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Michael Montgomery, Marie Montgomeray, Linda Montgomeray By their Guardian Ad Litem Marie Davis and Bernice Wood Podroza v. Preferred Risk Mutual Insurance Company : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

UNIVERSITY OF UTAH

MICHAEL MONTGOMERY,
MARIE MONTGOMERY,
LINDA MONTGOMERY,
by their guardian ad litem
MARIE DAVIS, and
BERNICE WOOD PODROZA,
Plaintiffs and Respondents,

— VS. —

REFERRED RISK MUTUAL
INSURANCE COMPANY,
a corporation,
Defendant and Appellant.

OCT 15 1965

LAW

BRIEF OF APPEAL

Appeal From the Judgment of the District Court
in and for Davis County
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— vs. —

PREFERRED RISK MUTUAL
INSURANCE COMPANY,
a corporation,
Defendant and Appellant.

}
Case
No. 10278

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This case, as outlined in appellant's statement of facts below, involves the question as to whether or not an automobile liability insurer has been substantially prejudiced in a lawsuit by reason of the insured's total disappearance to testify at trial on his own behalf when his testimony is the only evidence for the defense.

DISPOSITION IN LOWER COURT

The case here on appeal is the result of a previous case in the same district wherein the plaintiffs in the instant case obtained a judgment against the driver of an automobile which at the time of the accident was insured by the appellant. Thereafter the plaintiffs (respondents) brought direct action on their judgment against the insurer resulting in a judgment against the insurer (appellant).

RELIEF SOUGHT ON APPEAL

The relief sought by defendant (appellant) is reversal of the lower court's judgment in favor of plaintiffs (respondents) and an order directing a judgment in favor of defendant (appellant) of no cause of action.

STATEMENT OF FACTS

The appellant, Preferred Risk Mutual Insurance Company, issued its automobile insurance policy (Exhibit 17) to one Willard Wood covering a 1957 DeSoto. On June 25, 1957, the vehicle was involved in an accident while being driven by Mr. Wood's son, Darrel. There was no other car involved and an action was brought against the son, Darrel Wood, by two of the three passengers, one Bernice Wood and the heirs of a second passenger, one Lois Montgomery, who died as a result of her injuries. The action was commenced in the Second District Court for Davis County, the residence of the defendant, and an Answer was filed on behalf of the defendant by the attorneys for appellant. Shortly thereafter, appellant obtained a sworn court

reporter statement (Exhibit 15) from the defendant as well as one from the remaining fourth passenger (Exhibit 14), one Lawrence Merrick. It is to be noted here that Merrick was asleep at the time the accident occurred and could give no pertinent facts of the occurrences surrounding the accident itself (Exhibit 14, p. 14), (T. 40, L. 17).

Nothing of significance occurred thereafter until November, 1958, at which time the plaintiffs took the deposition of the defendant (Exhibit 13). Following its transcription it was mailed to the insured with instructions to have the defendant read, correct, sign, have notarized, and return to appellant's counsel within ten days (Exhibit 4). The deposition was not returned and thereafter all efforts to locate him were to no avail. All letters to the only addresses of the defendant were returned, marked "moved left no address" (Exhibits 1, 5, 6, 7, and 8). During this period and subsequent, efforts were made to locate the defendant through his parents, the insured's attorney, and the Davis County Attorney (Exhibits II, pp. 2, 3; 12, p. 2; T. 16, L. 1; T. 63, L. 20) all to no avail. His parents did not know his whereabouts during the period shortly after the accident (June, 1957) (T. 52, L. 1) until 1962 (the trial was heard on September 12, 1961). The defendant's wife also moved without a forwarding address (T. 56, L. 3). Also during this period a warrant was issued for his arrest in Davis County and he was not located by the police until 1962 (T. 45, L. 24).

After pretrial the trial was set and heard on September 12, 1961, resulting in a judgment against the de-

fendant. Prior to commencement of the trial, appellants' counsel made an outline of its position (Exhibit 12) which restated its position outlined at the pretrial (Exhibit 11).

Thereafter the instant action was brought against the insurer, appellant, the defense of which was based on the non-cooperation clause of the policy which reads as follows (Exhibit 17):

CONDITION 18

"The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits . . ."

Had the insured been present for the trial and assuming he testified as he did in his sworn statement and deposition, his evidence concerning the accident would have been as follows:

- a. Lois Montgomery, one of the plaintiffs, had been driving prior to the accident but was scared of driving after dark and in unknown country (Exhibit 13, p. 20).
- b. Lawrence Merrick, the third passenger, had bad eyes (referring to his driving) (Exhibit 13, p. 21).
- c. He was traveling within the speed limit (Exhibit 13, p. 22; Exhibit 13, p. 32).
- d. He believed the cause of the accident was a blowout (Exhibit 13, p. 24).
- e. There was no protest as to his manner of driving (Exhibit 13, p. 27).

f. He was not under the influence of intoxicating liquor (Exhibit 13, p. 31).

It is thus apparent that his testimony would have been diametrically opposed to that of the plaintiff's evidence.

ARGUMENT

POINT I

THE COURT ERRED IN FAILING TO FIND THAT THE INSURED FAILED TO COOPERATE WITH THE DEFENDANT AND THAT SUCH FAILURE WAS A SUBSTANTIAL PREJUDICE TO THE INSURER.

Some courts have taken the position that the mere absence of an insured from the trial is in itself a material breach of the condition requiring the cooperation of the insured so that the insurer's burden of establishing the breach is satisfied by merely showing the fact of non-attendance or refusal to testify. 7 Am. Jur. 2d 517. Other courts including our own have held, however, that failure of the insured to attend the trial standing alone is insufficient. In *Oberhansley v. Travelers Insurance Company*, 5 Utah 2d 15, the court held:

“Though an *unreasonable* (emphasis added) failure by insured to attend the trial and testify when he is a material witness is a breach of cooperation clause in automobile liability policy where failure to appear is *excusable or justifiable and not without good reason* (emphasis added), it does not, in itself, constitute lack of cooperation withing such policy.”

Also,

“Even if insured’s failure to attend trial were violation of cooperation clause in automobile liability policy, unless insurance company is substantially prejudiced by such absence, it is not a valid defense against the injured third party.”

It would thus appear, therefore, that if the insured fails to attend the trial without a valid excuse, justification, or good reason, he has breached the cooperation clause of the policy. As indicated above, however, for a valid defense of non-cooperation the failure to attend the trial must result in substantial prejudice to the insurer.

Therefore, it seems the question to be determined on this appeal is whether or not the insured’s failure to attend the trial, to sign and return deposition, or to advise and make known his whereabouts so that the insurer could take his deposition for use at the trial resulted in a substantial prejudice to the insurer. This we believe to be the case. Aside from the fact that the insured’s testimony as per his statement (Exhibit 15) and unsigned copy of his deposition (Exhibit 13) was completely incongruous with the testimony of the plaintiffs at the trial would clearly indicate that his testimony was extremely vital to his defense and more particularly so by reason of the fact that he was the only witness to the accident that could refute the evidence of the plaintiffs. This we believe to be far more important in a situation such as this wherein it is a one-car accident and the only persons with knowledge of what actually occurred are the occupants of the car. This is also borne out by the

trial judge in his Memorandum Decision (R. 26) wherein the Court stated (P. 3):

“If believed, (referring to the insured’s statement [Exhibit 15] and the unsigned copy of the deposition [Exhibit 13]) it would be a complete defense to the action.”

Under this set of circumstances and more so in view of the fact that the plaintiffs had to overcome the provisions of our guest statute, it would seem readily apparent that the insured’s failure to appear at the trial is the epitome of non-cooperation and created not only substantial prejudice but actually total and absolute prejudice which in no way could be overcome by the insurer.

The Court also in its Memorandum Decision observes that the insurer did not ask any questions at the time plaintiffs took the deposition of the insured. We do not feel this to be either unusual or inconsistent with the usual practice of defense attorneys. Certainly if the insurer’s attorneys had had any inkling of the unavailability of having the insured present for trial his deposition would have been taken or would have thoroughly cross-examined and waived his signature at the time the plaintiffs took insured’s deposition (T. 15, L. 12).

We believe the law of a great majority of jurisdictions is generally stated in 139 A. L. R. 793 as follows:

Conduct on the part of the assured which makes it impossible for the insurer to get in touch with him in the face of an impending trial, although diligent search was made for him, justifies a conclusion that the assured has failed to meet the

condition of the policy requiring him to cooperate with the insurer, so as to relieve the insurer of liability thereunder, where the testimony of the insured was material. *Curran v. Connecticut Indemnity Company* (1941) 127 Conn. 692, 20 A. 2d 87.

Our position is borne out further in 60 A. L. R. 2d 1151:

“(the court) stating that there could be no doubt that the insured’s failure to cooperate was both prejudicial and injurious to the garnishee insurer, where the insured, driver of one of the automobiles involved in a collision in which the plaintiffs were injured, disappeared from her home to avoid arrest and prosecution for unlawful activities not related to the accident, several months before the suits were initiated against her held that the trial court should have directed a verdict for the insurer as a matter of law. Although the court recognized the rule that the insurer had the burden of proving that the breach of the clause was such as to result in substantial prejudice and injury to its position, it stated that such prejudice was shown since the insured was not only an essential witness at the trial, but the only witness for the defense, and her aid was necessary for the preparation and trial of the suits against her. Rejecting the contention that her absence was not injurious because she had no material evidence to offer and no valid defense to the charge of negligence, the court said that even if the insured’s liability was clear, the insurer was prejudiced by her failure to contest the important issue of the amount of damages to be awarded.” *Cameron v. Berger*, 7 A. 2d 293.

Also,

“Assured’s violation of clause in automobile indemnity policy by failure to cooperate in defense

of action by injured party *held* valid defense in action by injured party against insurer after obtaining judgment against assured where insurer was prejudiced by assured's violation of cooperation clause." *McDanel v. General Insurance Company of America, et al*, 36 P. 2d 829.

Also (referring to assured's failure to attend trial after giving insurer report that he was free from blame):

"We are also of the opinion and we think most of the authorities are agreed that the provision (cooperation) must be one reasonably necessary for the protection of the insurance company, and one which can readily be complied with by the assured; and the violation of the condition by the assured cannot be a valid defense against the injured party unless in the particular case it appears that the insurance company was substantially prejudiced thereby. Here these elements are all present. To require the cooperation of the assured to the extent of attendance at the trial, when he is a material and important witness, in a perfectly reasonable condition. Failure to testify may be as damaging as failure to give notice of the accident of of the suit. There is, of course, no obligation on his part to testify favorably to the company's interests, but here this report of the accident indicated that a defense existed, and it would normally be expected that his testimony would bear this out. Under these circumstances the company was clearly prejudiced by his failure to appear." *Hynding v. Home Accident Insurance Company*, 7 P. 2d 999.

Also in *Appleman*, Vol. 8, p. 148:

"The voluntary disappearance of the insured and his consequent failure to attend the trial, has been held to release the insurer of its obligation under

the policy." *Hoff v. St. Paul Mercury Indemnity Company*, 74 F. 2d 689; *Kleinschmit v. Farmers Mutual Hail Insurance Association*, 101 F. 987; *Associated Indemnity Corporation v. Daris*, 45 F. Supp. 118; *Hynding v. Home Accident Insurance Company*, 7 P. 2d 999; *Schneider v. Autoist Mutual Insurance Company*, 346 Ill. 137; *Hutt v. Travelers Insurance Company*, 110 N.J.L. 57; *Mionis v. Merchants Mutual Casualty Company*, 172 N.Y.S. 2d 727.

CONCLUSION

On the basis of the facts as revealed by the record in this matter and the law as discussed and presented herein, we do not feel that the finding of the trial court can be reconciled either to the facts or the facts to the law. The court's reasoning and findings to reach the result are as illogical as portions of its Memorandum Decision inferring that the insurer developed the situation deliberately when the insurer had everything to gain and nothing to lose by having the insured present at the trial to testify.

Appellant herewith respectfully requests the court to reverse the judgment of this district court.

Respectfully submitted,

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