1983

The Ohio Casualty Insurance Company v. Barbara Brundage et al : Supplemental Brief of Defendants-Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE OHIO CASUALTY INSURANCE COMPANY, Plaintiff-Respondent, vs. BARBARA BRUNDAGE, RAY H. IVIE, and J. RULON MORGAN, Defendants-Respondents ALLSTATE INSURANCE COMPANY, Defendant-Appellant.	Case No. 18288

SUPPLEMENTAL BRIEF OF DEFENDANTS-RESPONDENTS

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TABLE OF CONTENTS

	Page
ARGUMENT	1
CONCLUSION	5
CERTIFICATE OF SERVICE	6

CITATION

Laub v. South Central Utah Telephone Association, Supreme Court No. 17925, 17926 (December 29, 1982) 1,3,4,5

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SUPPLEMENTAL BRIEF OF DEFENDANTS-RESPONDENTS

Respondents, Brundage, Ivie and Morgan, presented their brief to the Court on the 4th day of October, 1982. Subsequently, the Supreme Court delivered its opinion in the case of Laub v. South Central Utah Telephone Association, Supreme Court No. 17925, 17926, (December 29, 1982). Respondents contend that the Court's decision in Laub, supra, should be controlling in the case at bar.

In Laub, supra, plaintiffs obtained a judgment against South Central (defendant) that included amounts for damages previously compensated by the PIP benefits. To satisfy the judgment, South Central's liability insurer, Employers of Wausau, tendered to plaintiffs two checks, one in the amount of $4,347.71, payable to plaintiffs, their attorney, and State Farm (the PIP carrier), and a second check for the balance of the judgment in the amount of $31,505.39, payable to plaintiffs and their attorney. . . . Wausau apparently intended the check for $4,347.71 to be reimbursement to State Farm for the PIP benefits previously paid by

State Farm to plaintiffs. This check was never cashed. Some six months later, the PIP carrier proceeded in arbitration and received an award against the liability insurer for the full amount of PIP benefits. Thereafter, the liability insurer succeeded in modifying the personal injury judgment under a Rule 60(b) motion, to reduce the judgment against them by the amount of the arbitration award.

On appeal, the liability insurer presented an identical argument to that raised by Allstate in the present proceeding: i.e., that double recovery would occur. The Court rejected this argument by holding that a paramount consideration is whether the liability insurer adhered to the wholesome and necessary time limitations for finality of judgments. Justice Stewart, speaking for the Court, indicated:

> "The reason offered by South Central as justification to reduce the judgment is that failure to reduce it will result in a partial double recovery for plaintiffs and a partial double payment by the liability insurer, Wausau. As South Central accurately states, prevention of double recovery is one of the purposes of the Utah Automobile No-Fault Insurance Act. And in keeping with that purpose, we recently upheld a trial court's reducing the special damages of a judgment by the amount of damages previously compensated by PIP benefits. Dupuis v. Nielson, Utah, 624 P.2d 685 (1981). Dupuis followed naturally from our holding in Allstate Insurance Co. v. Ivie, Utah, 606 P.2d 1197 (1980), that a tortfeasor is not personally liable to the injured insured for special damages previously compensated by PIP benefits from the no-fault insurer, and that the injured party should therefore not be allowed even to plead for those damages. However, if a plaintiff does improperly plead for previously compensated damages and they are allowed to be included in the judgment, the court should, at the conclusion of the trial, either on its own initiative or on motion of a party, reduce the judgment by the amount of those previously compensated damages, and thereby prevent double recovery.

Assuming that the reason offered by South Central to justify relief is a reason other than those listed in

> subdivisions (1) through (6), does it justify relief on the facts of the instant case? We hold that it does not. Dupuis, in which relief was granted, is distinguishable from the instant case because there the judgment was modified at the conclusion of trial and before it was accepted and satisfied. In the instant case the judgment was modified long after the time for amending the judgment (pursuant to Rule 59(e)) or filing an appeal had passed and long after South Central had approved and satisfied the judgment. Clearly, under Ivie, plaintiffs were not entitled to previously compensated damages. When the excessive judgment was rendered, South Central should have moved that it be reduced, as was done in Dupuis. Instead, South Central approved the judgment and paid it in full without objection, until six months later when it finally realized that plaintiffs were getting a partial double recovery." (Emphasis added)

As the foregoing language indicates, Allstate's remedy in the present case was lost when they failed to make an appropriate motion at trial to reduce the judgment to reflect PIP benefits already paid, and then failed to make any attempts to appeal the judgment until five years after it was rendered.

The Court in Laub, obviously had great difficulty in rendering a decision which might appear to uphold a double recovery by the injured plaintiff. See Dissenting Opinion of Chief Justice Hall, Laub v. South Central Utah Telephone Association, Supreme Court No. 17925, 17926, (December 29, 1982).

However, in allowing such a recovery, the Laub Court indicated two critical factors: (1) The prejudice which would be suffered by the injured plaintiff, and (2) the neglect of the liability carrier. As to the prejudice suffered by the plaintiff, the Court indicated:

> "We do consider the fact of prior satisfaction an important consideration in determining whether the motion to modify was made within a reasonable time. The possibility of prejudice to the nonmoving party increases significantly when the judgment has already been paid."

The prejudice to the plaintiff in the present case is obviously greater than what would have been suffered by the plaintiff in Laub, supra. In Laub, the motion to modify the judgment came only six months after the jury verdict. In addition, the check representing PIP benefits had never been cashed. By comparison, the liability carrier in the present case waited over three years from the time the judgment was satisfied before claiming any error. Furthermore, this check had already been cashed and divided between respondents Brundage, Ivie and Morgan.

As to the effect of the liability insurer's neglect, the Laub decision stated:

> "In view of the fact that plaintiffs' judgment should never have included the previously compensated damages, defendant South Central's own mistake or neglect is the cause of plaintiffs' partial double recovery. As discussed above, South Central could have prevented this undesirable result by timely motion to strike the improper portion of the prayer for relief or to amend the judgment."

Once again, the facts of the present case are even more pursuasive than those presented in Laub, supra. In the case at bar, the attorney selected by the liability carrier actually requested the Court to order that all payments be made solely to the injured plaintiff and her attorney. (See Brief of defendants-respondents, page 4, lines 9-10). Furthermore, unlike Laub, supra, where the liability carrier obviously intended to protect the PIP carrier by including their name on the draft delivered to the plaintiff, Allstate made no such attempt to protect Ohio Casualty in the present case.

CONCLUSION

Respondents Brundage and her attorneys respectfully contend that the facts of the instant case are clearly controlled by the rules of law enunciated in Laub v. South Central Utah Telephone Association, supra.

Respectfully submitted this 31st day of March, 1983.

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CERTIFICATE OF SERVICE

This is to certify that on this 31st day of March, 1983, I mailed, postage prepaid, two copies of the foregoing Supplemental Brief of Defendants-Respondents to:

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