1972

Flora Kesler v. Sherman Brimley Tate and Burton L. Tate v. Transnational Insurance Company : Respondent's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

FLORA KESLER,
Plaintiff and Respondent,

vs.

SHERMAN BRIMLEY TATE and BURTON L. TATE,
Defendants and Respondents,

and

TRANSNATIONAL INSURANCE COMPANY
Intervenor and Appellant.

Case No. 12806

RESPONDENT'S BRIEF

Appeal from an Order Denying Intervention,
Third District Court, Salt Lake County,
Honorable James S. Sawaya, Judge

JOEL M. ALLRED
610 East South Temple
Salt Lake City, Utah 84102
Attorney for Respondent Kesler

GREG HAWKINS
HENRIKSEN, FAIRBOURN AND TATE
320 South Fifth East
Salt Lake City, Utah
Attorneys for Respondents Tate

D. GARY CHRISTIAN
KIPP AND CHRISTIAN
520 Boston Building
Salt Lake City, Utah 84111
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

Page

TABLE OF CONTENTS (Continued)

Page

CASES CITED

TABLE OF CONTENTS (Continued)

RULES CITED

STATUTES CITED

TREATISES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

FLORA KESLER,
Plaintiff and Respondent,

vs.

SHERMAN BRIMLEY TATE and BURTON L. TATE,
Defendants and Respondents,

and

TRANSNATIONAL INSURANCE COMPANY,
Intervenor and Appellant.

Case No. 12806

RESPONDENT'S BRIEF

STATEMENT OF KIND OF CASE

This is an action by the plaintiff against the defendants, who are uninsured, for property damage and bodily injury sustained in an automobile collision which occurred on September 22, 1970.

DISPOSITION IN LOWER COURT

Although made aware of the filing of these proceedings prior to October 5, 1971, (R. 55) the date of the filing of the Complaint, the plaintiff's uninsured motorist carrier, Transnational Insurance Company (hereinafter

sometimes designated "Transnational"), did not file its Motion for Leave to Intervene until January 13, 1972, over three months later. At the time the Motion was filed, substantial discovery had been and was being completed and the case was at issue. A Request for Trial Setting had been filed (R. 70).

At the time of the Hearing on the appellant's Motion for Leave to Intervene all counsel were present and both the plaintiff and the defendant were heard in opposition. Having heard counsel; having analyzed plaintiff's memorandum of authorities on file; and having required additional time in which to read the Utah cases recited in the memorandum, the District Court, James S. Sawaya presiding, denied the applicant's motion for intervention. This appeal is from that denial.

RELIEF SOUGHT ON APPEAL

The plaintiff-respondent, Flora Kesler, seeks the affirmance of the Order of the Third District Court denying the appellant's Motion for Leave to Intervene.

STATEMENT OF FACTS

On September 22, 1970, at approximately 7:41 p.m., the plaintiff's automobile was struck from behind by a large dump truck driven by Sherman Brimley Tate and owned by his father, Burton L. Tate, or by a corporation in which Burton L. Tate was a principal. The collision occurred at the intersection of 1300 South and State Streets in Salt Lake City. Immediately prior to the collision the plaintiff was stopped and parked at a traffic semaphore waiting for the light to change.

The plaintiff, who was injured, filed a lawsuit against the defendants, alleging that the defendant, Sherman Brimley Tate, failed to maintain a proper lookout; failed to properly maintain and control a motor vehicle, and, further, that he was driving with faulty and defective brakes (R. 1). Plaintiff also contended that the truck was negligently entrusted to Sherman Brimley Tate, a minor, and that his father, in any event, was jointly and severally liable under the provisions of 41-2-10 and 41-2-22 U.C.A. 1953 as amended. The defendants, denying most of the allegations of the Complaint, answered that they were unable to stop because of the brakes; that they were not adequately aware of the defect and that the collision was the result of sudden peril and unavoidable (R. 4).

As a result of the collision, the plaintiff, alleging serious and permanent injuries, prayed judgment for her medical costs and pain and suffering. The action was filed on October 5, 1971.

On January 13, 1972, the appellant, Transnational, Mrs. Kesler's uninsured motorist carrier, moved for leave to intervene, not having been joined in the lawsuit. The Order denying intervention was entered on January 26, 1972.

Prior to the commencement of the lawsuit, the plaintiff had attempted to settle her case with Transnational and to arrange for arbitration and, failing in this, to secure Transnational's consent to the suit against the tortfeasor defendants (See: R. 48-58). In each instance, although the requests were, for the most part, specified in writing, the plaintiff's efforts met with no response.

ARGUMENT

POINT 1

THIS COURT HAS PREVIOUSLY HELD THAT THE PLAINTIFF'S UNINSURED MOTORIST CARRIER IS NOT A PROPER PARTY TO THE LAWSUIT BETWEEN THE PLAINTIFF INSURED AND THE DEFENDANT TORTFEASOR.

In the case of *Christensen* v. *Peterson,* 25 Ut. 2d 411, 483 P. 2d 447, two plaintiffs injured in an automobile accident filed a single complaint stating three separate causes of action. Plaintiff Christensen filed a cause of action sounding in tort against the tortfeasor Peterson. Plaintiff Larsen filed a cause of action sounding in tort against the same defendant. The two plaintiffs, Christensen and Larsen, then jointly stated a cause of action in contract against Allstate Insurance Company, the holder of the plaintiff's uninsured motorist coverage. The attorney for Allstate Insurance Company in the *Christensen* case was D. Gary Christian, who is presently counsel for Transnational Insurance Company, the intervenor-appellant. It is interesting to note that this case is not cited in the appellant's Brief.

The plaintiffs in the *Christensen* case argued to the trial court that there was an improper joinder of parties and a misjoinder of remedies. The trial court concurred with those contentions and dismissed Allstate from the lawsuit. This Court, on appeal, affirmed the dismissal, agreeing with the insurer's claim on both points.

If there was a misjoinder of remedies and an improper joinder of parties in the *Christensen* case, it is clear those same fundamental objections are present on this appeal. The claim of Mrs. Kesler against the tortfeasor defendants is a tort claim, while the claim of Mrs. Kesler against Transnational Insurance Company, her own insurer, is based in contract. In the *Christensen* case it was argued that the joinder of the insurance company as a named defendant would give "an unfair advantage" to the plaintiffs. While appellant can argue that it is willing to risk the unfair advantage inherent in the situation and join in the lawsuit at its own peril, this argument conveniently overlooks the fundamental objection that this Court has held that tort and contract actions cannot, under these circumstances, be joined.

If the plaintiff can clearly not join the uninsured motorist carrier under the *Christensen* rationale, then the issue becomes can the uninsured motorist carrier join itself, when it chooses, under the principles enunciated in that case. This Court has strongly inferred that the answer is no. In *Christensen,* the Court cited approvingly the Oklahoma case of *Holt* v. *Bell,* 392 P. 2d 361, and noted that the Oklahoma Supreme Court had consistently held in tort actions when liability insurance was involved that the insurer could not be joined with the tortfeasor unless it was a policy required by statute. This Court then indicated that *"The reason for such a rule is equally applicable where the insurer's obligation is under an uninsured motorist endorsement, . . . "* The Court quoting from *Holt* v. *Bell, supra* at 363, stated as the central theme of its decision, that,

> "When the parties are placed in a position where the interest of an insurer is to defeat the claim of its own insured, the position of the parties is such that the court cannot countenance the situation. The placing of the parties thusly virtually makes the plaintiff's insurer the liability insurer of the defendant and interested in defeating plaintiff's claim. Such being the case, under the holdings of this court, the insurer cannot be joined as a party defendant."

To intervene "as a defendant" is, of course, precisely what Transnational Insurance Company has attempted to do (R. 16). The *Christensen* option serves to controvert the statement of the appellant that it is "unable to find any Utah cases directly in point dealing with the question here presented for consideration" unless that statement is given a very strained and narrow interpretation (appellant's Brief, p. 3).

The intervention of the insurance company in the uninsured motorist situation is as potentially harmful to the tortfeasor as it is to the insured in the liability insurance situation. In the uninsured motorist situation, the tortfeasor is normally ultimately responsible for the payment of any award despite the fact that the insurance company may have paid under the uninsured motorist provisions of its policy. Normally this is accomplished, if the case is settled prior to trial, by the insurer bringing its claim in the name of the insured as if it were subrogated to the insured's interest. There is a wide range of possibilities available to the insurer if this court were to hold that it could join itself, although it could not be joined by others. If the case settled, the insurer

could bring suit against the tortfeasor in the name of the insured and compel, under the terms of the policy, the cooperation of the insured. If the insured filed an action against the tortfeasor, as in this case, the insurer could on the intervention theory urged here align itself against its own insured in its own name, as appellant seeks to do, or perhaps in the name of the tortfeasor, as if it were the tortfeasor's liability insurer. If the insured prevailed, the insurer could pay the amount of the award, and, in the insured's name, proceed to collect the money back from the tortfeasor, its former client. Whether one then finds the insurer lurking behind the insured or the tortfeasor, or acting in its own name, would depend upon the circumstances of the individual case. Each situation, with the exception of a subrogation claim derived from its own insured, involves serious theoretical and ethical impediments.

To permit the insurance company to join the tortfeasors as a named co-defendant is to permit, as far as the tortfeasors are concerned, the same destructive possibility that the jury will consider the insurance rather than the rules of law relating to liability and damages which exists in the liability insurance situation.[1]

It will not suffice to say, in this case, that the intervention of the uninsured motorist carrier could be con-

---

[1]The Court's conclusion that the question of insurance should not be injected into the trial of a personal injury lawsuit could not, according to Justice Crockett, be more explicit unless the Court had said "damn it." *Young* v. *Barney*, 20 Ut. 2d 108, 433 P.2d 846.

ducted in the name of the tortfeasor without the carrier being expressly named because:

1. The appellant-insurer requested in its motion that it be named as a defendant-intervenor and permitted to file an Answer in its own right.

2. This court in the *Christensen* case has specifically denied the joinder of the insurer as a party defendant.

3. The claim of the plaintiff against the insurer derives from contract and is not a tort. Conversely the rights of the insurer against the insured, if any, are based in contract. The joinder of two claims, contract and tort, in a single action under these circumstances was proscribed by the *Christensen* case.

4. The tortfeasor and the insurer are themselves potential litigants with inconsistent and conflicting interests.

Conceptually, there is less reason in the case before the court to permit intervention than there was to permit joinder in the *Christensen* case. In *Christensen,* the court said that joinder of the insurer would constitute treating the plaintiff's insurer as the liability insurer of the defendant interested in defeating plaintiff's claim. At least in that situation the plaintiff, by attempting to effect such a joinder, has concurred that such a result is permissible. Surely it becomes, under the rationale of these two cases, much more difficult to "countenance the situation" where such a result is imposed upon the insured plaintiff without his consent.

Whether the question is joinder or intervention; whether the participation of the insurer is requested by the plaintiff or by the insurer itself, the same fundamental considerations raised to support the decision in *Christensen* apply. There is, considering that case, no logical basis for drawing a distinction between the two situations. The Trial Court, considering the *Christensen* holding, could not have ruled otherwise.

In the liability insurance situation where the Court has been most emphatic in its exclusion of the insurer as a named defendant, it is conceivable that an insurer could be named without harmful effects to interests other than its own. That is to say that unless the coverage was inadequate to protect any residual interest of a named defendant insured, that the only party injured by the jury's consideration of the element of insurance would be the insurer itself. In this case, however, the intervention of the insurer in its own right, under its own name, could be seriously and ultimately injurious to the tortfeasor with whom the insurer has only a limited community of interest.

POINT II

DEFENSE COUNSEL'S CONCLUSIONS IN THE INSTANT CASE ARE AT VARIANCE WITH THOSE PREVIOUSLY URGED UPON THIS COURT.

Plaintiff concedes that argument is argument and that what counsel had to say on a prior occasion may have been dictated by the practical exigencies of his employment. The mention of certain contradictory prior

conclusions is not intended to embarrass counsel or to stress, unfairly, inconsistencies between his past and present positions.

The arguments advanced in Mr. Christian's Brief in the *Christensen* case are eminently reasonable and persuasive. They were, in a sense, the raw material for the *Christensen* opinion and have, consequently, both historical and explanatory significance.

The conclusions of appellant's present counsel in that earlier case were as follows:

1. " . . . before the Plaintiff is entitled to be reimbursed from the Defendant [i. e. Allstate] there must have been a legal determination that he comes within the scope of the policy providing for uninsured motorist coverage. . . " (Brief, Allstate Insurance Company, hereinafter "Allstate Brief," Case No. 12065, Utah Supreme Court, p. 7).

It was argued that the "legal determination" required proof of:

(a) Liability on the part of the tortfeasor.

(b) The amount of the damages.

(c) The absence of insurance.

2. " . . . that the Plaintiff *must* initiate legal action against the tortfeasor to determine the amount of his damages. . . " (Allstate Brief, p. 8).

Quoting the earlier Utah case of *Barnhart* v. *Civil Service Employees Insurance Company,* 16 Ut. 2d 223, 398 P. 2d 873, it was argued that,

> "Whether plaintiffs are legally entitled to recover from Welcker [the uninsured motorist] and, if so, the amount of damages *could only be determined between the plaintiffs and Welcker"* (Allstate Brief, p. 8, emphasis supplied).

3. " . . . an insured Plaintiff would not be allowed to join Plaintiff's insurer as a co-defendant in an action against an allegedly uninsured tortfeasor Defendant on the basis of un-insured motorist coverage contained in Plaintiff's insurance policy." (Allstate Brief, p. 8).

4. "It also seems clear that the policy [similar to the policy in the instant case] contemplates that *an action must be filed against the alleged uninsured motorist and the issues of liability and damages and lack of insurance must be determined in a separate proceeding . . .* " (Allstate Brief, p. 9, emphasis supplied).

Concluding that the cases and the arguments sufficiently established the misjoinder of remedies, Mr. Christian then proceeded to indicate that there was a further compelling reason why the dismissal should be affirmed, that being the improper joinder of parties. He quoted from the case of *Young* v. *Barney,* 20 Ut. 2d 108, 443 P. 2d 846, which indicated that it was prejudicial error to deliberately inject the subject of insurance coverage in a personal injury trial. To inject such issues would give the Plaintiff "an unfair advantage" (Allstate Brief, p. 10) in that the verdict might be based upon the fact

that there is insurance coverage available rather than upon the rules of law relating to the issues of legal liability and damages.

Finally, summarizing, the Brief concluded:

1. " . . . It is improper for Plaintiffs to join in a single Complaint, causes of action and remedies based in contract and in tort. . . "

2. " . . . *the proper procedure for the Plaintiffs* to follow in this case *is to file their action against the alleged tortfeasor and have the issues of liability and damages decided* by a judge or a jury or a court of competent jurisdiction *as mandatory conditions precedent* to any action against the insurance company . . . " (Emphasis supplied).

In obedience to those basic precepts, and subject to the rulings of this Court, the plaintiff proceeded to file its action directly against the tortfeasors for the determination of liability and damage issues.

POINT III

THE AUTHORITIES WHICH HAVE CONSIDERED THE QUESTIONS OF JOINDER AND INTERVENTION HOLD CONFLICTING VIEWS.

The appellant has relied almost exclusively on the citation of authorities from other jurisdictions to support its argument for intervention. The Utah cases mentioned in the Brief are old and do not specifically relate to the subject of uninsured motorist coverage.

Many of the nine out-of-state cases cited in appellant's Brief are, for different reasons, distinguishable.[2]

---

[2]Three of the cited decisions were from the State of Georgia. *State Farm Mutual Automobile Insurance Company* vs. *Lester E. Brown,* et al, 114 Ga. App. 650, 152 S. E. 2d 641 (1966); *State Farm Mutual Automobile Insurance Company* vs. *Glover,* 113 Ga. App. 815, 149 S. E. 2d 852; *State Farm Mutual Automobile Insurance Company* vs. *Jiles,* 115 Ga. App. 193, 154 S. E. 2d 286 (1967). In *State Farm Mutual Automobile Insurance Company* v. *Glover, supra,* the first of the Georgia cases, the tortfeasor filed no defensive pleadings. The court permitted intervention "where the case is in default as to the uninsured motorist." This position was later extended. *State Farm Mutual Automobile Insurance Company* v. *Brown, supra.* Georgia had a peculiar statute which the Court relied upon expressly stating that "The answer is in the construction of the uninsured motorist laws." Justice Pannell, specially concurring, also confirmed that the majority "has seen fit to base its conclusions upon a construction of that Act" . . . [Ga. L. 1963, p. 588 et seq. as amended by Ga. L. 1969, p. 306 et seq; Code Ann 56-407 .1]. The same statute had application in each of the three Georgia cases. It has no Utah counterpart.

In *Matthews* v. *Allstate Insurance Company,* 194 F. Supp. 459, the right of the insurer to intervene was "permissive". As indicated there,

"Had the defendant *appropriately* raised the question in the state court, it is not *unlikely* that, under the terms of the policy endorsement, the insurance company would have been permitted to intervene. . . . That such *permissive* joinder is proper is evidenced by . . . " (Emphasis supplied)

Where joinder is permissive, the grant or denial of intervention is discretionary with the trial court and subject to reversal only for abuse of discretion. This case does not serve to support Transnational's basic contention that it is entitled as a matter of right to intervene. Note that the question of intervention must, in any event, according to the *Matthews* decision, be "appropriately" raised.

In *Lamb* v. *Horwick,* 48 Ill App 2d 251, 198 N.E. 2d 194, there was no written opinion. No facts are recited; no law is stated and the court said nothing more than that the insurer should be "permitted" to intervene.

Indiana Insurance Company v. *Noble,* 265 N. E. 2d 419, as well as *Alston* v. *Amalgamated Mutual Casualty Company,* 53 Misc. 2d 90, 278 N.Y. S. 2d 906, started from a different premise.

A careful survey of the cases which have considered the question of intervention and joinder indicates that the courts hold conflicting views.

In the case of *Allstate Insurance Company* v. *Hunt*, 450 S.W. 2d 668, the Texas Court of Civil Appeals denied intervention by the insurer, Allstate Insurance Company. Before the trial court, Allstate moved that its identity be withheld from the jury. By means of a motion for severance Allstate succeeded in obtaining separate trials of the tort and contract questions. It then attempted to participate in the trial of the tort claim, in which it was not a named defendant, in a defense role. The trial court excluded Allstate from the trial of the tort claim.

The issue on appeal was whether or not the insurer could defend the claim of its own insured against the uninsured motorist. This was a matter of "first impression" in Texas.

The Texas Court, after specifically referring to six of the nine cases recited in the present appellant's Brief, affirmed the trial court citing supporting authority from a number of jurisdictions.[3] The lead case upon

---

Both Indiana and New York permitted an insured to file his original action directly against the insurer. To permit the insurer then, to intervene, was a mere logical extension of the Court's first position. This Court, however, in the *Christensen* case, expressly rejected a direct cause of action by the plaintiff against the insurer.

[3]*Hernandez* v. *State Farm Mutual Automobile Insurance Company* (La.), 192 So. 2d 679, *Kirouac* v. *Healy*, (N.H.) 181 A. 2d 634, other cases there cited.

which the Court relied was that of the Oklahoma Supreme Court in *Holt* v. *Bell, supra. Holt* v. *Bell,* of course, was the case approvingly cited and liberally quoted from in this Court's earlier decision in *Christensen* v. *Peterson, supra.*

The Texas Court indicated that a contrary ruling would result in serious "ethical" problems between the insurer, its insured and the uninsured motorist. It held that the insurer had "fiduciary" responsibilities with respect to its insured, and, if it defended him, to the uninsured motorist as well.

If there were a counterclaim in such a case there would be, concluded the court, a hopeless conflict since the insurer would be defending its insured's claim on the one hand, and have the duty and obligation to defend the insured on the other.

The conflict of interest "potentially present" in every case demanded non-intervention. The Texas case, which had its roots in *Holt* v. *Bell,* like its Utah counterpart, *Christensen v. Peterson, supra,* which had its roots in *Holt* v. *Bell,* seems to reflect the more rational view.

POINT IV

THE APPELLANT WAS DILATORY IN PROTECTING ITS INTEREST AND IN SERVICING ITS INSURED. A DECISION FOR INTERVENTION WOULD FORCE THE PLAINTIFF TO UNDERWRITE THE DEFENSE OF HER OWN CLAIM.

The plaintiff, Mrs. Kesler, and the appellant, Transnational Insurance Company, are not strangers. When it became apparent that her injuries were serious, Mrs.

Kesler contacted counsel to assist her in negotiating her claim.

On May 25, 1971, Mrs. Kesler's counsel corresponded with D. W. Langrock, appellant's agent (R. 51). Provisions were made for a settlement conference which took place in the latter part of June, 1971, at counsel's office (R. 48). Mr. Langrock was furnished with materials pertaining to the claim and a demand was made (Affidavit, R. 48). The appellant did not respond to the plaintiff's offer of settlement by saying either yes or no or by making any counter-offer. On August 26, 1971, plaintiff's counsel in compliance with paragraph 8 of the conditions specified in the uninsured motorist coverage endorsement (R. 69) made a demand for arbitration (R. 52). On September 15, 1971, twenty days after the demand was made, plaintiff had received no response to the demand for arbitration (R. 49). On September 15, 1971, the demand was withdrawn and the appellant was informed of impending litigation (R. 53). Under the terms of Mrs. Kesler's policy, the insurer's consent to be sued is required before a lawsuit can be commenced. In connection with the correspondence of September 15, 1971, plaintiff requested consent to litigate the matter. On October 5, 1971, the date the lawsuit was commenced, the plaintiff had received no response to her offer of settlement; no response to her demand for arbitration; no response to her request for consent to proceed against the tortfeasors and no response to the threat of impending litigation (Affidavit, R. 48). Basically, Transnational took no steps to protect or safeguard its interests from the time of the settlement conference in June of

1971, to the time of the filing of the motion to intervene in January of 1972.

On October 5, 1971, the lawsuit was commenced, without appellant's consent and in technical or apparent violation of the terms of the plaintiff's policy. The appellant was, on October 1, 1971, both sent in the mail and served with copies of the pleadings (R. 55). Under the applicable rulings of this court, the plaintiff could not join Transnational as a party. Plaintiff's dilemma, then, was that she could not sue the appellant directly under the decisions of this court. She could not sue the tortfeasor under the terms of her policy without Transnational's written consent which she could not acquire (R., unmarked, between 68 and 69). Only some three months after the lawsuit was commenced, after substantial discovery had been completed, did the appellant first move to intervene and legally safeguard the interests which it now deems to be so imminently critical.

If intervention were permitted, Mrs. Kesler would face one final indignity, that of underwriting the defense of her own claim. Her own insurer, in direct contradiction to her most personal interests, and to its fiduciary responsibilities[4] would attempt to defeat the claim arising from the negligence of the uninsured motorist.

Where the uninsured motorist has engaged counsel and is adequately represented, (nothing in the record or on this appeal suggests otherwise) the tortfeasor's own

---

[4]*Allstate Insurance Company* v. *Hunt*, Tex Civ App, 450 S. W. 2d 668.

interests dictate that he be permitted to handle his own defense. Whereas, Mrs. Kesler, to be adequately protected, must locate her own counsel and arrange for his services, the uninsured motorist (if he had not engaged counsel) would, if intervention were permitted, be enhanced by the qualified efforts of the plaintiff's insurer, in effect at plaintiff's expense.

Transnational Insurance Company has had numerous prior opportunities to protect its vital interests, such as they are, essentially all of which have been imperiously disregarded. To permit intervention now, under the circumstances, would seriously prejudice the plaintiff and unfairly privilege the appellant.

POINT V

THE APPLICANT FOR INTERVENTION FAILED TO COMPLY WITH THE REQUIREMENTS OF RULE 24 OF THE UTAH RULES OF CIVIL PROCEDURE.

A. *The Applicant Failed to File a Pleading Setting Forth the Claim or Defense for Which Intervention was Sought.*

Rule 24(c) as amended provides as follows:

> "PROCEDURE. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. *The motions* shall state the grounds therefor and *shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought*" (Emphasis supplied).

The Utah rule on procedure is similar to the federal rule. Prior to the enactment of the federal rule, which served as the model for its Utah counterpart, federal practice was governed by the principles enunciated in the 1922 case of *Atlantic Refining Co.* v. *Port Lobos Petroleum Corp.,* (D Del 1922) 280 Fed 934. One of those threshold principles, since incorporated in the federal and state rules, was the requirement that the petition must present a well-pleaded defense. In a later case before the United States Supreme Court this was determined to imply that a proposed answer be presented. *Chandler & Price v. Brandtjen & Klug,* 296 U. S. 53, 56 S. Ct 6, 80 L. Ed 39 (1935). Rule 24(c), a 1937 innovation, adopted, in the main, the procedure outlined in the federal cases. It requires that the applicant for intervention must "in all cases" present his proposed pleading, whether it is defensive, or aggressive. 3 B *Moore's Federal Practice,* section 24.12, p. 502. The pleading is to be served with the motion. 3 B *Moore's Federal Practice,* section 24.12, p. 504. The pleading must set forth the claim or defense for which intervention is sought. *In Re Finger Lakes Land Co.,* (WD NY 1939) 29 F Supp 50, 1 FR Serv 24c.11, Case 1; *Miami County National Bank* v. *Bancroft* (CCA 10th, 1941) 121 F. 2d 921, 5 FR Serv 246.4, Case 1. The motion may not "adopt" the pleading of an original party *Mullins* v. *De Soto Sec. Co.* (WD La 1942) 2 FRD 502, nor may it merely describe a future pleading. In the *Mullins* case the court found that "under the present rules [24(c)] the application to intervene is defective if unaccompanied by a proposed pleading." In that case the motion to intervene did

contain language whereby the applicants proposed to adopt the allegations of the petition and the motions of the original parties.

In the case before the court, Transnational Insurance Company presented no "well-pleaded defense", served no answer with its motion, set forth no legal basis for the requested intervention, did not purport to adopt the pleadings, by reference or otherwise, of the original parties and merely claimed "the right" to file an answer at some future time.

B. *The Application of the Prospective Intervenor was Untimely.*

Whether intervention is "of right" or "permissive", an application for intervention must be "timely". (Rules 24(a) and (b), U.R.C.P., 3 B *Moore's Federal Practice*, section 24.13, p. 521). The plaintiff's Complaint was filed on October 5, 1971 (R. 1). Copies of the pleadings were at that time served upon the prospective intervenor. Not until January 13, 1972, more than three months later, was Transnational's Motion for Leave to Intervene filed with the Court (R. 16). In the interim period, an Answer was interposed (R. 4), Interrogatories were served by the plaintiff (R. 5), Answers were received (R. 11), and a Request for Trial Setting was filed (R. 70). An original party would not have received the same consideration that the appellant contends it is entitled to had such original party taken no action for a three month period. Where a case is substantially underway when intervention is sought, such intervention is "tardy" and will "usually be denied." 3 B *Moore's*

Federal Practice, section 24.13, p. 523. See: *Securities & Exchange Commission* v. *Bloomberg,* (CA 1st, 1962) 299 F. 2d 315.

C. *There Is No Showing Upon Appeal, and There was None Before the Trial Court, that the Representation of the Appellant's Interests Is or Was Inadequate.*

In order for appellant's intervention to be permitted under the provisions of Rule 24(a), it must be shown that the representation of its interest by existing parties is or may be inadequate and that the applicant is or may be bound by a judgment in the action (Rule 24(a) U.R.C.P.). Both conditions must be shown to exist before intervention is authorized. *Mullins* v. *De Soto Securities Co.,* 2 F.R.D. 502 at 504; *McDonald* v. *United States,* (9 Cir.) 119 F. 2d 821. A careful search of the record in no way indicates that the tortfeasor has failed to secure adequate representation to protect such interests as the tortfeasor and the appellant jointly have. Only the statement that counsel for the plaintiff and for the defendants could stipulate to a judgment in favor of the plaintiff which might ultimately be paid by Transnational supports this contention (appellant's Brief, p. 10). Even then counsel is hasty to add that, "It should be made clear that appellant does not contend or allege that counsel for the parties are going to so act at this time; however, appellant is subject to that risk."

The tortfeasor defendants have their own incentives to minimize the recovery or avoid it altogether. Those incentives are frustrated, as to them, if the insurer is injected into the lawsuit as a named defendant.

The burden of showing that the representation of its interest is inadequate is upon the applicant for intervention. 3 B *Moore's Federal Practice,* section 24.09, p. 316. A careful reading of appellant's Brief does not constitute persuasive evidence that this burden has been met.

Consider briefly two other points in this context. First, the judgment in this matter, if there is one, will not automatically bind Transnational, the applicant. It will be necessary to bring a separate action on a contract theory before this can be accomplished. Consequently, the judgment in the action before the Court does not bind the insurer unless the Court finds that it does in the subsequent action on the contract.

Second, in theory as in practice, the insurer will ultimately look to the tortfeasor for the payment of the judgment. Only, as a practical matter, in the event of the tortfeasor's insolvency is the insurer charged with the ultimate payment.

Summarizing, there has been no satisfactory showing that the appellant's interests are inadequately represented or that the applicant for intervention is or may be bound by "a judgment in the action" before the Court. "Even though the applicant may be bound by the judgment, he cannot intervene as of right if he is as a fact adequately represented by the existing parties to the action." Lavine and Horning, "Manual of Federal Practice", p. 346, quoting Moore. The intervenor must not merely show that there is a possibility that the representation of his interest is inadequate, but that he is in fact inadequately represented.

D. *The Applicant for Intervention was Not a Proper Party to the Lawsuit When it was Commenced.*

This Court has previously indicated that

> " . . . a party seeking to intervene in a particular action should make it appear in his application for intervention that he would have been at least a proper party to the action when it was commenced and in which he seeks to intervene, and that he would have been entitled to the relief he seeks in a separate action in the same court against the parties against whom he seeks relief." *Price* v. *Hansen,* 60 U.29, 206 P. 272.

In the case now before the Court, it is inexorably clear that the plaintiff could not have made the applicant intervenor a party defendant in any case, however much desired.

Transnational Insurance Company was not a proper party to the lawsuit "when it was commenced" and is not now.

CONCLUSION

In the case before the Court, the appellant failed to accord the plaintiff with the good faith to be expected of a fiduciary. In the process, the appellant may have also failed to protect its own only lately alleged self-interest.

The tortfeasors are adequately protected by counsel of their own choice. The appellant's application for intervention was untimely, inadequately factually sup-

ported and defective in failing to comply with the specific requirements of Rule 24(c) of the Utah Rules of Civil Procedure.

There are serious ethical and conceptual problems tied to the issue of the intervention of the insurer. These problems are theoretically the same whether the issue is joinder by the insured or intervention by the insurer.

The appellant did not move the Trial Court to obscure its identity. Rather it claimed the "right" as "a defendant" to "litigate the matter of liability and damages" and to file an answer as if it were a party (R. 16).

The interests of the appellant in this case are adequately protected.

The decision of the Trial Court should be affirmed.

Respectfully Submitted,

JOEL M. ALLRED
610 East South Temple
Salt Lake City, Utah 84102
Attorney for Respondent