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Verne J. Oberhansly v. Travelers Insurance Co. : Brief of Amici Curiae on Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

VERNE J. OBERHANSKY,

Plaintiff and Respondent,

-vs-

TRAVELERS INSURANCE COMPANY,
a corporation,

Defendant and Appellant.

Clerk, Supreme Court, Et Al

Case No. 8450

BRIEF OF AMICI CURIAE ON
PETITION FOR REHEARING

RAY, QUINNEY & NARBEKIAN
HANSON & BALDWIN
MORETON, CHRISTENSEN &
CHRISTENSEN

Amici Curiae

I N D E X

STATEMENT OF POINTS:

POINT 1. THE COURT'S OPINION SHOULD BE MODIFIED TO INDICATE CLEARLY THAT THE FAILURE OF THE ASSURED TO ATTEND TRIAL IS A BREACH OF THE COOPERATIVE CLAUSE.

POINT 2. THE COURT'S OPINION SHOULD BE MODIFIED TO INDICATE CLEARLY THAT THE INSURER IS NOT REQUIRED TO DEFEND AT ITS PERIL IN THE ABSENCE OF THE DEFENDANT BY THE USE OF DEPOSITIONS IN LIEU OF THE PERSONAL TESTIMONY OF THE INSURED.

POINT 3. THE COURT'S OPINION SHOULD BE MODIFIED TO INDICATE CLEARLY THAT THE QUESTION IN EACH CASE IS NOT WHETHER THERE HAS BEEN A BREACH OF THE COOPERATION CLAUSE, BUT WHETHER THE BREACH IS EXCUSABLE, AND WHETHER THE COMPANY HAS EXERCISED THE PROPER DILIGENCE TO OBTAIN THE ATTENDANCE OF THE ASSURED AT TRIAL.

POINT 4. THIS COURT SHOULD ESTABLISH WHAT STANDARD OF DILIGENCE SHALL BE REQUIRED OF AN INSURANCE CARRIER, SO THAT IT MAY KNOW IN ANY PARTICULAR CASE WHAT IS REQUIRED OF IT IN ORDER TO COMPLY WITH ITS POLICY OBLIGATIONS.

IN THE SUPREME COURT OF THE STATE OF UTAH

VERNE J. OBERHANSKY,

Plaintiff and Respondent,

-vs-

Case No. 8450

TRAVELERS INSURANCE COMPANY,
a corporation,

Defendant and Appellant.

BRIEF OF AMICI CURIAE ON
PETITION FOR REHEARING

Amici Curiae have sought and obtained leave to appear in this case, and to file a brief in support of the petition for rehearing. We feel that the rules laid down in the opinion of the Court will result in a hardship upon defendants in general and particularly upon the casualty insurance industry in this state; that they will both permit and promote collusive actions by claimants against insureds to the detriment of the casualty insurance companies, and

ultimately and inevitably, to the detriment of the premium paying public. The authorities governing the same and similar factual situations, have been fully cited, quoted and discussed in the able brief in support of the petition for rehearing prepared by counsel for the appellant. We see no purpose in repeating them here. However, we do wish to call to the attention of the court certain aspects of the decision which we feel will have a harmful effect upon the insurance industry unless the opinion is modified and revised.

In the first place, it is suggested by the opinion that there is a question whether a failure of the insured to attend trial could be considered in any event, a policy violation. Such is inferred from the following language of the Court:

"It should be pointed out that even if his failure to attend the trial could be considered a violation of the cooperation clause, yet, unless the insurance company was substantially

prejudiced by such absence, it is not a valid defense against the injured third party." (Italics ours).

We submit that the policy provides in plain and unequivocal language that the insured "shall cooperate with the company, and upon the company's request, shall attend hearings and trials * * *." (Italics ours). The policy provisions contain nothing whatsoever about the convenience of the insured, nor whether in the opinion of the insured the request of the company must be reasonable. Plainly, without equivocation or qualification, the provision is that the insured shall, upon the company's request, attend trials. We submit, therefore, that there can be no question but that the failure to attend a trial upon the request of the carrier, is a clear breach of the cooperation clause; and the principal problem becomes whether the insured had any excuse for his failure to comply with its clear terms. We concede that there may be

situations such as personal illness, where failure upon the part of the assured to attend trial might be excusable. However, the insured's personal opinion that his prospects for promotion in his employment might be impaired by his attendance at trial does not appear to us to be a valid excuse, nor does our research discover any authority so holding. It is an excuse that would be readily available to almost all insureds, since most insureds are employees of someone else, and since absence from employment for any reason is never conducive to advancement. It would therefore be a simple matter for any insured to say "take my deposition, my prospects for promotion will be impaired if I take the trouble to spend a day or two in court to personally appear and defend myself."

The opinion of the Court leaves the door wide open for collusive suits between claimants and insureds. While this might be

most easily accomplished in cases arising under the guest statute, it could conceivably result in any type of automobile accident where the insured desires to see the injured party compensated at the expense of the insurance carrier and regardless of legal liability.

The opinion also assumes that the deposition of the defendant would be as efficacious as his personal attendance and testimony at trial. We venture to assert that all experienced trial lawyers would agree that in practically all cases, testimony presented in person is far more effective with a jury than testimony read into the record by deposition. As noted in the brief in support of the petition for rehearing filed by the appellant, this court has repeatedly pointed out the advantage trial courts have of personally observing the witnesses, an advantage not available to the appellate court. Yet it is now suggested that a jury of laymen, without any training or ex-

perience in the law, can do what this Court admits that it, with its knowledge and experience cannot do, and that is to fairly evaluate the testimony of witnesses presented in the cold form of a written record. Apart from the loss of the personal observation of the witness by the jury, there is the further psychological disadvantage in that a jury could gain the impression that the defendant is not interested in the success of his own cause and counsel could irreparably implant such an impression during argument to the jury. Such can be, and usually is highly detrimental, as any experienced trial attorney will readily affirm.

Still a further disadvantage in the use of a deposition in lieu of personal testimony is that frequently matters arise at trial which are not anticipated, despite the most careful employment of all available discovery procedures prior to trial. Frequently the plaintiff will offer evidence of which defense

counsel is not aware, or which he could not reasonably anticipate would be offered. The defendant, if present in court, might readily be able to rebut such evidence. But if such testimony was not anticipated at the time of taking his deposition, it would not be available for the defense where the defendant is not personally in court. Further, in order to adequately meet all of the evidence possible of presentation in any given case, depositions of each and every witness other than the plaintiffs should be taken prior to the taking of the defendant's deposition and of necessity subsequent to a pre-trial conference and order.

In its opinion, this court stressed the fact that the insured furnished a written statement to the insurer. Such a statement was valuable to the insurer only for the purpose of evaluating the claim for settlement purposes, evaluating the prospects for successful defense, and for marshalling the evidence

so clarified that the rights and duties of each as to the other may be clearly defined and understood.

Much has been written indicating that the trend of judicial decision is toward liberalizing the rules of liability in favor of plaintiff's recoveries, and that in nearly all types of personal injury litigation, the trend of jury verdicts is toward ever larger awards. If such is true, the casualty insurers cannot hope to render to the public adequate protection at a reasonable cost, and this is especially so where they may not be assured of the attendance at trials of their own insureds to assist in defending claims which may be doubtful or spurious.

We respectfully urge that the language of the Court in the original opinion should be substantially modified to indicate clearly that:

1. The failure of the assured to attend

trial is a breach of the cooperation clause.

2. The insurer is not required to defend at its peril in the absence of the defendant, by employing depositions in lieu of the personal testimony of the insured.

3. The question in each case is not whether there has been a breach of the cooperation clause, but whether the breach is excusable, and whether the company has exercised the proper diligence to obtain the attendance of the assured at trial.

4. This Court should establish what standard of diligence shall be required of an insurance carrier, so that it may know in any particular case what is required of it in order to comply with its policy obligations.

Respectfully submitted

RAY, QUINNEY & NEEBKER
HANSON & HALDWIN
MORETON, CHRISTENSEN &
CHRISTENSEN

Amici Curiae