1966

Phillip E. Ellis and Carolyn B. Ellis v. Mrs. Betty Gilbert : Respondent's Brief

IN THE SUPREME COURT

OF THE

STATE OF UTAH

PHILLIP E. ELLIS and CAROLYN B. ELLIS,	:	Case
Plaintiffs and Respondents,	:	No.
vs	:	
MRS. BETTY GILBERT,	:	10526
Defendant and Appellant	:	

RESPONDENTS' BRIEF

Appeal from the Judgment of the Fourth Judicial District Court for Duchesne County, the Honorable Joseph E. Nelson, Judge Presiding

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vs	:	
MRS. BETTY GILBERT	:	
Defendant and Appellant	:	

RESPONDENTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is an action by respondents for personal injuries and wrongful death resulting from an automobile accident that occurred on February 12, 1964, at Roosevelt, Utah.

Appellant petitioned, and was granted, an Intermediate Appeal from an Order of the District Court of Duchesne County, requiring appellant to answer an interrogatory submitted by the respondents.

DISPOSITION IN THE LOWER COURT

The District Court of Duchesne County, Joseph E. Nelson, Judge, entered an Order requiring the appellant to answer an interrogatory inquiring as to the existence of liability insurance, and the name of the appellant's liability insurance carrier.

RELIEF SOUGHT ON APPEAL

The respondents seek to have the Order of the District Court affirmed and to require appellant to answer the interrogatory as to the existence of liability insurance.

STATEMENT OF FACTS

Respondents agree with the Statement of facts set forth in appellant's brief.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY REQUIRED THE APPELLANT TO ANSWER THE INTERROGATORY RELATING TO THE NAME OF APPELLANT'S INSURANCE CARRIER AND THE LIMITS OF LIABILITY.

The general rule as per the numerical weight of authorities permitting interrogatories into the extent of insurance coverage is found in 17 Am. Jur., Sec. 30, page 35, Discovery and Inspection, as follows:

> "*** Under modern pre-trial discovery proceedings providing for examination of a party regarding matters relevant to the subject matter involved in the pending action, the plaintiff may

> ascertain from a defendant whether he carries liability insurance and if so, the amount of such insurance and the identity of the insurer."

The principal issue in determining this question seems to be whether such discovery is " relevant to the subject matter" of the action.

> "*** The deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party, or to the claim or defense of any other party.*** It is not grounds for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."
> Rule 26 (b) of the Utah Rules of Civil Procedure; Rule 26 (b) of the Federal Rules of Civil Procedure.

As noted, the term " relevant" is not limited to matter which is admissible in evidence at the trial, but includes all of those things which

are relevant to the subject matter of the action. It is relevancy to the subject matter that is controlling. The majority of the few reported cases that have dealt with the question have held that discovery of the existence and dollar limits of liability policies in automobile torts cases is " relevant" and available.

The landmark case permitting inquiry concerning liability insurance by way of discovery and inspection is the case of Maddox v Grauman, (Ky. 1954) 265 S. W. 2d 939, 41 A. L. R. 2d 964. In that case the plaintiff sought in a pre-trial deposition to ascertain the amount and the name of the insurance carrier of the defendant. The defendant objected and the witness was instructed not to answer the question. The matter was submitted to the trial court and the

defendant was ordered to answer, and upon refusal was found guilty of contempt of court. The issue was appealed to the Kentucky Court of Appeals. The Kentucky Rules of Civil Procedure were substantially identical with Rule 26 (b) of the Utah Rules of Civil Procedure. The Court held that while the question of automobile liability insurance is improper in the trial and should not be presented to the jury, it is, nevertheless, a proper matter for pre-trial discovery. In discussing the point of relevancy, the Court stated:

> " If the insurance question is relevant to the subject matter after the plaintiff prevails, why is it not relevant while the action pends? We believe it is. An insurance contract is no longer a secret, private, confidential arrangement between the insurance carrier and the individual but it is an agreement that embraces those whose person

> or property may be injured by the negligent act of the insured. We conclude the answers to the propounded questions are relevant to the subject matter of the litigation and within the spirit and meaning of C. R. 26.02."

In the case of Brackett v Woodall Food Products, (Tenn. 1951 D. C.) 12F. R. D. 4, Judge Darr held:

> "The Court is of the opinion, however, that the plaintiffs should have an opportunity to examine the liability insurance policy of their alleged tort feasor on the broad viewpoint that it is relevant to the subject matter of the litigation, and within purview of Rules 34 and 26 (b) of Federal Rules of Civil Procedure." See also Orgel v McCurdy, (D. C. 1948 N. Y.) 8 F. R. D. 585; Superior Insurance Company v Superior Court in and for Los Angeles County (Cal. 1951) 235 P2d 833

Some courts have concluded that insurance coverage is relevant to the subject matter of a tort action on very general grounds.

(See Williams, Discovery of Dollar Limits in Liability Policies in Automobile Tort Cases, 10 Ala. L. Rev. 355, 1958) A more specific rational relied on by other courts is that the injured party has a discoverable interest in the policy because he is the beneficiary thereof. In essence, this is the position adopted by the court in Lucas v District Court, (Colo. 1959) 345 P2d 1064. That decision arose from a mandamus proceeding to require the district court to enter an order compelling the defendants to answer inquiries into the existence and extent of liability insurance. The court concerned itself with the scope of discovery under Rule 26 (b), R. C. P. Colo., which rule is identical to the Utah Rule. Justice Doyle, after referring to a multitude of noteworth cases in point, held:

" As a result of our study of the rules, the statute and the decisions of other jurisdictions, it is our opinion that the holding which allows questions to be propounded in pre-trial depositions for the purpose of eliciting information as to the existence of liability insurance and the policy limits of such liability insurance is the better rule, and the one which is more in accord with the object, purpose and philosophy of the rules of civil procedure. This object and purpose is served by holding that the scope of examination is broad. This will have a tendency to eliminate secrets, mysteries and surprises and should promote disposition of cases without trial and substantially just results in those cases which are tried."
345 P 2d 1070

Also, in the case of Hurley v Schmidt, (Oreg. 1965 D. C.) 37 F. R. D. 1, the Court held that the defendant was required to respond to inquiries regarding insurance or other

indemnity coverage when required by plaintiff. In so ruling, the Court stated:

> "*** that the subject matter of these interrogatories is relevant to the subject matter involved in this pending action and that they are within the spirit and meaning of Rule 26 (b)."

In 1964, the Supreme Court of Alaska required a defendant to produce a public liability and property damage insurance policy in the case of Miller v Harpster, (Alaska 1964) 392 P2d 21. In that case defendant objected to producing the insurance policy or revealing its limits, contending that such information was not relative to the issues of the case nor could such information reasonably lead to the discovery of relevant facts. The Court held:

> " We believe that the policy does have a relevancy to the issues and that no error was committed in ordering it to be produced. Definite know-

ledge as to whether or not there was insurance coverage and if there was the name of the carrier and the amount would be of assistance to the plaintiff in determining whether to prosecute or settle the action. Requiring production and disclosure does not, in our opinion, confer any advantage on respondent in so far as the actual trial of the issues is concerned."
(See also People ex. rel. Terry v Fisher, (Ill. 1957) 145 N. E. 2d 588; Pettie v Superior Court of Los Angeles County, (Cal. 1960) 3 Cal. Rptr. 267; Christie v Board of Regents of Univ. of Michigan, (Mich. 1961) 111 N. W. 2d 30; Hill v Greer,(N. J. 1961 D. C.) 30. F. R. D. 64)

Of the 44 cases cited by appellant concerning inquiries into insurance coverage, 20 of these cases permitted the inquiry. There are 7 other cases, not cited by appellant, which have required the opposing party to divulge insurance coverage.

Demaree v Superior Court (Cal. 1937) 73 P2d 605;
Villars v Portsmouth (N. H. 1957) 129 A. 2d 914;
Pettie v Superior Court of Los Angeles County, supra;
Rolf Homes Inc. v Superior Court of San Mateo, (Cal. 1960) 9 Cal. Rptr. 142;
Patterson v Highway Insurance Underwriters, (Tex. 1955) 278 S. W. 2d 207;
Hurley v Schmidt, supra;
Hurt v Cooper (Ky. 1959 W. D.) 175 F. Supp. 712 .

Many of the decisions relied upon by appellant should be viewed with skepticism and are inappropriate as authority in that those decisions were from states operating under rules dissimilar to the Federal Rules and the Utah Rules.

In Goheen v Goheen (N. J. 1931) 154 A. 393, probably the earliest decision on point, the Court denied the use of interrogatories to discover limits of automobile liability insurance

because discovery at that time was limited to matters that would constitute relevant and competent evidence at the trial. This was prior to the 1946 amendment to the Federal Rules which added the last sentence of the present Rule 26 (b) to make clear the liberal interpretation intended. Similarly, Bean v Best, (S. D. 1957) 80 N. W. 2nd 565, in an action against a sheriff for false arrest, is equally inappropriate as South Dakota had adopted the Federal Rules prior to the 1946 amendment and it was not subsequently added to their rules. Verrastro v Grecco, (Conn. 1958) 149 A. 2d 703, arising from an auto collision, and State ex rel. Allen v Second Judicial District Court, (Nev. 1952) 245 P2d 999, an action testing the perpetuation of testimony statute in Nevada, also without import as they were decided under proced-

ural rules much more narrow than the Federal Rules.

The question of discovery as to the extent of liability insurance first came to the Courts operating under the rules parallel to the Federal Rules as they now exist in the case of Orgel v McCurdy, supra. Here, as in Layton v Cregan and Mallory Company, (Mich. 1933) 248 N. W. 539, discovery was sought on the basis of a contested issue as to the operation and control of the motor vehicle. However, the court went further than required and decided the question on the ground that it was relevant within the broad meaning of relevancy as used in Rule 26(b). Here was formed the nucleus that has split both the Federal and State courts applying the discovery rules and interpretation of the scope of relevancy

in light of the purposes of discovery.

Appellant's brief attempts to distinguish those decisions permitting the discovery of insurance on the basis that the insurance or safety responsibility statutes in those states are unique. Those statutes normally give a direct right of action against an insurer if a judgment is not satisfied. But in Johanek v Aberle, (Mont. 1961 D. C.) 27 F. R. D. 272, a federal court concluded that the policy requirements of safety responsibility statutes exact nothing more than the normal provisions of the standard automobile liability policy. In discarding this distinction, the Court held:

> "*** It should be noted, however, that the standard automobile liability insurance policy used by most insurance companies has for many years included provisions essentially the same as those

required for policies issued in California and Illinois.***

" While there may here be no discoverable interest by virtue of any statutory requirement, a discoverable interest may nevertheless inure to an injured party by virtue of the same provisions in the standard policy itself. Whether based upon the statutory requirement or the provisions of the standard policy, the injured party may not institute any action against the insurer until after judgment. After judgment he has the same right of action under the standard policy as he would have under the statute. The same reasoning applies in permitting him to ascertain the policy provisions in the personal injury action. 27 F. R. D. 276 ***

"*** I agree with the conclusion of the Colorado Court that the holding permitting discovery of policy information is the better rule. 'And the one which is more in accord with the object, purpose and philosophy of the Rules of Civil Procedure ' ".

See Furumizo v United States (D. Hawaii 1963) 33 F. R. D. 18; Schwentner v White (D. Mont. 1961) 199 F. Supp. 710.

It may be conceded that one of the main purposes and results of the Federal Rules of Civil Procedure, emulated by Utah and other states, is to induce pre-trial settlements. (See 24 Wash. L. Rev. 21, 1949) The instant case should be justified on that basis alone. Rule 1 of the Federal Rules and Utah Rules requires a liberal construction in their application:

> " They shall be liberally construed to secure the just, speedy, and inexpensive determination of every action. "

It can scarcely be disputed that a fair and equitable settlement of an action is often a more just and certainly more speedy determination of it, than ordinarily follows an actual trial of the issues therein. If, as is often the case, disclosure of the insurance coverage will bring about

such settlements, it would seem that the ends sought by the rules as above disclosed, the just, speedy and inexpensive determination of every action, are thereby effectively attained.

CONCLUSION

Respondents respectfully submit that the disclosure of the insurance coverage by appellant is relevant to the subject matter of the action and that the Order of the District Court of Duchesne County should be affirmed.

Respectfully Submitted

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