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Richard J. Young v. Julia M. Barney and Utah Farm Bureau Insurance Company : Appellant's Petition For Rehearing and Brief In Support thereof

IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD J. YOUNG,
Plaintiff and Appellant,

vs.

JULIA M. BARNEY and UTAH FARM BUREAU INSURANCE COMPANY, a corporation,
Defendants and Respondents.

Case No. 10519

Appellant's Petition for Rehearing and Brief in Support Thereof

WILL L. HOYT
Nephi, Utah
RAWLINGS, WALLACE, ROBERTS & BLACK
530 Judge Building
Salt Lake City, Utah
Attorneys for Plaintiff and Appellant

PUGSLEY, HAYES, RAMPTON & WATKISS
400 El Paso Natural Gas Building
Salt Lake City, Utah
Attorneys for Defendants and Respondents

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Page

TABLE OF CONTENTS

POINT I

THE DECISION RENDERED BY THIS COURT FAILS TO CORRECTLY INTERPRET THE LANGUAGE AND MEANING OF RULES 18 AND 20, U.R.C.P. AND IS A DENIAL TO PLAINTIFF OF DUE PROCESS OF LAW. 2

CASES CITED

Ellis v. Gilbert, 19 Utah 2d 189, 429 P.2d 39..... 5

Jordan v. Stephens, 7 FRD 140, (D. C. Mo. 1945).. 8

Greenwood v. Burt, 202 N.W. 489, 162 Minn .247.. 9

Hunt et al. v. Hoerr, 80 N.W. 1120, 78 Minn. 281.. 9

TEXTS CITED

15 A.L.R. 763 7

Barron & Holtzoff, Federal Practice and Procedure 1A (1960) Sec. 426.3 7

Ann. Cas. 1913 D.1031 9

39 Am. J. 928 Sec. 55 n. 17 9

67 CJS 977 Sec. 53 (e) n. 27, 47 C.J. 96 n. 23 9

Pac. Dig. Key No. 38 "Parties" 9

17 C.J.S. 1087 Sec. 232 n. 39 10
13 C.J. 447 n. 17, 125 P.2d 987, 989

17 C.J.S. 594 n. 47 10

17 C.J.S. 1057 n. 59, 13 C.J. 456 n. 5 10

17 C.J.S. 1069 Sec. 229 (1) 10

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Appellant's Petition for Rehearing and Brief in Support Thereof

COMES NOW the plaintiff and appellant herein and respectfully petitions this Honorable Court for a rehearing in the above-entitled case. It is appellant's position that this Court's decision affirming dismissal of Utah Farm Bureau Insurance Company from the case is contrary to law and should be reversed and this petition is based on the following:

POINT I

THE DECISION RENDERED BY THIS COURT FAILS TO CORRECTLY INTERPRET THE LANGUAGE AND MEANING OF RULES 18 AND 20, U.R.C.P. AND IS A DENIAL TO PLAINTIFF OF DUE PROCESS OF LAW.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT I

THE DECISION RENDERED BY THIS COURT FAILS TO CORRECTLY INTERPRET THE LANGUAGE AND MEANING OF RULES 18 AND 20, U.R.C.P. AND IS A DENIAL TO PLAINTIFF OF DUE PROCESS OF LAW.

The underlying theory upon which the present decision rests appears to be that juries cannot be trusted to be impartial toward insurance companies and that the courts therefore should not permit suit against an insurer even in a case where it has expressly bound itself by contract to pay damages suffered by an injured party.

This brings up some very vital questions: What authority do the courts have for selecting the cases or class of cases which juries should be considered dis-

qualified to impartially try? If one court believes that jurors are prejudiced against insurance companies, another court may believe that jurors are prejudiced against railroad companies or manufacturing companies or great industrial organizations or persons of great wealth or persons of a different race or color or religion. Shall the court then deny the right of jury trial as against such defendants? If such a person or corporation or association has contracted to pay a debt owing by another party, will the court say the beneficiary will not be permitted to sue on such contract? Or will it say that the plain wording of Rules 18 and 20 must be interpreted as containing an implied exception to protect such individuals or organizations against being joined in a suit with the original debtor? Or if an insurance company or great corporation or rich individual or person of color has become surety on a note or contract of another party, will the courts be justified in reading into Rule 18 or Rule 20 an exception to prevent suit against the surety until after judgment against the principal obligor? If so, where is authority given in the law to confer such a discretion or power upon the courts? Is the right to jury trial a right which is subject to discretion of the court? If Rules 18 and 20 were adopted with a view to avoidance of multiplicity of trials and bringing all interested parties before the court in one action, should it be thought that the rule makers had in mind an undisclosed intention to protect insurance companies, or any other class of persons or

companies, from being subject to the plain wording of these rules?

If appellant's counsel in their former brief failed to bring out clearly to the court that the case now before the court is unmistakeably different from the cases cited by the court in its opinion, we then beg leave to make the point clear that in this case it is expressly alleged in the amended complaint that the defendant insurance company has bound itself by its contract, *not merely to indemnify the insured against damages, but has bound itself to pay all damages suffered by any person* through use of the automobile covered by the policy. That made a contract for the benefit of a third party. It is the kind of liability insurance which is imperatively needed in this day of high speed traffic and constantly increasing accidents and tragedies on the highways. It is the kind of liability insurance which is contemplated by financial responsibility laws. These laws were not adopted to protect or indemnify drivers against judgments. They were adopted to provide protection to persons injured by an operator of a motor vehicle. Therefore, when an insurer binds itself by its contract to pay damages suffered by the injured person, what law or logic can forbid the injured person the right to sue the insurer directly? Or to join the insurer with the tort-feasor in a suit to recover damages? Can it be said that such a suit is merely a suit to determine negligence or liability of the tort-feasor and that the existence of insurance and the insolvency of the tort-feasor are entirely *immaterial?* Does the

court realize that the trial court so ruled, and that this court is upholding this ruling in the present opinion? Has the court forgotten what was at least intimated in the case of Ellis v. Gilbert, 19 U.2d 189; 429 P.2d 39, that the object and purpose of a suit such as this is not merely to determine the question of negligence but to recover damages? And, if the tort-feasor is insolvent, can any good reason be given for refusing to allow the injured person to join a party who has bound itself by contract to pay such damages?

This brings us back to the point made in our former brief that the only possible ground which can be urged under present rules to prevent joinder of an insurer with the tort-feasor in an action for damages is that the policy of insurance contains a "no action clause." There is no discussion of this point in the court's opinion. And no discussion of appellant's contention that the defendant insurance company is estopped to claim the benefit of such a clause by reason of a contrary clause which binds the insurer to defend any action brought against the insured. And no discussion of the further point that the company has elected to take over defense of the action—and was not made a defendant until after it had so elected and had taken control of the defense of the action.

Furthermore there is no discussion of fundamental constitutional questions to which the attention of the court was invited in appellant's former brief. Nothing is said as to the constitutional right of equal access

to the courts and that the courts shall be open for redress of grievances. It is not asserted either by the court or by the opposing counsel that the refusal of the defendant insurance company to pay damages, which by its contract it had agreed to pay, does not constitute a *"grievance"* within the intent of the constitutional provision. Nothing is said as to the constitutional or statutory right to jury trial, or the right asserted by plaintiff to enforce a contract made for his benefit by due process of law. Nothing is said as to the constitutional provision that the right to recover damages for wrongful death shall never be abrogated. The opinion appears to stand upon the sole ground that *the courts have decided* that juries cannot be trusted to be impartial toward insurance companies—and that such decisions are binding upon the court regardless of facts which are pleaded in this case—and admitted by the pleadings of the defendants — which unquestionably distinguish this case from the class of cases referred to in the opinion and in the respondent's brief.

It is not shown in the record before the court whether or not the insurance policy herein involved contains a "no action clause." But in order to forestall a second appeal, counsel for appellant in their former brief, expressly requested the court to assume, for the purpose of this appeal, that the policy contains such a clause.

Respondent's counsel, in their brief, passed over this point with the very casual comment that the no

action clause is not a part of the record and that "even if it were, the general rule is contrary to the position urged by appellant." Respondent then cited 15 A.L.R. 763 as follows:

> "The validity of a clause in a casualty insurance policy that no action shall be instituted against an insurer until the liability of the insured shall have been determined by a final judgment or by agreement of the parties has generally been upheld."

It will be noted that nothing is there said as to the effect of the no action clause in a case where the insurer has also reserved the right to defend and where, as here, it has taken charge of and is conducting the defense. It should further be noted that this point is *not involved in nor referred to in any of the cases cited by respondents.* Counsel for appellant has found *no case* in which a court has held that the no action clause forbids impleading the insurer as a defendant *where it has reserved the right to defend and has exercised such right. It is submitted that no such case can be found* and that the court should not uphold such inconsistent and arbitrary contract arrangements.

It has repeatedly been held by the courts in interpreting *Rule* 14 of the Federal Rules that the "no action clause" in liability insurance policies cannot be used to prevent an insured when sued in a negligence action from impleading the insurer in such action. Barron & Holtzoff, Federal Practice and Procedure 1A (1960) Sec. 426.3, discusses the matter as follows:

"May a defendant in a negligence action implead his liability insurer under Rule 14. This question which has been much discussed is in fact not difficult. Both on principle and on authority it is clear that the answer must be in the affirmative."

"The argument has been advanced that although impleader of an insurer may be proper in the abstract, still it is not permissible where the policy of insurance contains a "no-action clause" . . . It is apparent that such clauses are inconsistent with Rule 14. The cases are agreed that the rule rather than the policy provision is controlling. The leading case is Jordan v. Stephens.

In that case it is said:

The no-action clause is directly opposed to Rule 14. It poses a question as to whether the courts should permit litigants to circumvent rules of court by contractual arrangements. Rule 14 was promulgated not for the purpose of serving litigants but as a wise exposition of public policy. The object of the rule was to facilitate litigation, to save costs, to bring all the litigants into one proceeding, and to dispose of an entire matter without the expense of many suits and many trials. The no-action clause of the policy is neither helpful to the third party defendant, to the courts, nor generally, is it in the interest of the public welfare. Its object is to put weights on the already slow feet of justice. Jordan v. Stephens, 7 FRD 140, (D.C. Mo. 1945).

"THIS Appears to represent what is now the settled view."

Appellant submits that the right of equal access to the courts is a sacred and inherent and fundamental right. The right is violated when a person, who is a real party defendant in interest, is permitted to come into court and conduct defense of an action behind a shield of secrecy. Any contract provision in a liability insurance policy which purports to give a person such a right is not only against public policy but is an attempt to deprive the injured party of a fundamental constitutional right.

> "It is a general principle that persons who are not parties to a suit have no standing in court to enable them to take part in or control the proceedings." Ann. Cas. 1913 D. 1031.
>
> "Persons who are not parties of record to a suit have no standing therein to take part or control the proceedings." 39 Am. J. 928 Sec. 55 n. 17.
>
> "A stranger to an action can take no part therein except to intervene or to make an application to become a party thereto." 67 CJS 977 Sec. 53 (e) n. 27. 47 C.J. 96 n. 23.
>
> Greenwood v. Burt, 202 N.W. 489, 162 Minn. 247
>
> Hunt et al v. Hoerr, 80 N.W. 1120, 78 Minn. 281
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> Pac. Dig. Key No. 38 "Parties"
>
> "Any agreement which tends to work a fraud

or an imposition on a court of justice is void as against public policy."

17 C.J.S. 1087 Sec. 232 n. 39
13 C.J. 447 n. 17
125 P.2d 987, 989

"All agreements, it is said, relating to proceedings in court, civil or criminal, which involve anything inconsistent with the impartial course of justice, are void, although not open to the charge of actual corruption, and regardless of the good faith of the parties."

17 C.J.S. 594 n. 47

"The principle has been applied to a stipulation in a contract that a party who breaks it may not be sued. Or that a party may not resort to the courts."

17 C.J.S. 1057 n. 59
13 C.J. 456 n. 5

"Contract provisions intended to oust courts of their jurisdiction in advance are void."

17 C.J.S. 1069 Sec. 229 (1)

"If the court has jurisdiction of an action, the parties cannot deprive the court thereof by contract, and agreements made in advance of controversy where the object is to oust jurisdiction of the courts are contrary to public policy and will not be enforced."

Ib. n. 58

Referring now to the observation made by the court that Rule 20 is "permissive"—with the implication that the right of joinder granted by the rule is not a "right" but a favor or privilege which is subject to discretion of the court, appellant submits that this does violence

to the language of the rule and is contrary to fundamental principles of statutory construction. A statute or rule which is unconditional language grants permission to do an act ought never to be interpreted as being subject to the will or discretion of the court.

Referring now to the comment by the court that "it is generally held that it is not proper to join an action such as the primary one here, which is based on negligence, and therefore in tort, with one like the claimed supplemental action which would be in contract" appellant submits that Rules 18 and 20 were adopted for the express purpose of eliminating the evils and useless burdens of that former rule. Barron & Holtzoff has this to say upon the matter:

> "Under this Rule practically all restrictions on joinder of causes of action are abrogated. The Rule expressly permits either party to join in the same action as many independent or alternate legal or equitable claims as such party may have against the other. Thus, where the parties are the same, there is no restriction whatever. The former limitations on the joinder of causes of action in contract and tort, or causes of action at law or in equity exist no longer. If the parties are different any joinder is permitted in respect to claims which arise out of the same transaction or occurrence or series of transactions or occurrences, and involve a common question of law or fact." 2 Barron & Holtoff 40.

In this connection it seems appropriate to refer to the comment as to object and purpose of the new

rules which was made by this court in the case of Ellis v. Gilbert, 429 P.2d 39, 40:

> "Their purpose is to make procedure as simple and efficient as possible by eliminating any useless ritual, undue rigidities or technicalites which may have become engrafted in our law; and to remove elements of surprise or trickery so the parties and the court can determine the facts and resolve the issues as directly, fairly and expeditiously as possible. In accord with this is the beginning policy statement in Rule 1 (a): 'that the rules shall be liberally construed to secure the just, speedy, and inexpensive, determination of every action.' "

Appellant submits that the foregoing comment of the court in Ellis v. Gilbert should also be considered in connection with the discussion of Rule 18 (b) in the opinion in this case. The court here expresses the opinion that the makers of the Rule 18 (b) appear to have had in mind situations where one party has a claim against another, and where ultimate recovery might depend upon resort to property, which, by a fraudulent conveyance, or perhaps in situations of some generally similar character, was in the hands of a third party, in which case the sequel action could be joined. That view seems to be unjustifiably influenced by the reference to fraudulent conveyances in the title of the rule. It is definitely not consistent with the footnote appended to the rule which recites that:

> "The rule applies particularly to suits against a surety before determining the extent of the liability of the principal."

Appellant contends that the title is no part of the act and that the broad and explicit language of the rule clearly embraces a situation such as shown in this case. Also that to restrict its application to cases involving fraudulent conveyances, or similar situations, would be a clear violation of the general object and purpose of the rules as hereinabove set forth.

We submit that the time has come to break the rule of masquerade wherein an insurance company which is the real party defendant in interest is permitted to conduct the defense and yet mislead the jury to believe that an impoverished or penniless individual is the only party chargeable with payment of the judgment.

The time has come for courts to declare that juries should know the facts and not be deceived by a cloak of concealment thrown around the real party defendant.

If insurance companies cannot trust jurors to deal with them without prejudice, why should a plaintiff not fear that a jury will be affected by undue sympathy for the defendant where appearances indicate that an impoverished individual must bear the burden of the judgment?

When no mention of insurance is permitted is it not probable that jurors will assume that there is no insurance and that they should trim the verdict out of sympathy for an unfortunate individual—or to make it more probable that the judgment will be paid?

Is it not also verily true that insurance carriers

win many mistrials and new trials and many appeals by reason of belief of judges that mention of insurance in the hearing of jurors must be considered prejudicial error—even in cases where the real defendant in interest is an insurance company which is conducting and controlling defense of the case and using its vast resources of legal talent and investigative machinery to defeat the claim of an injured party?

Is it not time to unshackle the hands of trial judges and permit frank and sensible questioning of veniremen as to their interest in or connection with or prejudice toward insurance companies, and permit sensible and frank instructions by the court as to duty of jurors where insurance is involved?

Respectfuly submitted,

WILL L. HOYT and
RAWLINGS, WALLACE, ROBERTS
& BLACK