

1957

# Irene Paul and Charles J. Paul v. Woodrow Lawrence Kirkendall et al : Brief of Appellant

Utah Supreme Court

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Howell, Stine and Olmstead;

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## Recommended Citation

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

IRENE PAUL and CHARLES J. PAUL,

*Plaintiffs and Respondents*

VS.

WOODROW LAWRENCE KIRKENDALL, JOHN

DOE, JANE DOE AND JOHN DOE COMPANY,

*Defendants,*

and

MARYLAND CASUALTY COMPANY, a corporation

*Garnishee and Appellant*

**Appellant's Brief**

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### STATE OF UTAH

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IRENE PAUL and CHARLES J. PAUL,  
*Plaintiffs and Respondents*

vs.

WOODROW LAWRENCE KIRKENDALL, JOHN  
DOE, JANE DOE AND JOHN DOE COMPANY,  
*Defendants,*  
and

MARYLAND CASUALTY COMPANY, a corporation  
*Garnishee and Appellant*

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#### STATEMENT OF FACTS

This is an appeal from an interlocutory order denying Appellant's motion for summary judgment, which order was entered by the Second District Court for Weber County, Honorable John F. Wahlquist, Judge, presiding. Plaintiffs in the court below will be here referred to as such, the defendant Kirkendall as the defendant, and the Appellant Maryland Casualty Company, as the Garnishee.

Plaintiffs and Respondents herein recovered a judg-

ment entered upon a jury verdict against defendant Kirkendall in the sum of Twenty Thousand (\$20,000.00) Dollars, for personal injuries arising out of an automobile accident. This judgment was affirmed on appeal to this court 1 U. 2nd 1; 261 P. 2nd 670

Garnishee, the Appellant herein, as defendant's insurance carrier, paid said judgment up to the limits of its policy coverage of Ten Thousand (\$10,000.00) Dollars, together with interest.

Plaintiffs, after execution returned unsatisfied, sued out a writ of garnishment with interrogatories, which was served on appellant, Maryland Casualty Company, as Garnishee. It was therein asked, among other things, if Garnishee was indebted to defendant. The answer was negative. Plaintiff then replied to the Answers alleging that Garnishee was indebted in the amount of the excess judgment, based upon the assertion affirmatively pleaded in plaintiffs' second reply, in substance, that Garnishee negligently and in bad faith failed to settle the case within the policy limits before trial, after having an opportunity to do so.

Upon the issues framed by interrogatories and reply, both sides moved for summary judgment, which motions were taken under advisement by the Court at pre-trial. Various memorandums and affidavits were filed by both parties. On June 25, 1956, the lower court entered its order denying both motions, holding that garnishment was an available remedy under our rules for plaintiffs to pursue, and that the issues of bad faith and negligence could be litigated therein without the presence of the defendant, under plaintiffs' theory

that appellant held the excess sum for their use and benefit as a chose in action of the defendants. The court set a trial date for the determination of the issues. This appeal was then taken from that order.

## STATEMENT OF POINTS

Subsequent considerations have prompted us not to include in the brief certain of the points set out in the petition for an appeal. We feel, however, that the points herein contained are meritorious and will properly sustain our position.

It is Appellant's contention that the lower court in denying its motion for summary judgment erred for the following reasons:

### I.

THE ALLEGED CLAIM HERE SOUGHT TO BE GARNISHED SOUNDS IN TORT AND AS A MATTER OF LAW IS NOT SUBJECT TO GARNISHMENT.

### II.

UNDER THE PLAIN LANGUAGE OF THE RULE THE ALLEGED CLAIM IS NOT SUBJECT TO GARNISHMENT, SINCE IT IS NOT IN THE POSSESSION OR IN THE CONTROL OF A THIRD PERSON.

### III.

THE RELATION BETWEEN DEFENDANT AND GARNISHEE HEREIN IS NOT THAT OF DEBTOR TO CREDITOR, AND THE RIGHT OF ACTION EXISTING, IF ANY,

CANNOT BE INTERPRETED AS A DEBT  
WITHIN THE LANGUAGE OF RULE 64 (D),  
U.R.C.P.

## ARGUMENT

### POINT I.

THE ALLEGED CLAIM HERE SOUGHT TO  
BE GARNISHED SOUNDS IN TORT AND AS  
A MATTER OF LAW, IS NOT SUBJECT TO  
GARNISHMENT.

The claim here sought to be garnished is the chose in action alleged to exist in behalf of the defendant Kirkendall against the Garnishee, for negligently and in bad faith refusing to settle within the policy limits before trial. The defendant has never asserted such claim. If it is capable of being asserted, it seems without argument that such a claim sounds in tort. It was argued extensively by Respondent below, and undoubtedly will be argued as extensively here, that the alleged claim of defendant sounds in contract under the insurance policy, as well as in tort for breach of the duties arising under such contract. According to our research, this position is not sustained by the authorities. See 131 A.L.R. 1500, supplementing 71 A.L.R. 1485. The cases therein cited hold that where an insurer in a liability policy reserves the exclusive right to contest or settle any claim against the insured, and prohibits him from voluntarily assuming any liability for settling any claims without the insurer's consent, except at his own cost, (the policy herein involved being substantially standard in these respects), there is imposed upon the insurer no contract obligation, either express or implied,



to compromise or settle, and from this it follows that notwithstanding the insurer's failure or refusal to compromise or settle within the policy limits, no action in assumpsit or on the contract will lie against it for any amount that a judgment recovered against the insured is in excess of the policy limits. Liability, if any, rests in tort. In *Zumwalt vs. Utilities Insurance Company, Missouri*, 228 S.W. 2d 750, which was an action to recover an excess judgment based upon the claim that the the Company negligently and in bad faith refused to settle, the Court said at Page 756:

"This action is a tort action. It is not an action to recover 'any loss under a policy' of insurance. It is true it grew out of a contract, a policy of insurance. No action on a contract will be against an insurance company for that part of a judgment recovered against the insured which is in excess of the policy limit. See 131 A.L.R. 1500 and cases therein reviewed."

If the claim sounds in tort therefore, it is subject to the general rule that such claims are not subject to garnishment within the purview of statutes generally in force today. 38 C.J.S. 296; 93 A.L.R. 1088 *et seq.*

We call attention to the case of *Black vs Plumb, Colorado*, 29 Pac. 2nd 708, 91 A.L.R. 1334, and the annotation following at Page 1338. These cases are noted to be illustrative of the general rule that a mere liability on the part of the Garnishee to an action by the principal defendant for conversion of the property of the defendant, will not serve as the basis of a judgment in favor of the property owner's creditor against the garnishee, such liability being for an unliquidated tort claim. In

the Black case the Colorado statute provided only for the garnishment of a credit, debt or *chose in action*. Black was an officer of the defendant corporation against whom the plaintiff recovered a judgment. It appeared that Black had sold the use of a list of stockholders of the debtor corporation, thereby converting it, and the plaintiff by garnishment sought to reach the proceeds of the sale. The Supreme Court in reversing the judgment of the lower court, held that the Garnishee should have been discharged, since the claim of the debtor corporation was for conversion, a tort, was unliquidated, and did not fall within the scope of the statute. In view of the statute, one must necessarily read this decision as holding that choses in action for purposes of garnishment must be those arising ex contractu.

The Supreme Court of Georgia in *Brenau College vs. Mincey*, 61 S. E. 2nd 301, held

“It is well settled law in this State that defendant in a tort action is not subject to garnishment until the tort claim is reduced to judgment.”

Citing *Bates and Company vs Forsyth*, 69 Georgia 365 (2), to the effect:

“That although one may have the right to bring a tort action against another, the tortfeasor is not subject to garnishment at the instance of a creditor of the injured party.”

And further:

“Garnishees are required to answer as to indebtedness and as to assets or property in hand, not as to the torts they may have committed

against the defendant in a suit."

The Supreme Court of Montana in *Coty vs Cogswell*, 50 *Pac. 2d* 249, under its attachment statute (credits, personal property or debts), held that a chose in action for personal injury was not property within the purview of the statute, since it was an unliquidated claim for damages in tort, and therefore not subject to attachment. See also *Arp vs Blake* (Cal.) 218 *P. 773*; *Pacific Gas & Electric Co. v Nakano* (Cal.) 87 *P. 2d* 700, 121 *A.L.R.* 417; *Lewis v. Barnett* (Kan.) 33 *P. 2nd* 331, and the discussion in *McNeilly v. Furman* (Del.) 95 *A. 2d* 267, 35 *A.L.R. 2d* 1436.

These cases are collected in the notes and supplement in 38 C.J.S. 296 under Garnishment — Claims Ex Delicto.

Even if it were determined that the alleged claim here involved were dual in nature, giving the person aggrieved, the right to waive the tort and sue under the contract, the cases we have been able to find on the subject nevertheless hold that the creditor of the wronged person is not at liberty to exercise this option in order to defeat the principle prohibiting the garnishment of unliquidated tort claims. 91 *A.L.R.* 1339, 93 *A.L.R.* 1088.

## POINT II.

UNDER THE PLAIN LANGUAGE OF THE  
RULE THE ALLEGED CLAIM IS NOT SUB-  
JECT TO GARNISHMENT SINCE IT IS NOT  
IN THE POSSESSION OR IN THE CONTROL  
OF A THIRD PERSON.

The rule involved, 64 (d) (a), U.R.C.P., insofar

as material here, provides as follows:

"The plaintiff, at any time after the filing of the complaint, may have a writ of garnishment issue, and attach the credits, effects, debts, choses in action, money, and other personal property of the defendant *in the possession or in the control of any third person*, as garnishee, whether the same are due at the time of the service of the writ or are to become due thereafter; \* \* \*."

The claim here, if in fact one exists, is one belonging to and in the possession or control of the defendant himself, and is not held by any third person. It is or would be a claim by Kirkendall against the Appellant based upon negligence or bad faith, if any there might have been.

*Mortimer vs Young, California*, 127 Pac. 2d 950, was a case applying similar language under the California statute as it existed at that time. It involved levy by execution on a cause of action for fraud. It was held that a levy on property not capable of manual delivery, other than a debt, is to be made by giving notice to the person having such property "in his possession or under his control", *that person being in the case of a cause of action the plaintiff who is suing on it*.

In *Bassett vs McCarty, Washington*, 101 Pac. 2d 575, the garnishment statute provided that the garnishee shall appear and answer as to what personal property or effects of the defendant he has in his possession or under his control. The plaintiff commenced an action against the defendant to recover for money lent and subsequently he sought to garnish a verdict the defend-

ant had obtained against a third person. This verdict was based upon a cause of action for tort, but had not yet been reduced to judgment. The court in affirming the dissolution of the writ of garnishment, held as follows during the course of the opinion at page 579:

“Appellant, however, contends that a verdict constituted ‘property’, and for that reason is subject to garnishment. Rem. Ref. Stat. Sec. 683, on which appellant relies in this connection, refers to ‘personal property or effects, if any, of the defendant’, which the garnishee ‘has in his possession or under his control, or had when such writ was served.’ (Italics ours)

“Conceding that a claim against the garnishee constitutes property of the claimant, it clearly is not in the possession, or under the control of, the garnishee defendant. As stated before, the question before us is not what constitutes a legal basis for the issuance of a writ of garnishment, but specifically, what is subject to garnishment.”

See also *Cunningham v. Baker* (Ala.) 16 So. 68, which was decided under a garnishment statute embracing, among other things, money or effects in the possession or under the control of a third person. The Garnishee held money and effects of the defendant which were acquired tortiously. The Court said at Page 71:

“It would be a diversion of a garnishment from its real office and purposes if it were employed to redress torts committed against the debtor, and to reach and subject moneys or effects the possession of which is not held in his right, but is held adversely and in hostility to him.”

We submit, accordingly, that defendant Kirkendall’s

claim or cause of action against Appellant, if any he had, was not a chose in action "in the possession or in the control" of appellant and therefore was not subject to garnishment.

### POINT III

THE RELATION BETWEEN DEFENDANT AND GARNISHEE HEREIN IS NOT THAT OF DEBTOR TO CREDITOR, AND THE RIGHT OF ACTION EXISTING, IF ANY, CANNOT BE INTERPRETED AS A DEBT WITHIN THE LANGUAGE OF RULE 64 (D), U.R.C.P.

Plaintiffs, in their answer to Garnishee's petition for intermediate appeal, and also in their reply to answers of Garnishee, assert that Garnishee is "indebted" to defendant within the meaning of Rule 64 (d) U.R.C.P. In this connection, it should be noted that Rule 64 (D) (a), in outlining what property may be attached by a Writ of Garnishment, uses the words "debts". The word "indebted" is used later in Rule 64 (D) (a), in connection with the requirement of the affidavit for a writ to issue prior to judgment. Therefore, the word "indebted" has no bearing in the present question, and the word "debts" as used in this rule is controlling.

To determine if the alleged right of action existing between defendant and Garnishee is a "debt", it is necessary to know its exact nature.

The duty claimed to have been breached by garnishee was (if such a duty is found to exist) a duty imposed by law rather than a duty imposed by contract or agreement of the parties.

In this regard, the provision of the contract of

insurance here involved is as follows:

“As respects the insurance afforded by the other terms of this policy under coverages (a) and (b), the Company shall:

(a) Defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;”

Under this provision, the Company had the right or option to make a settlement with plaintiffs, but no duty to so do. If any duty to settle did exist, it arose, not by provisions of this contract, but was imposed by law from the relation of insurer-insured.

The case of *City of Wakefield v. Globe Indemnity Co.* (Mich .1929), 225 N.W. 643, is similar in point. There the insured brought suit against the insurer in tort to recover an excess judgment rendered against the insured, upon the theories (a) negligent defense of the suit, (b) negligent failure to settle, (c) bad faith in refusing to settle. While holding that Insurer could be held liable only on ground (c), the Court said:

“The courts seem to be unanimous in the opinion, as expressed by direct ruling, recognition, or assumption, that the insurer is liable to the insured for an excess of judgment over the face of the policy when the insurer, having exclusive control of settlement, fraudulently or in bad faith refuses to compromise a claim for an amount within the policy limit. They are also unanimous

that the instant form of policy contains no express or implied contract obligation of the insurer to compromise claims, and that an action in assumpsit or on the contract will not lie for the excess of judgment over policy limit. Where the proposition is stated, the great weight of authority holds that the insurer has the option to compromise but no obligation to do so. The exclusive control of settlement in the insurer, however, applies only to the policy limit, as the insured may compromise his own possible liability in excess of that amount. *General Accident, Fire & Life Assurance Corporation v. Louisville Home Telephone Co.*, 175 Ky. 96, 193 S.W. 1031, L.R.A. 1917 D 952; *Pickett v. Fidelity & Casualty Co.*, 60 S.C. 477, 38 S. E. 160, 629."

In the case of *Best Building Co. vs Employer's Liability Assurance Corp. et al*, 247 N.Y. 451, 160 N.E. 911, the insured sued the insurer for alleged negligence in failure to settle the claim within the policy limits. While holding the insured to be liable only for bad faith, not negligence, the Court said:

"The question is directly raised whether under the terms of these accident policies as they now read the insurance company is liable for negligence in failing to settle a case when there was a possibility of so doing. That the insurance company in the handling of the litigation or in failing to settle is liable for its fraud or bad faith is conceded and has been repeatedly stated in all the cases bearing on the subject. So also it has been held by this court that the company is not liable on its contract for a failure to settle; a contract imposes upon it no such duty, *Aubrecht v Maryland Casualty Co.*, 236 N.Y. 247, 140



*N.E. 577, 28 A.L.R. 1294; Streat Coal Co. v Frankfort General Ins. Co., 237 N.Y. 60, 142 N.E. 352.* In the latter case this court said: 'Defendant, however, was privileged at its own cost to settle any claim or suit. It was not obligated so to do, neither was it required to consult plaintiff in regard thereto . . . In the absence of fraud, negligence or bad faith, alleged and established it is not the duty of the court to read into contracts conditions or limitations which the parties have not assumed' . . ."

The cases above cited hold with the majority of American courts that the only duty insurer owes insured in regard to settlement is the duty of good faith. A minority of courts hold that in addition to the good faith requirement, the insurer may be held liable to insured if it *negligently* refuses to settle plaintiff's claim within the policy limits. This question has never been decided in this jurisdiction.

However, it does not matter which approach is taken, because both the "good faith" and "negligence" rules are founded solely upon a breach of duty implied by law, *not* imposed by contract.

The case of *Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Insurance Co.* (1917, *CA 1st Mass.* 240 *F.* 573, is one of the leading cases adopting the "negligence" theory. Therein the court said, on petition for rehearing:

"The defendant's duty to the plaintiff, as set out in the first and second counts of the declaration, does not depend upon whether it did or did not obligate itself in the policy to prepare and defend

the Hodele suit, or to settle the same. As pointed out in our opinion handed down in this case on February 27, 1917, the plaintiff's right of action in the first count, is based upon the ground that defendant entered upon the preparation and defense of the suit, and in the second count that it entered upon the task of settling it, and that in each case it was negligent in what it undertook to do. As each count sounds in tort, and is based upon a duty imposed by law, it is wholly immaterial whether the defendant was or was not under a contractual duty to prepare and defend the suit or to settle the same."

It may be urged by plaintiffs that since the original relation between Garnishee and defendant is contractual, defendant is entitled to waive the tort and sue in contract for the breach thereof. We submit that such a result can not be reached because the cause of action is based solely on tort, as pointed out hereinbefore.

Even if defendant in this instance could waive the tort and sue in contract, such an option is entirely personal, and does not extend to the plaintiff.

In the case of *Black v. Plumb, supra*, the court said:

"A claim in tort, not reduced the judgment, is not a debt within the meaning of the statutes in reference to garnishment. \* \* \* The rule is the same where as between the tort-feasor and the person to whom the wrong was done the latter might at his option either hold the tort-feasor to his liability in tort, or, waiving the tort, treat him as his debtor, since the creditor of the wronged person is not at liberty to exercise this option in his place, and so evade the general rule as to garnishment of claims in tort, sub-

stituting thereafter a liquidated claim quasi ex contractu."

*Lewis v. Dubose*, 29 Ala. 219, 38 C.J.S. Garnishment Sec. 91, Page 296, 4 Am. Jur. Attachment and garnishment, Sec. 206 and 207.

In discussing "debt" as pertaining to garnishment statutes, the Supreme Court of Alabama said in *Station Nat. Bank of Decatur at Oneonta v. Towns*, 62 So. 2nd 606, at Page 607:

"An indebtedness from a garnishee to a judgment debtor subject to garnishment is such debt as will sustain an action of assumpsit by the judgment debtor. *Coosa Land Co. v. Stradford*, 224 Ala. 511, 140 So. 582; *Pettus v. Dudley Bar Co.*, 218 Ala. 163, 118 So. 153."

Again, in the case of *Hollis v. Bender*, 40 So. 2nd 876, the Supreme Court of Alabama held:

"With reference to the instant case, if at the time of the service of the garnishment, or at the time of making the answer, or at any time intervening between these dates, the garnishee was not indebted to the defendant, York, or if there was not then existing a valid and binding contract under the terms of which such indebtedness would accrue in the future, then there was no debt subject to garnishment. The right thus arising must have been such demand as would support an action of debt or indebitatus at the instance of the debtor. *Archer v. Peoples Saving Bank*, 88 Ala. 249, 7 So. 53; *Henry v. Murphy & Co.* 54 Ala. 246; *Nicrosi v. Irving*, 102 Ala. 648, 15 So. 429, 48 Am. St. Rep. 92; *Feore v. Miss. Transp. Co.*, 161 Ala. 567, 49 So. 871; *Pettus v. Dudley*

*Bar Co.*, 218 Ala. 163, 118 So. 153; *Coosa Land Co. v. Stradford*, 224 Ala. 511, 140 So. 582; *Sloss v. Glaze*, *supra*; *Allen v. Woodruff*, 2 Ala. App. 415, 56 So. 247..

“Writing on the subject, Chief Justice Stone observed in *Teague, Barnett & Co. v. Legrand*, 85 Ala. 493, 5 So. 287, 7 Am. St. Rep. 64: ‘True, the debt need not be due and presently demandable; but there must be a contract, express or implied, out of which a money liability will certainly spring in the usual course of things. Many contracts from which money liability may possibly arise are not subject to garnishment at law.’ ”

The case dealt with a situation where garnishee let defendant take garnishee’s hogs, fatten them, and upon sale defendant was to receive one-half the weight increase. The Court said there was no debt to sustain garnishment.

Also standing for this interpretation is *Tucker v. Ware (Okla.)* 37 P. 2d 625.

The Garnishee herein respectfully submits that the claim existing, if any there be, between defendant and garnishee, is a tort claim for damages which could not sustain an action of ‘debt’ or ‘indebitatus assumpsit,’ and therefore is not a ‘debt’ within the meaning of Rule 64D, U. R. C. P.

## CONCLUSION

It is submitted that the remedy of garnishment cannot have been intended to allow adjudication of a purely, alleged, tort claim of the defendant against the

garnishee, the liability for which is expressly denied, in proceedings solely between garnishor and garnishee. Such a theory perverts the very purpose of this provisional remedy which historically has been strictly confined to contract obligations.

The claim here involved is clearly not a debt within the purview of garnishment. It further cannot be the subject of garnishment, since it is held, not by a third person, but by the defendant himself, if in fact it exists.

The order of the lower court should be reversed and the writ dissolved.

Respectfully submitted,

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