

1965

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 Respondent

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Recommended Citation

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CASE NO. 10278
IN THE
SUPREME COURT
OF THE
STATE OF UTAH

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

FILED

MAY 1 1961

Plaintiffs and Appellants

- vs. -

PREFERRED RISK MUTUAL
INSURANCE COMPANY,
a corporation,

Defendant and Appellee

Brief of Response

Appeal From the Judgment of the Second District Court
in and for Davis County, Utah
Honorable John F. Wahlquist, Judge

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Plaintiffs and Respondents,

- vs. -

PREFERRED RISK MUTUAL
INSURANCE COMPANY,
a corporation,

Defendant and Appellant.

BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

This case involves the questions :

1. As to whether or not an insured cooperated with an auto liability insurer, the appellant.
2. Whether or not appellant was substantially prejudiced by insured's non-appearance at the trial.
3. Whether appellant made any attempt to obviate prejudicial effect of the non-attendance of the insured.
4. Whether or not the appellant used due diligence to obtain the cooperation of the insured.

5. Whether or not appellant waived any lack of cooperation by the insured.

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

Appellant seeks reversal of the lower court's judgment. Respondents urge confirmation of the trial court's decree.

STATEMENT OF FACTS

Darrell Wood borrowed the car of his father, who had a policy with the Appellant, to take Lois Montgomery, the mother of the minor Montgomery plaintiffs, Bernice Woods Podroza, and Lawrence Merrick for a drive. With Darrell Wood at the wheel, the car left the highway resulting in fatal injuries to Lois Montgomery and injuries to Bernice Woods Podroza.

The minor children and Bernice Woods Podroza filed an action in Davis County, Utah, against Darrell Wood for their loss, which case was given file No. 6936. Summons and Complaint were served upon Darrell Wood on February 28, 1958, but not delivered to Appellant until April 12, 1958, (T. 77 L. 23 and Exhibit 9).

The following dates are significant in this case:

June 26, 1957	Car left highway, resulting in death of Lois Montgomery and injuries to Bernice Woods Podroza
October 15, 1957	Darrell Wood and passenger Lawrence Merrick gave statement to Appellant's representative before court reporter, Cecil Tucker, concerning the circumstances of the day of June 26, 1957.
November 13, 1958	Deposition of Darrell Wood taken before Court Reporter, Cecil Tucker, in case No. 6936.
December 18, 1958	Completed deposition of Darrell Wood mailed to address of named insured Willard Wood
November, 1960	First effort by Appellant after December 18, 1958, to follow-up getting the deposition signed.
March 20, 1961	First letter to Darrell Wood requesting his signature on the deposition after it was mailed to his father, December 18, 1958.
August 1, 1961	Pre-trial of Case No. 6936
September 12, 1961	Trial day of Case No. 6936.

Darrell Wood, on October 15, 1957, gave a statement to appellant's representative before Cecil Tucker, Court Reporter (Exhibit 15). In this statement Darrell Wood stated that he was a carpenter, was then unemployed and had been since February, 1957, except for two weeks' work (page 2); that he was a married man, (page 1); that they bought a six pack of beer, (page 9) and bought

one other drink (page 12); that he and Lawrence Merrick planned to tell and did tell the investigating officers that Lawrence Merrick was the driver at the time of the accident (pages 21 and 22); that he was sentenced to six months in jail (page 22); served sixty-four days (page 23); that he had his driver's license revoked on a drunken driving charge about two years before (pages 24 and 25).

The difficulty of finding Darrell Wood for deposition is described at T. 70-71. On November 13, 1958, Darrell Wood appeared for deposition with Appellant's counsel. The deposition followed generally the statement previously given except that in the deposition Darrell Wood said that no beer was purchased (page 11) which differed from the purchase of beer indicated in the statement (page 9). The deposition also established that he was in Michigan from March until June in 1956, the year before the accident.

The completed deposition of Darrell Wood was mailed to Willard Wood, father of Darrell Wood, December 18, 1958, requesting that he deliver it to Darrell. There is no evidence that the deposition was ever delivered to Darrell Wood.

There was no follow-up effort made by the Appellant to get the deposition signed between December, 1958, and November, 1960, (T. 60 - 62). No effort was made to contact Darrell Wood through the Carpenter's Union or through his wife or children in Cadillac, Michigan (T. 65), and no personal contact effort was made to contact

Darrell Wood at his last known address in Roy, Utah, (T. 53 and 65), nor to find him through his brothers and sisters who reside in Utah, nor through his friend Lawrence Merrick (T. 56, 57, 65, and 66). That illustrative of the Appellant's efforts to find Darrell Wood is contained in the statement of his father (T. 55, L. 14-20). That the only time he talked with representatives of the Appellant was when he went to see them himself. That none of the letters written by Appellant to Darrell Wood stated or directed him to keep Appellant notified as to his whereabouts nor stressed the importance of his keeping in touch with them. (T. 84 and 85). That the first letter written Darrell Wood after deposition was mailed to father on December 28, 1958, was dated March 20, 1961, (Exhibit #5).

At the pre-trial on August 1, 1961, counsel for Appellant informed the Court that the defendant's insurance company might invoke the non-cooperation provisions of the policy and that he might withdraw as counsel for said defense; and the Court gave counsel until August 25, 1961, in which to advise defendant of the withdrawal; counsel for Appellant also offered the sum of \$1,000.00 in full settlement of all the causes of action (Exhibit 11). At the trial on September 12, 1961, before proceeding with evidence, counsel for Appellant after stating his position made an offer to pay the sum of \$1,000.00 in full settlement of all causes of action then pending; and in response to questioning from the Court, stated that he would proceed with the defense of Darrell Wood under the circumstances as stated (Exhibit 12).

At the trial of Case No. 6936, Cecil Tucker served as the Court Reporter, but Appellant made no effort to have him, prior to or at the trial, certify the unsigned deposition of Darrell Wood and made no effort to introduce such deposition, (T. 83), as provided by Rule 30 (e), U.R.C.P.

The judgment obtained in Case No. 6936 against Darrell Wood remained unsatisfied and the above-entitled action was brought against the Appellant.

ARGUMENT

POINT I

EVIDENCE SUPPORTED THE DISTRICT COURT'S FINDING THAT THE INSURED COOPERATED WITH THE APPELLANT.

After the accident (June 26, 1957), the driver Darrell Wood appeared on October 15, 1957, and gave a statement before Cecil Tucker, the Court Reporter (Exhibit 15); later delivered to the appellants the Summons and Complaint served upon him, and appeared on November 13, 1958, at the office of Glenn W. Adams to have his deposition taken. The deposition was mailed to Willard Wood, father of Darrell Wood, with a request that Darrell's signature be obtained on it. There is no evidence that Darrell Wood ever received the deposition. There is no evidence that Darrell Wood ever received any notice of the trial date.

In *Panczko vs. Eagle Indemnity Company of New York*, 104 NE 2d, 645, the insured appeared and gave a

pre-trial deposition and was advised he would be notified when the case was called for trial. Letters were written to the driver telling him about the trial day, which letters were receipted by his wife; but he had separated from his wife and there was no evidence that he received notice or knew of the trial day. A jury conclusion, on interrogatories that he did not fail to cooperate, was affirmed.

In two cases, involving similar fact situations, it was determined that there was no lack of cooperation on the part of the insured even though the insured did not appear at the trial when requested by the insurer. *Wormington vs. Associated Indemnity Corporation*, 56 P.2d, 1254 (Wyoming) and *Jensen vs. Eureka Casualty Company*, 52 P.2d 540 (California).

The case of *Cameron vs. Berger*, 7A2d 293, cited by Appellant (Br. 8), appears to be concerned with a totally different fact situation. An examination of that case discloses that the insured, to avoid arrest, disappeared from her home several months prior to suit being filed against her for damages, and she gave the insurer no aid whatsoever in the preparation or trial of the suits against her; and the insurer had no notice of the suits until counsel for plaintiff notified them on October 11, that the trial of the actions was listed for November 15.

In the case at hand, Darrell Wood did cooperate with the insurer, the Appellant, by giving them a sworn statement concerning the accident prior to any action being filed against him, delivered suit papers to the

insurer after they were served on him, and at their request also appeared for a deposition long after the action had been filed.

POINT II

EVIDENCE SUPPORTED THE CONCLUSION THAT APPELLANT FAILED TO SHOW IT WAS SUBSTANTIALLY PREJUDICED BY THE NON-APPEARANCE OF DARRELL WOOD.

29A Am. Jur. Sec. 1479, P. 588 states "... it appears to be the view of the great majority of the courts that the lack of cooperation by the insured in failing to attend the trial or testify must be substantial or material, and that a technical or inconsequential lack of cooperation is insufficient to void the policy . . . accordingly, it has frequently been held that the clause is not breeched by the insured's non-attendance where his testimony would not have been of material aid or where, for this or other reason, the insurer was not prejudiced by his absence, or where the same or equivalent testimony could have been or was presented in some other manner or from some other source."

It may have been much more advantageous for the Appellant to have utilized the deposition of Darrell Wood to bring before the Court his version of the facts concerning the accident without further cross-examination than to personally have him present at the trial to again

testify to such facts and then be vigorously cross-examined concerning his testimony.

The memorandum decision of the trial court suggests that the appearance of Darrell Wood, in view of his background, may not have been helpful to the appellants. This was the observation of the court in the *State Farm Mutual Automobile Insurance Company vs. Farmers Insurance Exchange*, 387 P.2d 825.

POINT III

THE EVIDENCE SUPPORTED THE DISTRICT COURT'S CONCLUSION THAT THE INSURER DID NOT USE DILIGENCE TO SECURE THE COOPERATION OF THE INSURED.

The courts have generally recognized that the insurer must establish due diligence to secure the insured's cooperation, particularly where the insurer has reason to anticipate that its insured might not respond (60 A.L.R. 2d 1163 - 1171). A case which is illustrative of this principal is as follows: *State Farm Mutual Automobile Insurance Company vs. Farmers Insurance Exchange*, 387 P.2d, 825 (Oregon), wherein the Court pointed out at page 828 that it is to the interest of the defendant's insurance company not to have the insured cooperate as this gives them an opportunity to escape a judgment which has been entered against the insured; and that therefore their efforts to locate the insured should be critically examined. The court further stated

that the opportunity inherent in this situation is a factor to be considered in determining the scope of their duty to use due diligence. Also see *Johnson vs. Doughty*, 385 P.2d, 760 (Oregon).

Applying the reasoning set forth in these cases, it seems clear that Appellant did not use due diligence in attempting to secure the attendance of Darrell Wood at the trial where they had prior indications that he might not be readily available at trial. The completed deposition was mailed to Darrell Wood's father December, 1958, with a request to obtain Darrell's signature on it. There was no follow-up effort between December, 1958, and November, 1960, and the first letter tracing the deposition was not mailed until March 20, 1961. Darrell Wood apparently disappeared about June, 1959 (T. 63 L. 23); he was available for two years after the accident and for six months after the deposition was mailed. It is noted that the Appellant obtained the statement of passenger Lawrence Merrick (Exhibit 14) on July 26, 1957, one month after the accident but failed to have one of their claims representatives personally take the deposition to Darrell Wood or do any other thing to get his signature during the six months that he was apparently available after December, 1958. In view of the information obtained by the Appellant in the statement given by him October 15, 1957, that he was separated from his wife, had been in Michigan three months the year before and was unemployed, put Appellant on notice that Darrell Wood might be difficult to find at trial time and that an early signing of the deposition was imperative.

POINT IV

THE APPELLANT WAIVED ANY LACK OF COOPERATION ON THE PART OF THE INSURED BY CONTINUING ITS DEFENSE.

At the trial on September 12, 1961, counsel for Appellant although advising the Court that he appeared in defense of the matter on behalf of the insurance company only, and after offering to settle all the causes of action for the sum of \$1,000.00, in response to the Court stating that the only defendant was Darrell Wood, counsel for Appellant stated that he would proceed with the defense of Darrell Wood under the circumstances stated. At the pre-trial on August 1, 1961, Appellant's counsel had been instructed by the Court to notify Darrell Wood by August 25, 1961 if he did in fact intend to withdraw; counsel for appellant also offered to settle all causes of action for \$1,000.00; no withdrawal was ever made pursuant to the pre-trial order.

70ALR 2d 1203 states, "It appears to be the rule that an automobile liability insurer which learns before the trial of an action against its insured that the insured has breached the co-operation clause of the policy, and nevertheless defends him at the trial, thereby waives or is estopped to assert the insured's noncooperation, in a subsequent action to recover on the policy."

70ALR 2d 1205 states, "In a number of cases in which the insured under an automobile liability insurance policy failed to appear at the trial of the original action brought against him, and the insurer conducted

the insured's defense in his absence, it was held that the insurer thereby waived or was estopped to assert this lack of cooperation by the insured, in a subsequent action on the policy."

60ALR 2nd 1156 states, "Most of the courts considering the question have held or stated that an insurer, by continuing the defense with knowledge of the conduct of the insured, may waive the breach of the condition of the policy requiring his attendance or testimony at the trial, or may be estopped to take advantage of the breach when sued by the injured party on the policy."

Brandon vs. St. Paul Mercury Indemnity Co., 294 P. 881 (Kansas), appears to be a representative case under these ALR citations. In this case, an action was brought by B. against W. for personal injuries, the attorney for W. was also the attorney for the insurance company of W. in resistance of the claim. Before the trial of the case resulted, W. became insolvent and disappeared. Thereafter he took no part in the trial and his whereabouts were unknown to any of the parties. His attorney who acted for the insurer procured a number of continuances of the case and when it was finally tried, a judgment in favor of B. was rendered. Several offers of settlement were made to B. by the attorney for W. and the insurer in settlement of the claim and judgment. The court held that by the attorney for W. and the insurer proceeding in the defense after W. has disappeared, and also applying for and obtaining a number of continuances of the case, and also having made a number of offers of compromise and settlement with the

plaintiff, operated as a waiver of the failure of W. to aid in the defense.

POINT V

APPELLANT MUST SHOW THAT IT ACTED WITH REASONABLE DILIGENCE AND TOOK REASONABLE STEPS TO OBVIATE THE PREJUDICIAL EFFECT OF NON-ATTENDANCE OF INSURED.

Rule 30(e), U.R.C.P. provided for the use of an unsigned deposition. The trial court in its Memorandum Decision expressed the view that if the testimony of Darrell Wood as given in his deposition were believed, it would be a complete defense to the guest claims of plaintiffs.

The Appellant took a statement (Exhibit 14) from Lawrence Merrick, one of passengers in the car, and knew his address and the name and phone number of his sister (Merrick's statement page 24). This statement was given July 26, 1957, at Spring Glen, Utah, covering the events of June 26, 1957. While Merrick stated that he was asleep right at the time the car left the road (pages 14-15), he did not state that the car travelled about 40 miles per hour coming back (page 13-14). There is no evidence of any effort to secure the attendance of Lawrence Merrick at the trial for what assistance he might have been to the defense.

Appellant's failure to offer the unsigned deposition of Darrell Wood as provided by the Rule, or to make an effort to procure the attendance of witness Lawrence

Merrick, was a lack of reasonable diligence to obviate the prejudicial effect of the insureds non-attendance (see 29A Am. Jur. Sec. 1479).

CONCLUSION

The findings and decree of Trial Court were founded on fact and law presented at the trial and should be affirmed.

Respectfully submitted,

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