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# Barbara Lima v. Earl Chambers v. Prudential Property & Casualty Insurance Company : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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BARBARA LIMA,

Plaintiff-Respondent,

vs.

EARL CHAMBERS,

Defendant-Respondent, Case No. 17622

vs.

PRUDENTIAL PROPERTY &
CASUALTY INSURANCE COMPANY,

Intervenor-Appellant.

- - - - - - - - - - - - - - - - - - - - -

# BRIEF OF APPELLANT

- - - - - - - - - - - - - - - - - - - - -

Appeal from an Order of the
Second Judicial District Court,
Honorable Ronald Hyde

- - - - - - - - - - - - - - - - - - - - -

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FILED

JUL 23 1981

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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## NATURE OF THE CASE

This is an action arising from an automobile collision in July of 1977 between plaintiff and defendant, an uninsured motorist. The present appeal concerns the right of Plaintiff's insurance carrier to intervene as a party defendant pursuant to its uninsured motorist coverage.

## DISPOSITION IN LOWER COURT

The present litigation was initiated in April of 1979. Subsequently, a partial summary judgment was obtained against the defendant by the plaintiff based upon Defendant's affidavit. Appellant Prudential Property and Casualty

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Insurance Company moved to intervene in the remaining litigation concerning damages. This motion was denied by the lower court.

An application for interlocutory appeal was filed with this Court and was granted on April 2, 1981.

## RELIEF SOUGHT ON APPEAL

Appellant seeks an order of this Court allowing it to intervene in the lower court litigation as a party defendant.

## STATEMENT OF FACTS

There is no dispute concerning the statement of facts in this litigation. On or about July 14, 1977, the plaintiff and Defendant were involved in an automobile collision in Eden, Utah. The plaintiff Barbara Lima filed her complaint against defendant Earl Chambers on April 3, 1979. (R. 1-2). Defendant Chambers who is uninsured obtained the services of an attorney and filed an answer on April 25, 1979. (R. 3).

On May 11, 1979, Plaintiff filed her first set of interrogatories to be answered by Defendant. (R. 4-11). These interrogatories went unanswered until the plaintiff filed a motion to compel answers to interrogatories on November 27, 1979. (R. 13). Plaintiff's motion was set for hearing on December 5, 1979, and the court made a minute



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entry indicating that the defendant was not present in person nor through counsel at the hearing. A stipulation was subsequently entered into between counsel for the parties where the defendant agreed to appear at the office of the plaintiff's attorney to answer the interrogatories. (R. 15).

On February 12, 1980, Defendant's attorney withdrew from the case. (R. 16). The following day, February 13, 1980, Defendant executed an affidavit prepared on the letterhead of Plaintiff's attorney stating among other things that he was driving a 1966 Ford pickup truck and that "I caused said vehicle to collide into the vehicle being operated by Barbara Lima. . . ." (R. 17-18).

On September 18, 1980, Plaintiff moved for partial summary judgment as to liability alone upon the basis that Defendant himself had admitted that he had caused the accident. (R. 21). On October 21, 1980, the lower court granted the motion stating "It appears from Defendant's affidavit that he agrees he is the cause of the accident, and by filing said affidavit he appears he agrees partial summary judgment should be granted." (R. 22). Accordingly, an order granting partial summary judgment was entered. (R. 23).

On January 12, 1981, Prudential Property & Casualty



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Insurance Company, the insurance carrier of the plaintiff providing uninsured motorist coverage, moved to intervene in the litigation as a party defendant. It claimed that because defendant Earl Chambers was not represented by counsel the interests of the insurance carrier were not properly represented. (R. 29).

On February 18, 1981, the motion to intervene was denied. (R. 36). An order was subsequently entered. (R. 37).

Prudential Property & Casualty Insurance Company filed an application for interlocutory appeal. This Court entered an order granting the application. (R. 38).

## ARGUMENT

### IN UNINSURED MOTORIST LITIGATION, THE INSURANCE COMPANY OF THE PLAINTIFF HAS A CONSTITUTIONAL AND STATUTORY RIGHT TO INTERVENE FOR ITS OWN PROTECTION AND TO PREVENT MANIFEST INJUSTICE.

#### This Court's previous decisions forbidding the uninsured motorist carrier to intervene as a party should be overruled.

On three separate occasions this Court in split decisions has addressed various questions of uninsured motorist representation. In Christensen v. Peterson, 25 Utah 2d 411, 483 P.2d 447 (1971), the plaintiff sued the tortfeasor (an uninsured motorist) and his own insurance carrier. The trial court held that the insurance carrier could not be joined as a party in the case and dismissed



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the complaint as to it. On appeal, this Court affirmed with Justice Ellett dissenting.

In Kesler v. Tate, 28 Utah 2d 355, 502 P.2d 565 (1972) the insurer for the plaintiff sought to intervene since the action was against an uninsured motorist and the insured desired to have its day in court and not be compelled to pay a judgment against it without a chance to be heard. The uninsured motorist in the case was represented by his own counsel. Again, this Court stated the Christensen case was dispositive and sustained the trial court in refusing to permit the intervention by the insurer. Justice Ellett and Justice Crockett dissented in that case.

Finally, in Wright v. Brown, 574 P.2d 1154 (Utah 1978), an action was brought to recover against plaintiff's automobile insurer for injuries sustained when plaintiff was struck from the rear by a vehicle driven by an uninsured motorist. The uninsured motorist and the insurer of the driver were joined as third-party defendants. The insurers were granted summary judgment and the lower court entered default against the uninsured motorist. The insurance carrier appealed from the default judgment and garnishment which sought satisfaction of the judgment. This Court held that the insurer lacked standing to appeal from the default



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judgment in that it was not a party to the action. Again, Justice Ellett and Justice Crockett dissented.

As can be seen, therefore, the judicial history of litigation involving the rights of uninsured motorist carriers has been one involving a divided court. Appellant submits that it is now time to "alter the course of the law as set forth in Christensen v. Peterson and Kesler v. Tate," quoted from Brown, (574 P.2d at 1155) and to allow an uninsured motorist carrier to intervene in the litigation between the insured and the uninsured motorist.

The reasons for allowing intervention are that the failure to allow intervention is unconstitutional and Rule 24, U.R.C.P., requires intervention be allowed.

1. Failure to allow intervention of an uninsured carrier is unconstitutional.

It appears that an insurance carrier is bound by the judgment entered against an uninsured motorist which has been obtained by the carrier's insured. Schippers v. State Farm Mutual Automobile Insurance, 518 P.2d 1099 (Utah 1974); Vernon Fire & Casualty Insurance Company v. Metney, 351 N.E.2d 60 (Ct. App. Ind. 1976); State Ex Rel Manchester Insurance & Indemnity Co. v. Moss, 522 S.W.2d 772 (Mo. 1975).

Appellant adopts the argument raised by Justice Ellett in his dissenting opinion in the Kesler case in support of



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its position that the failure to allow intervention is a denial of due process if the carrier is bound by the previously obtained judgment. Justice Ellett stated the following:

> If it be assumed that the insurer will be bound by the judgment rendered in the case in which it has had no opportunity to be heard, then there would be a denial of due process of law, for the gist of due process of law is the right to have a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights.
>
> Under our system of law there must be a competent court to pass upon the subject matter of the dispute; and where that involves the personal liability of a defendant, the defendant must be brought within the jurisdiction of the court and be afforded the right to be present in court; to be heard, by testimony or otherwise; to have the right to cross-examine each and every witness for the opposition; and to offer such evidence as it may care to present to the court. 502 P.2d at 567.

The failure to allow appellant to intervene as a party defendant in this litigation clearly denies it due process of law as is required under Article I, Section 7, of the Utah Constitution. In effect, the procedure prohibiting intervention allows a plaintiff and an uninsured motorist to conspire to obtain a judgment which is legally binding upon the insurance carrier. To prohibit the carrier from asserting any type of defense throughout the proceedings clearly violates the carrier's due process


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rights.

In the instant case, for example, the order granting partial summary judgment was based upon the affidavit submitted by the defendant Chambers but prepared entirely by Plaintiff's own attorney. Unless Appellant is allowed to intervene in the litigation involving damages, it is just as likely that Defendant will not contest the claim of Plaintiff concerning the amount of damages and therefore Plaintiff will be given free rein to basically ask for any amount of damages which will be completely unrefuted and untested.

Due process dictates that Appellant be given an opportunity to challenge the evidence of damages presented by Plaintiff in order to insure that a judgment has been obtained in a fair and just proceeding in which all parties are adequately represented. If, on the other hand, this Court were to rule that an uninsured motorist carrier is not bound by a judgment against the uninsured, then the principle of judicial economy is violated since the Plaintiff will have the "unnecessary expense of two lawsuits instead of one even though the identical issues will be raised in the second action as are litigated in the first." Kesler, supra, 502 P.2d 567 (Justice Ellett dissenting). See also Vernon Fire & Casualty v. Metney,



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351 N.E.2d 60 (Ind. 1976); Heisner v. Jones, 169 N.W.2d 606 (Neb. 1969).

2. Rule 24, Utah Rules of Civil Procedure, requires that intervention be allowed.

Rule 24 of the Utah Rules of Civil Procedure provides that upon timely application anyone shall be permitted to intervene in an action when "the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

It cannot seriously be disputed that there is no representation of the defendant in this case. The defendant has no attorney, has indicated no intention of obtaining one, and has even signed an affidavit prepared by Plaintiff's attorney admitting full liability of the accident. Likewise, as previously noted, the insurance carrier in this case is probably bound by any judgment obtained against the uninsured motorist Chambers. For these reasons, therefore, it is evident that the criteria of Rule 24, has been met.

This Court has noted that the purpose of Rule 24 is to allow a person to intervene who is not a named party but who has often a greater interest in the subject matter of the litigation than either the plaintiff or the defendant. Commercial Block Realty v. United States Fidelity & Guaranty



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Co., 28 P.2d 1081 (Utah 1934).

While normally an insurance carrier does not wish to become a party to the litigation because of the prejudicial effect its entry could have upon a jury, as noted by Justice Crockett in his dissenting opinion in Kesler, it is for the insurance carrier to determine whether it wishes to enter its appearance and should it so determine the court should allow its entry into the litigation as a "real party in interest."

Courts in other jurisdictions have held under similar intervention statutes that the insurance carrier of uninsured motorist coverage has a vested right to intervene in the main action. In Wert v. Burke, 197 N.E.2d 717 (App. Ill. 1964) the Illinois court held that an uninsured motorist carrier clearly was entitled to intervene in the main action since its interests could never be "adequately" protected. The court in defining "adequate" stated the following:

> The word "adequate" and its broad usage is indicated by its definition as applicable to the case before us. It is defined as "legally sufficient; such as is lawfully and reasonably sufficient; . . . an adequate remedy." (Webster's New International Dictionary, 2nd Edition). Certainly no reasonable man, confronted with the same situation as that of the petitioning intervenor, would rely on the defendant and their lawyers for the representation of his interest. Id. at 719.



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In State Farm Mutual Automobile Insurance Co. v. Giles, 154 S.E.2d 286 (C. App. Ga. 1967), the court there allowed intervention under a similar intervention statute stating "the insurer does have a direct and immediate interest to protect in this kind of action, and it stands to lose or gain by the direct effect of the judgment." Id. at 288. See also Rawlins v. Stanley, 586 P.2d 840 (Kan. 1971).

Since the essential criteria for allowing intervention under Rule 24 is clearly present in this case and all cases involving uninsured motorists it was erroneous for the lower court to deny Appellant's motion for intervention and this Court should remand the matter to allow Appellant the right to become a party defendant in this action.

## CONCLUSION

This case represents a classic example as to when intervention should be allowed. Here, Utah law requires that the appellant insurance carrier provide uninsured motorists to all covered drivers. Section 41-12-21.1, U.C.A. Since the plaintiff is anxious to recover a collectable judgment and since the defendant is anxious for the plaintiff to be fully satisfied there is no adverse environment in which to litigate the issue as to liability and damages. Both the plaintiff and the defendant are interested



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in obtaining a judgment so that the uninsured motorist carrier will be liable.

Unless the uninsured motorist carrier is given the right to intervene in the main litigation the carrier is clearly denied a due process right since it is held liable to a judgment without the opportunity of defending itself. If such judgment, on the other hand, is not considered res judicata against the insurance carrier then it would be necessary for the insured to relitigate the exact issues, facts, and other circumstances in a subsequent trial thereby causing a needless waste of judicial time and subjecting the insured to double expenses.

Rule 24 of the Utah Rules of Civil Procedure was clearly designed to allow a procedure in which a party who has a substantial interest in the litigation and whose interest is not being protected by the litigants may intervene in order to have his day in court. To allow the appellant to become an intervenor and named as a party defendant will insure that the evidence presented by the plaintiff is subject to all the rigors of cross-examination and will protect the validity of the judgment against any claim of fraud or collusion with the uninsured motorist.

This Court's previous decisions did not address the constitutional and statutory issues now raised in this



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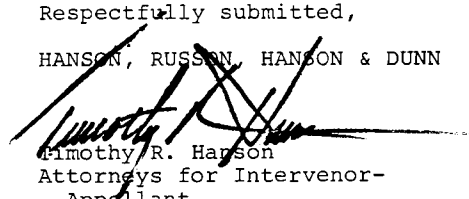
appeal. In addition, the fact that the uninsured motorists in those cases were represented by private counsel created a less compelling reason for intervention. However, because these decisions were decided by a bare majority and because the facts in this case clearly show the abuse that can occur, intervention in uninsured motorist cases should now be allowed and "all prior cases holding to the contrary should be overruled." Wright v. Brown, 574 P.2d at 1156 (Justice Ellett dissenting).

For these reasons, therefore, the lower court's order denying intervention is erroneous and this Court should remand the matter to the lower court with directions that Appellant be named as a party defendant and be allowed to fully participate in the litigation.

Respectfully submitted,

HANSON, RUSSON, HANSON & DUNN



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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Appellant to Earl Chambers, defendant, Eden, Utah 84310, and to David B. Havas, Attorney for Plaintiff, Suite 216, Harrison Place, 3293 Harrison Boulevard, Ogden, Utah 84403 this _____ day of July, 1981.

_____

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