is generally held that a gas company must exercise care and diligence in order to avoid injury to the health or property of others by the escape of gas. The degree of care which it must exercise has been described as ordinary care, as due and reasonable care, and as a high degree of care. These terms, however, are said to mean no more than that care and diligence should vary according to the exigencies which require vigilance and attention, conforming in amount and degree to the particular circumstances under which they are to be exerted. *In other words, in view of the highly dangerous character of gas and its tendency to escape a gas company must use a degree of care to prevent the escape of gas from its pipes proportionate to the danger which it is its duty to avoid.*"

Numerous cases are cited in support thereof, including *Lawrence v. Scranton*, 130 Atl. 428, 41 A.L.R. 454.

There is further imposed upon gas companies the necessity for maintaining a system of inspection of its lines which will prevent the escape of gas and possible injury to third persons. A good statement of the requirement to inspect is found in paragraph 26, under "Gas Companies", page 683, of Volume 24, American jurisprudence. This statement is as follows:

"As pointed out above, a gas company must maintain such a system of inspection as will insure reasonable promptness in the detection of leaks that may occur from the deterioration of the material of its pipes or from any other cause within the circumspection of men of ordinary skill in the business, *including the careless or wrongful meddling of third persons* and, except in cases of breaks caused by some sudden calamity or an emergency created by some happening which causes many leaks at the same time, the gas company should be prepared, with a sufficient force, to repair any defects that may be discovered."

In this connection the Court's attention is invited to the case of Okmulgee Gas Co. v. Kelly, an Oklahoma case, found at 232 P. 428. With respect to the duty of inspection the Court says at page 430:

"The gas company owes the duty to see that the pipe lines and fittings, when first laid in the ground, with reasonable care and skill, will not permit the escape of gas, and a system of inspection is required as will result in reasonable promptness in the discovery of leaks, which may occur from deterioration of the material, *or from other causes within contemplation by the company.*"

The Court's attention is invited to the statement from American Jurisprudence requiring gas companies by inspection to protect against happenings within their knowledge or contemplation, including the careless or wrongful meddling of third persons.

In connection with an examination of this matter, the doctrine of concurrent negligence should be considered. Assuming for argument that negligent installation of the gas main and the subsequent negligent excavation resulted in damage to the main. The subsequent negligence of a third person not connected with the appellant does not relieve appellant, in the absence of contributory negligence on the part of the plaintiff, from the imposition of liability.

A good statement of the doctrine of concurrent negligence is found in the Utah case of Hillyard v. Utah By-Products Co., 263 P. 2d. 287. This case involved a collision by a moving vehicle with one improperly parked, resulting in death to a passenger in the moving car. The statement of the doctrine of concurrent negligence, however, respondents feel is applicable to this situation as well as to a collision.

Mr. Justice Crockett says the following in the opinion, at page 290 of 263 P. 2d:

"In addressing the question whether the parking of the truck on the highway was an act of negligence, it should be remembered that an act is not necessarily rendered non-negligent merely because it may be said that no injury would result to another except for some subsequent act of negligence. One is guilty of negligence when 'he

does such an act or omits to take such a precaution that under the circumstances present, as an ordinary prudent person, he ought reasonably to foresee that he will thereby expose the interests of another to an unreasonable risk of harm.' When one does so he may be held liable for resulting injuries caused by any reasonably foreseeable conduct whether it be innocent, negligent or even criminal."

The court further makes this statement on the same page:

" * * * the test of liability is not whether * * * the defendant could * * * have foreseen the precise form in which the injury actually resulted, but he must be held for anything which * * * appears to have been a natural and probable consequence of his act. If the act is one which (he) * * * could have anticipated as likely to result in injury, * * * although he could not have anticipated the particular injury which did occur.' The court was therefore justified in submitting the question of defendant's negligence in parking the truck to the jury; and the latter were warranted in finding that such negligence existed."

In the light of these legal principles, namely, the high degree of care imposed, the duty to inspect, and concurrent negligence, let us examine the testimony.

The testimony of D. J. Robison, Assistant Superintendent of Distribution of the appellant, is significant. Mr. Robison testified that there was no phase of the installation, distribution or maintenance of natural gas with which he was not familiar. (R. 221, Tr. 87)

He testified that no inspection of the gas main had

been made from its installation in about February, 1948, until the explosion in November, 1951. (R. 231, Tr. 97)

He further testified that the gas main was laid after the water main. (R. 228, Tr. 94) He further said that the gas main in some places near where the break occurred was laid six inches from the water main. (R. 229, Tr. 95)

Mr. Robison was questioned concerning a deposition taken before the trial about the method of inspection used by the appellant.

We feel it proper to quote from his testimony in this respect, which is as follows: (R. 232, Tr. 98, R. 233, Tr. 99)

“Q. Now, Mr. Robison, you will recall on last Friday I took a deposition, and you testified to certain things in response to my questions; do you recall, in connection with that deposition—on Page 17 we are referring to—that this question was asked:

‘As a matter of fact, in your company policy, how frequently do you check the mains in that area, or any other areas that you serve, for breaks or damage?’

Do you remember making the answer:
‘I don’t know.’

A. I believe I did, and said, ‘No,’ with the idea in mind that you meant digging them up and making a visual inspection of them.

Q. Do you recall being asked the question, then:
‘You do not know?’

And you recall making the answer:
‘I don’t believe they are tested.’

A. That's right.

Q. You recall being asked the question :
'As far as you know, you have no regular
program of inspection?'

Do you remember making the answer :
'There is none.'

A. There is none. There is no regular program ;
there is a program.

Q. And the further question :
'Of any of your mains?'

And do you recall making the answer :
'That's right.'

A. That's right.

Q. Now, do you recall being asked this question :
'When trouble occurs, you go out and inspect
them?'

A. That is correct.

Q. Do you recall making the answer :
'Correct.'"

In view of Mr. Robison's position with the appellant company, and his knowledge of the business, he seems qualified to comment that they have no policy of inspection.

Some further testimony by Mr. Robison is also significant with regard to the policy of laying of gas mains in the proximity of water mains and other facilities. He testified as follows: (R. 228, Tr. 94)

"Q. Now, will you refer again to Plaintiffs' Exhibit 33, and tell me, if you can, from an examination of it, approximately the distance

between the gas main and the water main, as

MR. KASTLER: That is '32'.

(Discussion.)

MR. ALLEN: Yes, I am referring now to Exhibit 32, the diagram.

A. The lines were laid between six inches and a foot apart.

Q. In some places they are as close as six inches?

A. Yes sir.

Q. Now, Mr. Robison, what is the general practice with reference to the laying of gas mains, by your company, adjacent to water mains?

A. We try to lay them away from the water mains some distance.

Q. In some instances, if it is possible, you put them across the street, do you not?

A. Yes sir.

Q. And this at least down the section that existed in front of the Friedman home was laid pretty close to the water main?

A. Fairly close.

Q. Now, why is it that you have a policy of laying the gas main at some distance from the water main?

A. So that there will be no difficulty in us digging up our gas main, or the water company connecting onto their water main, that we will not get together and not get the wrong pipe for—there will be room for each company to work on their individual lines.

Q. In other words, you lay them at some distance, so there won't be any danger of people interfering with your gas lines, if they are digging for some other legitimate purpose?

A. Correct.

Q. You recognize there is possibility of that occurring?

A. Yes sir."

It is clear from his testimony in this regard that the gas company normally tries to lay its lines some distance from water mains and other facilities for the very reason that they are likely to be damaged by third persons making legitimate installations. It is further clear that this hazard is clearly within the contemplation of the appellant company.

The respondents therefore submit that upon the basis of the testimony here adduced, there was sufficient competent evidence from which the jury could find that the appellant company was negligent in failing to maintain any policy of inspection or that it was concurrently negligent, assuming a third party bent the gas main in laying the gas main so close to the water main when there was a clear recognizable possibility that it would be interfered with by third persons, and that such interference might cause damage.

Previously in this brief the statement has been made that respondents dispute the contention of appellant that there could be no disagreement as to the source of the gas which escaped in the Friedman home and exploded. There is other evidence in the record which points to the

possibility that the gas may have come from a defective meter or gas regulator, and that under the evidence and the instructions of the Court, the jury might have so concluded.

In this connection respondents desire to call the Court's attention to Instructions 25 and 26 (R. 111) which are as follows:

INSTRUCTION 25

"If you find that gas causing the explosion escaped from some other source than the damaged pipe in the street, you will find for defendant, Todd, No Cause of Action."

INSTRUCTION 26

"If you can reasonably determine from the preponderance of evidence presented in this case that the gas that caused the explosion in plaintiffs' house came from some other source than the damaged pipe in the street, your verdict should be for defendant, Byron W. Lundberg, No Cause of Action."

The respondents feel that these instructions were proper and permitted the jury, under the evidence, to consider whether the gas came from a source other than the broken main.

Mr. D. J. Robison testified that the gas, the gas mains, and everything up to and including the meter inside the Friedman home, was owned and controlled by the appellant. (R. 230, 231, Tr. 96, 97)

According to the testimony of Davis Watkins, Superintendent of Distribution of the appellant, the day following the explosion the gas meter was taken by the

appellant. (R. 414, Tr. 28) The testimony of Mr. Watkins as to what examination was made of the meter is very interesting. He testified as to the usual course of inspection of meters at the shop of the appellant, and contended that the meter from the Friedman house was given the same treatment. He further claimed that tests showed it did not leak.

However, it is important to consider that he testified he was not present when the gas meter was tested. (R. 409, Tr. 276, R. 410, Tr. 277) The evidence further developed that it was the custom of the foreman of the shop to sign the inspection card which is kept as a permanent record on each meter from its purchase by the appellant to its removal from service. In this instance, after the tests made following the explosion, for some reason the foreman did not sign the card. (R. 430, Tr. 296) No satisfactory explanation was ever offered for this.

No one who actually physically handled or inspected the Friedman meter was ever called to testify.

The record further shows that certain repairs were made to the meter. Mr. Watkins testified that the gaskets were replaced, meter torn down, plates removed, and certain other work done upon it. (R. 430, Tr. 296) Mr. Watkins contended, of course, that this was standard procedure and did not necessarily mean there was anything the matter with the meter. Such testimony, however, was certainly evidence which the jury had a right to consider in determining in their minds whether the meter was or had been defective.

Mr. Watkins further testified that no examination

of the gas regulator was ever made so far as he knew. (R. 431, Tr. 297)

Mr. Watkins was asked if it were possible for a meter to leak in the event the gaskets broke or dried out. He testified that it was possible. (R. 438, Tr. 304).

In connection with the consideration of another source of gas than the broken main, testimony of Dr. Melvin A. Cook of the University of Utah should be carefully considered.

Dr. Cook is eminently qualified as an explosives expert, and his qualifications were examined at some length. (R. 172, Tr. 35, 36, 37) Dr. Cook was called to make an examination of the premises the day following the explosion. He made a narrative statement of the kind of investigation he conducted. (R. 176, Tr. 39, 40) He testified that the unmistakable physical evidence left by the explosion showed that the focal point of the blast was immediately above the meter, the gas inlet and the regulator. (Exhibit 28, Tr. 47, R. 188, and Exhibit 21, Tr. 52, R. 188)

The following testimony of Dr. Cook is significant on the matter of the place where the gas entered the basement. He testified as follows: (R. 190, Tr. 54)

“Q. Do you have an opinion, from your investigation, as to the source from which the gas came, that entered the basement in the position you have testified?

A. Yes, the evidence of the explosion to me shows that the gas came through at the point that the gas main—gas line—came into the house. Now, where it originated, beyond that, I

wouldn't know, except that that was—this particular repair—was going on in the front, and I assumed that the break had occurred there, but it was clear to me that it had entered the building, at any rate, on the south side of the building, where the gas inlet came into the building.”

On cross-examination by counsel for Todd, one of the defendants, the following appears in the record: (R. 209, Tr. 74)

“Q. Now, according to your theory of the area of concentration—the contour of this blast—had there been a meter there that was leaking at the time, or immediately prior to the explosion, could this same contour have occurred in the blast?

A. Yes. if there were a leak, yes.

Q. Same kind?

A. That's right.”

Dr. Cook's theory of the way in which the explosion occurred was that gas jetted in from a point where the gas inlet was located and the meter and regulator, and with not too much diffusion reached a point approximately mid-way in the basement, where it was ignited by the gas furnace or the pilot light of the gas water heater. As a consequence, the greatest point of impact and the focal point of the blast was the point near the meter, causing singeing and extensive damage to the south part of the house, and leaving the north part of the basement relatively unscathed.

In his testimony Dr. Cook carefully explained, by the use of numerous photographs to the jury, his theory

of how the blast occurred. (Plaintiff's Exhibits 4, 5, 8, 9, 10, 21, 22, 24, 25, 26, 27, 28)

Respondents contend that upon the basis of all of this testimony concerning the meter and concerning the contour of the blast that there was evidence under Instructions 25 and 26 from which the jury might reasonably and fairly conclude that the source of gas which exploded came from the area near the gas inlet line, and possibly from a faulty meter or pressure regulator.

Counsel for the appellant comments on the injuries to Mrs. Friedman. The facts concerning the sensation she felt and the circumstances which occurred at the blast are clearly set forth in the transcript. (R. 144, 145, Tr. 8, 9) There can be little question that the portion of the house in which Mrs. Friedman was seated came down all around her as if shaken by an earthquake. It is further clear that one of the Friedman children sitting close to her mother was thrown from her chair by the force of the explosion and suffered an injury to her head. (R. 145, 146, Tr. 9, 10)

Respondents submit that the physical effect of the blast upon Mrs. Friedman is entirely sufficient to justify the award made to her.

In summation of the argument under this point, respondents feel that upon a fair consideration of all the evidence before the trial jury the requirement of the Seybold case, has been met.

“If there is any substantial competent evidence upon which a jury, acting fairly and reasonably, could make the finding, it should stand”

POINT II.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL.

In appellant's brief, under its Point 2, contending that the trial court should have granted a new trial, appellant admits that the principal point is whether there is substantial evidence upon which the jury could have returned the verdict that it did.

The evidence and argument based upon it is **amply** set forth in the argument under Point I of this brief, and we see no useful purpose to be served by repeating the same material here.

Appellant also contends that it was prejudiced by certain instructions of the trial court. The respondents contend that upon a full consideration of the evidence, the instructions complained of did not prejudice the appellant.

POINT III.

THE TRIAL COURT PROPERLY PRECLUDED APPELLANT FROM INTRODUCING EVIDENCE IN SUPPORT OF THE SECOND DEFENSE SET FORTH IN ITS ANSWER.

The simple question presented by this point is whether, because the plaintiffs provided themselves with insurance against the damage which occurred, the appellant should have the right to insist that the insurance company, if any, be made a party to the action, or whether the defendant is hurt by a non-joinder of the insurance company.

The respondents contend that the only purpose in suggesting or requiring the insurance company to be

made a party is to be able to bring the fact that the plaintiffs had insurance before the jury in an attempt to prejudice the plaintiffs thereby. The appellant cannot seriously contend, nor does it, that it might be subjected to double liability by any court in this state if the insurance company is not made a party. It is abundantly clear that the appellant would be completely and absolutely protected against any such result.

It should be pointed out that before the matter was tried, a motion was filed by the respondents to strike the second defense. This motion was heard and denied by one of the Judges of the Third District Court.

Thereafter, at the trial, the appellant made an offer of proof concerning the second defense, which was denied by the trial judge. The respondents are wholly in accord with the statement made by the Court when the offer of proof was denied, which statement is fully set forth in the appellant's brief on page 21.

It should also be considered that after the motion to strike the second defense was denied, the appellant made no move or effort to procure an order of court requiring the respondents to make the insurance company a party.

Further, there is no contention on the part of the appellant that it has or had any defense which might be asserted against the insurance company which it was not in a position to assert against the plaintiffs and respondents.

In support of the appellant's position, two Utah cases are cited, the first, National Union Fire Ins. Co.

v. Denver & R. G. R. Co., 44 Utah 26, 137 P. 653, and the other, Bank of America Fork v. Smith, 44 Utah 284, 140 P. 122. The respondents take the position that neither of these cases is in point, based upon the circumstances in the case at issue.

In the National Union Fire Insurance Company case, the insurance company sued in its own name to recover \$250.00 which it had paid of a \$600.00 loss suffered by the insured. The question in that case was not whether the insurance company was a necessary party, but whether it had the right to sue at all. The case held that the insurance company had the right. The respondents contend that the insurance company in this case might have sued in its own name, but was not a necessary party.

The Court's attention is invited to the following language from the National Union Fire Insurance Company case, found at page 655 of 137 P.:

"Starting out with the postulate that under our own statute the claim in question was assignable and that the real party in interest must sue, why could not respondent bring this action upon the cause of action in this case precisely the same as it might sue on any other cause of action? Does the fact that some other person or persons may also have or claim to have some interest in the claim sued on deprive the respondent of the right to sue? We think not."

The second case cited by appellant involved an action by the bank against defendants on a subscription contract among them to put up money to build a bridge. The secretary of the defendants' association borrowed

money from the bank on the strength of the agreement. The question arose as to whether the bank could sue as an equitable assignee of the contract. The Court held that the bank was able to bring the action. The case does not hold, however, that the signers of the agreement would not be able to bring an action based upon it, and the following language from that case is pointed out to the Court:

“But no objection was made that the plaintiff was not the real party in interest. The defense made is based on the ground that in no event are appellants liable either to the plaintiff or to any one else.”

Neither of these cases appears to be a holding that the insurance company or an assignee of a right of action is a necessary party. In the second case cited that question was never even raised.

The respondents are entirely in accord with the statement of the trial court in this case which is quoted verbatim on page 21 of the appellant's brief. In support of that position the respondents invite the Court's attention to the following Utah cases:

In the case of *Cederloff v. Whited*, 169 P. 2d 777, there was an action to recover for personal injuries and for damage to an automobile as a result of a collision. The trial court limited recovery for damage to the car to \$50.00, which was the amount of the deductible insurance contract.

This court held that such a limit was error by the trial court. In that case the insurance company was not joined. The defendant and appellant in that case relied

upon Johansen v. Cudahy Packing Company, 152 P. 2d 98. In commenting upon the Johansen case, Mr. Justice Wade has the following to say, at page 780 of 169 P. 2d:

"The case was dismissed by the trial court. One of the grounds for dismissal was that the plaintiff could not maintain such action because the insurance company as a result of the payment had been subrogated to the claim of the plaintiff. We held that to the extent of the amount paid by it, the insurance company was subrogated to the claim of the plaintiff, that since plaintiff had a claim in excess of the amount paid by the insurance company she was also interested in the claim and was a proper party plaintiff and could maintain the action, on behalf of herself and as trustee for the insurance company; that there was only one cause of action which could not be divided into two suits; that some courts hold that the insurance company would be a proper party plaintiff, and some even go so far as to hold that it is a necessary party and in case it refused to join as plaintiff it must be joined as a defendant, but that the failure to join the insurance company was at most a defect in parties which defendant by its failure to raise had waived and therefore the action should proceed in the name of the plaintiff alone."

On the same page the opinion has the following language, which the respondents claim is applicable to the situation at bar:

"As pointed out in the Johansen case, *supra*, even though the insurance company is subrogated to a part of the claim of the plaintiff, against the defendant, that does not create another cause of action and there can only be one suit to recover

on that cause of action. Thus this action will bar any future action on this cause of action whether plaintiff recovers the amount paid by the insurance company or not, even though the insurance company is not made a party to this action."

The respondents think that the case of *Loggie v. Interstate Transit Co.*, a California case found in 291 P. 618, is applicable. In that case an action was brought to recover for personal injuries and damage to an automobile. The jury found in favor of the defendant and the trial court granted a new trial based upon misconduct of counsel. The misconduct of counsel was the attempt to show that the plaintiff had insured himself and had been compensated for the damage he suffered. The following language from that case, found at page 619 of 291 P., is significant:

"It was error to overrule the objection to the foregoing question on cross-examination, because it was wholly immaterial whether Renshaw was the representative of an indemnity insurance company, and the jurors doubtless inferred from the question and answer that the plaintiff was protected by such insurance. The offer of proof, however, was more prejudicial, implying that the plaintiff had been fully compensated for the damage to his automobile, and the first thought of the jurors, unfamiliar with legal principles, probably was that, having received full compensation for his loss from one person, the plaintiff was not entitled to a second recovery for the same loss."

The Court further says on the same page the following:

“ ‘Damages recoverable for a wrong are not diminished by the fact that the party injured has been wholly or partly indemnified for his loss by insurance effected by him, and to the procurement of which the wrong-doer did not contribute; and this is equally true * * * though the insurance company, by reason of having paid the loss, is entitled to be subrogated to the rights of the insured as against the tort-feasor, or to recover back from him the amount he recovers. The question who will be entitled to the proceeds of the recovery, the insurer or the insured, is a matter between them, and constitutes no defense to an action for the damages caused by the wrong which, in any event, must be brought in the name of the insured owner although it might be for the use of the insurer.’ 8 R. C. L. 557; Clark v. Burns Hamman Baths, 71 Cal. App. 571, 575, 236 P. 152.”

See also the case of Lebet v. Cappobiacho, 102 P. 2d 1109.

CONCLUSION

The respondents feel, as hereinbefore stated, that a full, fair and complete review of the testimony and of the physical exhibits presented to the jury provided it with clearly sufficient competent evidence upon which their verdict could be based, and the respondents submit that the verdict of the jury and the judgment entered thereon should be sustained.

Respectfully submitted,

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