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In the Supreme Court of the State of Utah

FILED
JUL 1 6 19[illegible]
Clerk, Supreme Court

DOUGLAS L. ROBINSON and
NELDA H. ROBINSON,
Plaintiffs and Respondents,

vs.

PAUL SINGLETON HREINSON,
Defendant and Appellant.

CASE
NO. [illegible]

RESPONDENT'S [illegible]

Appeal from a Judgment entered after a [illegible]
the Fourth Judicial District Court of [illegible]
Hon. R. L. Tuckett, Judge

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In the Supreme Court of the State of Utah

DOUGLAS L. ROBINSON and
NELDA H. ROBINSON,
Plaintiffs and Respondents,

vs.

PAUL SINGLETON HREINSON,
Defendant and Appellant.

CASE
NO. 10337

RESPONDENT'S BRIEF

STATEMENT OF KIND OF CASE

A personal injury action brought by Nelda H. Robinson and an action for loss of property and consortium by her husband, Douglas L. Robinson.

DISPOSITION IN LOWER COURT

Plaintiffs recovered a jury verdict as indicated in appellant's brief.

STATEMENT OF FACTS

Contrary to appellant's assertion that the facts are immaterial, it is felt that they are of great significance.

The defendant struck the rear of a vehicle in which plaintiff, Nelda H. Robinson, was riding as a passenger. Defendant admitted liability at the time of trial. As a result of injuries, Mrs. Robinson, the mother of five small children, all under ten years of age, was hospitalized on three separate occasions; one for the purpose of taking a myelogram test. Considerable pain and numbness was caused by her injuries, all of which had a most disruptive effect upon her, and her husband's personal life.

In the face of these facts and the admitted liability of defendant, Mr. Midgley stated that Mrs. Robinson was not injured and was merely trying to "cash in" by suing (Tr. 8).

ARGUMENT

POINT I

THAT THE DEFENDANT WAS NOT PREJUDICED BY ANY TESTIMONY REGARDING INSURANCE.

Mrs. Robinson's reference to insurance is accurately quoted in appellant's brief. Following such statement the defendant's attorney, in chambers, moved for a mistrial and Judge Tuckett denied such motion by stating (Tr. 90):

> "Well, the motion will be denied for the reason that no one's insurance was mentioned. It may have referred to the plaintiff's insurance."
>
> (Underlining provided)

It is not denied that defendant was insured. Defendant had admitted liability and, further, that plaintiffs had other insurance (Tr. 91). Thus, such statement was not prejudicial as borne out by the following authorities:

In 4 A.L.R. 2d 784 it is held that "Irresponsive or inadvertent answer referring to insurance is not ground for mistrial." Numerous cases are cited, including:

Hatchimonji v. Homes, 38 Ariz. 535, 3 P.2d 271.
Hughes v. Quackenbush, 1 Cal. App. 2d 349, 37 P.2d 99.

Also, 4 A.L.R. 2d 819, Sec. 22. Doubt as to whose insurance is referred to:

"Where a reference to insurance leaves it in doubt as to whether it is liability insurance which is referred to or some other type of insurance, and where it is uncertain whether it is plaintiff's or defendant's insurance about which reference has been made, the courts are inclined to regard the reference to insurance as relatively harmless."

Several cases are cited, in all of which insurance has been interjected but is held to be harmless.

Pruett v. Marshall, 46 Cal. App. 2d 169, 115 P. 2d 507;
Coker v. Moose, 180 Okla. 234, 68 P. 2d 504.
Fixico v. Harmon, 180 Okla. 412, 70 P. 2d 114.

In this same annotation, Sec. 21, in the case of White v. Makela, 304 Mich. 425, 8 NW 2d 123:

"It was held that trial court properly denied a motion for the declaration of a mistrial because plaintiff, on his direct examination, said that one of the defendants had said that everything would be taken care of because he was covered by insurance, where the question of defendant's liability was reasonably clear and the amount of the verdict was not excessive."

Also see 4 A.L.R. 2d 764:

"In view of the fact that most automobile owners now

carry liability insurance covering operation of their automobiles, the probability of prejudice resulting in the minds of the jury from some suggestion that the defendant in an automobile accident case carried liability insurance does not seem so real as it formerly did. While the courts still are careful to prevent unwarranted injection of the liability insurance factor, the more recent cases indicate less of a tendency to regard error in this regard as beyond cure by proper action of the trial judge."

Also, 4 A.L.R. 2d 766, which states: "In Texas, however, the courts have held without an enabling statute that the insurer may be joined as a proper party." Louisiana and Wisconsin have statutes expressly permitting the joinder of the insurer.

See 5 Am. Jur. 855, Sec. 967:

"Moreover, it is to be observed generally that in view of the present almost universal custom among automobile owners of protecting themselves from liability for damages resulting from negligence in the operation of their automobile by procuring liability insurance, and of the general knowledge of jurors of the prevalence of such a custom, it is probable that evidence suggesting that defendant is insured is not as prejudicial to the right of a defendant to a fair and impartial trial as heretofore."

Thus, in Moinz v. Bettencourt, 24 Cal. App. 2d 718, 76 P.2d 535, it was said:

"That while attorneys might not deliberately drag in the fact that defendants were protected by an insurance company, it was very generally known in these days to every person of understanding that most owners and operators of automobiles were protected by

some form of insurance, and particularly common carriers operating large trucks upon the highways, and that therefore questions and answers referring to insurance carriage by defendant could not have made any difference in the final outcome of the case or any amount that the jury awarded."

The case at hand is distinguishable from the cases cited by appellant. For example, the case of Hill v. Cloward, 14 Utah 2d 55, 377 P. 2d 186, the defendant was specifically asked by the Court why he didn't bring his truck so that it could be viewed and the defendant stated in response that he didn't have any insurance or license on it. It is true that no immediate objection was made to this evidence, but it is interestng to note that the reference to insurance was specifically directed toward the defendant's vehicle and in that case the Supreme Court sustained the verdict.

In the case of Gittens v. Lundberg, 3 Utah 2d 392, 284 P. 2d 1115, the court did hold, as stated in the appellant's brief, that generally speaking, reference to insurance for purpose of getting it before the jury is prejudicial. However, they noted that when such reference as this is so interwoven in an admission against interest that it is impractical to exclude it without destroying or impairing the benefit of the admission, the statement is not error.

In the instant case, I am sure that the plaintiff, Mrs. Robinson, made the statement inadvertently and since she made no specific reference to the insurance of the defendant, it is respectfully submitted that such testimony was not prejudicial.

Counsel for appellant cites an excerpt from the case of Belle v. Smith (1932) 81 Utah 179, 17 P. 2d 224. How-

ever, a careful reading of this case clearly indicates it to be precedent in behalf of the respondent. In that case the counsel for plaintiff, in voir direing the jury, the following record of the proceedings was cited in the case:

> Q. (by Mr. Hanson, counsel for plaintiff).
>
> "Are you acquainted in any way with what is known as Intermountain Lloyds Company?
>
> Mr. Stewart (counsel for defendant): At this time we take exception to the reference made by counsel and assign it as misconduct, and we ask the court at this time to discharge the jury and call a new venire.
>
> Court: I will sustain the objection. I think there should be no reference made to that company, and I will admonish you, ladies and gentlemen of the jury, to disregard the reference to the company just referred to.
>
> Mr. Hanson: I am going to make a record of this, and I have the authorities on it; I am going to dictate it into the record now.
>
> Mr. Stewart: Just a moment. If your Honor please, we will ask that the jury be excused.
>
> Court: The company is not a defendant in any sense.
>
> Mr. Hanson: I know it is not, but it is the party in interest. That is the test, your Honor.
>
> Mr. Stewart: We will ask that the jury be excused during any discussion on this matter."

The jury was then excused and proof was presented to show that the defendant did, in fact, carry Intermountain Lloyds insurance. Following this proffer of proof the counsel for the defense, along with his client, testified that they were in the hallway and could clearly overhear this testi-

mony and since they were in the presence of other jurors, assumed that they also heard the presentment of these facts. In the face of all this evidence the court held, on page 194:

> "There is nothing to indicate bad faith on the part of counsel or to show a willful, persistent or diligent course or effort to impress upon the jury the fact that defendant's liability was insured. We are satisfied the jury's verdict was not prejudiced by such remark."

Thus, we have a case in which the jury, at the time of voir dire, was, in effect, advised by counsel for plaintiff that the true party in interest was the insurance company referred to in their question of the prospective juror and yet the court refused to grant a mistrial and such ruling was sustained.

In the case of Reid, et al, v. Owens, et al, 98 Utah 50, 93 P. 2d 680, the court again held that the admission of insurance upon the part of the defendant was not reversble error when such admission was interwoven with other relevant evidence. In that case evidence from the deceased's widow was:

> Q. "Now will you state what Mr. Owens said?
> A. Mr. Owens said, 'My boy is careless, and he drives too fast and it worries us.' He said 'We have taken out insurance to protect him,' and he says, 'If you won't prosecute our boy, we will do all we can to help you get the $5,000.00 insurance.' "

It is recognized that this type of admission of coverage is distinguishable from the case at hand, but it is interesting to note the general attitude of our courts in holding that such statement, when interwoven with admissible

evidence, is not reversible error. The court further states, on page 60 of this case:

> "If questions are propounded to a witness for the obvious purpose of revealing such irrelevant fact to the jury (the presence of insurance), a mistrial may properly be declared or a new trial granted."

In the case under appeal the reference to insurance on the part of the plaintiff was most inadvertent and in the eyes of the respondent did not in any way prejudice the result.

POINT II

THE TESTIMONY OF DOCTOR WAYNE M. HEBERTSON WAS PROPERLY ADMITTED AND THE INSTRUCTION REGARDING FUTURE MEDICAL TREATMENT WAS PROPER.

Defendant's reference in his brief to the testimony of Dr. Hebertson is accurate. This was to the effect that plaintiff, Mrs. Robinson, had suffered a severe strain of the neck and spine and radiculitis of the nerve roots of the neck and, further, may have suffered a herniated disc (Tr. 57). He further testified X-rays do not always reveal an injury to the spine (Tr. 61) and surgery is often performed with no objective showing in the X-ray (Tr. 62).

Dr. Hebertson was then asked (Tr. 63):

> Q. "Does this lead you, doctor, to the opinion as to a probability that Mrs. Robinson will continue to have some complaint or pain without stabalizing surgery?"

The doctor then answered that it probably would be required (Tr. 64).

Q. "Do you have an opinion, sir, as to any reasonable degree of certainty whether surgery will be required in the case of Mrs. Robinson?

A. I think it will if she is to expect improvement in her condition."

Costs of such procedure were then testified to (Tr. 67).

This court has ruled clearly upon this subject in Moore v. D & R G W Co., 4 Utah 2d 255, 292 P. 2d 849.

"This court has long recognized that the mere use of words such as 'belief', 'impression', 'probability', or 'possibility' will not exclude a witness' testimony where his expression does not indicate a lack of personal observation, but merely the degree of positiveness of his original observation of the facts or the degree of positiveness of his recollection; Jackson v. Harries, 65 Utah 282, 236 P. 234; Picino v. Utah-Apex Mining Co., 52 Utah 338, 173 P. 900; Utah Fuel Co. v. Industrial Commission, 102 Utah 26, 126 P. 2d 1070; and further that the words must be taken within the context of the testimony in determining the meaning and value of the evidence; Jones v. California Packing Corp., Utah, 244 P. 2d 640. Likewise, this court has approved the giving of an instruction allowing the jury to assess damages for such results of the defendant's wrong as plaintiff will probably suffer in the future. Picino v. Utah-Apex Mining Co. supra; Kirchgestner v. Denver & R. G. W. R. Co., 118 Utah 20, 218 P. 2d 685. Respondent argues that the liberal policy thus adopted by this court is an express repudiation of the doctrine of torts that recovery may be had for such injurious consequences only as are reasonably certain. It is, however, clear from a reading of all cases cited supra that the plaintiff retains his burden of proving his damages by competent evidence to an

extent where the trier of the fact might discover that which is probably true, having regard for the certainty or uncertainty which is more or less inherent in every issue of fact."

Thus, the admission of such evidence and the instruction given were in accord with well established law.

Respectfully submitted,

HEBER GRANT IVINS
Attorney for Respondents