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Shirlee M. Housley and Reese C. Housley v. The Anaconda Company, A Corporation, and Dennis P. Cox and The Travelers Insurance Comp Any, A Corporation : Respondent's Brief

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

SHIRLEE M. HOUSLEY and
REESE C. HOUSLEY
Plaintiffs-Appellants

vs.

THE ANACONDA COMPANY, a corporation and DENNIS P. COX,
Defendants-Respondents

RESPONDENT'S BRIEF

Appeal from the Orders of the District Court of Salt Lake County, State of Utah
Hon. Joseph G. Jeppson, Judge
Hon. Aldon J. Anderson, Judge
Hon. Merrill C. Faux, Judge

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STATUTES

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Case No.
10612

RESPONDENT'S BRIEF

PRELIMINARY STATEMENT

The Anaconda Company, hereinafter referred to as "Anaconda" and Dennis P. Cox, hereinafter referred to as "Cox" do not adopt the statement of facts set forth in the brief of Shirlee M. Housley and Reese C. Housley, hereinafter referred to as "Plaintiffs".

The statement of facts contained in plaintiff's brief is incomplete and inaccurate. A chronological review of the proceedings in the trial court should be helpful.

STATEMENT OF FACTS

On January 5, 1959, Cox, a resident of the State of Utah, was driving a motor vehicle owned by the Anaconda Company east on 5th South in Salt Lake City. (R 58) He was following a 1954 Chevrolet sedan driven by plaintiff Shirlee M. Housley and owned by plaintiff Reese C. Housley. As the two vehicles approached the intersection of 5th South and 4th East, the driver of another vehicle proceeding south on 4th East failed to stop for the stop sign on the northwest corner of the intersection. Shirlee Housley slammed on her brakes to avoid colliding with the car which ran the stop sign. Cox was unable to stop in time and collided with the rear of the Housley vehicle. (R 132) Cox was on his way home for lunch at the time of the accident. (R 134)

On the 22nd day of February, 1959, Cox left the State of Utah to accept employment in Brazil, South America. (R 58) Cox lived in Brazil for approximately two years then returned to the United States and now resides in Bethesda, Maryland. (R 58)

Plaintiffs filed a complaint against Anaconda and Cox on September 27, 1960. Anaconda was served on September 28, 1960. (R 7) Cox has never been served in the State of Utah.

Three years after the complaint had been filed, plaintiffs moved to amend their complaint. (R 15) The amended complaint contained an additional count alleging in substance that Cox had a "chose in action against his employer and the employer's insurance carrier upon which in

rem jurisdiction (could) be acquired." (R 19) Cox's attorney made a special appearance to object to the motion to amend the complaint on the ground Cox did not have property in the State of Utah which could be made the subject of an in rem proceeding. (R 60)

The motion was heard before Judge Jeppson who ruled, after considering memorandums filed by both sides, that plaintiffs could amend their complaint. (R 61) Judge Jeppson further ruled that Cox had made a special appearance challenging jurisdiction over his person and such appearance did not constitute a general appearance. (R 61)

Cox was served with the summons and amended complaint in Bethesda, Maryland on January 19, 1964. (R 27) A Writ of Garnishment was served on The Travelers Insurance Company (hereinafter referred to as "Travelers") on March 4, 1964. (R 42) Travelers answered the interrogatories attached to the Writ of Garnishment by stating that it was not indebted to Cox and did not have under its control any property, effects, goods, chattels, rights, credits or choses in action of Cox. (R 44) Travelers further answered the Writ of Garnishment by stating it did insure Anaconda at the time of the accident in question and the definition of the "insured" included anyone who was using the motor vehicle with the permission of the named insured. (R 45) Plaintiff's did not reply to Travelers answers to the interrogatories.

Cox filed a motion to dismiss the amended complaint on the ground the court did not have jurisdiction over his person and to quash the summons on the ground he was not

served in the State of Utah. (R 33) The motion was supported by the affidavit of Cox in which he stated at the time of the accident (January 1959) he was a resident of the State of Utah and on or about the 22nd day of February, 1959, he left the State to work in South America. (R 58) Cox further stated that after living in South America for two years he returned to the United States and became a resident of Bethesda, Maryland. (R 58)

The motion to dismiss and to quash summons was denied by Judge Aldon Anderson. (R 62, 63) Cox filed a motion for rehearing asserting that the order denying the motions to dismiss and quash summons deprived him of his property without due process of law, contrary to the provisions of Section 7, Article I of the Constitution of the State of Utah, and contrary to the provisions of the XIV Amendment to the Constitution of the United States. (R 64)

The motion for rehearing was argued before Judge Anderson. Briefs were filed by plaintiffs and Cox. The Judge granted the motion of Cox to quash summons. (R 82)

Plaintiffs then filed a motion to set aside the order quashing summons. (R 84) This motion was also argued before Judge Anderson. At the hearing on the motion to set aside the order quashing summons, Judge Anderson ruled that the order quashing summons be set aside and the parties be permitted to file additional briefs. After considering the briefs, Judge Anderson ruled that the motion to set aside the order quashing summons be denied. (R 127) Judge Anderson stated that in his opinion

the prior ruling of Judge Jeppson allowing the plaintiffs to amend their complaint did not preclude him from granting the motion to quash summons. (R. 102)

At the pretrial Anaconda Company moved for a summary judgment on the ground Cox was not in the scope of his employment at the time of the accident. (R 132) The motion for summary judgment was supported by the affidavit of Cox, stating in substance, that at the time of the accident he was on his way home to have lunch with his wife and he had no intention of going into the field after lunch. (R 134)

The motion for summary judgment was argued before Judge Merrill C. Faux. Plaintiff's and Anaconda submitted memoradums in support of their positions. The motion for summary judgment was granted by Judge Faux. (R 160)

Plaintiffs have appealed; (1) from the order of Judge Jeppson holding Cox made a special appearance to challenge jurisdiction over his person; (2) from the order of Judge Anderson quashing the service of summons on Cox and (3) from the order granting summary judgment in favor of Anaconda.

ARGUMENT

POINT I

COX HAS NOT WAIVED HIS OBJECTION TO PERSONAL JURISDICTION.

Plaintiff's motion to file an amended complaint came on for hearing before Judge Jeppson on November 6, 1963. The amended complaint contained an additional count alleging in substance that Anaconda had a policy of liability insurance insuring itself and any person using an owned vehicle with the permission of the insured, all in accordance with the provisions of Section 41-12-21 (b) (2) Utah Code Annotated 1953 (Safety Responsibility Act). The amended complaint also contained the allegation:

> "That, whether contained in said policy or not, by express provision of Section 41-12-21 (f) (1), Utah Code Annotated . . . . 'the liability of the insurance carrier with respect to the insurance required by this act shall become absolute whenever injury or damage covered by said motor vehicle liability occurs. . . .'

The final allegation was that Cox had a "valuable chose in action against his employer and the employer's insurance carrier upon which in rem jurisdiction (could) be acquired." (R 18, 19)

Cox's attorney made a special appearance to object to the motion to amend on the ground Cox did not have any property in the State of Utah which could be made the subject of an in rem action. (R 60)

The reporter's transcript of the hearing on the motion to amend shows the following proceedings were had:

THE COURT: This motion is to amend as to Mr. Cox, is it not?

MR. FULLER: Essentially as to Mr. Cox, your Honor.

THE COURT: Do you have any objection to that?

MR. NEBEKER: We would object to that—appearing especially for that purpose, yes.

THE COURT: What is your objection?

MR. NEBEKER: Our objections are, your Honor, the amendment relies apparently upon the financial responsibility, which we maintain does not apply, and we have produced an affidavit from Mr. Reece of that division stating that Mr. Cox was never required to obtain proof of financial responsibility.

THE COURT: You do not represent Mr. Cox?

MR. NEBEKER: We are appearing especially for that purpose, your Honor.

THE COURT: You do not represent Mr. Cox?

MR. NEBEKER: For the purpose of resisting this amendment, yes. No jurisdiction over Mr. Cox, that is the problem.

THE COURT: Are you Mr. Cox' attorney? You did not so state.

MR. NEBEKER: Yes, I would represent here we are representing him for the purpose of this amendment.

THE COURT: Do you want to argue he cannot state a cause of action against Mr. Cox?

MR. NEBEKER: Yes, your Honor.

THE COURT: I will hear the matter when we get to it.

The bulk of the argument of counsel was not reported. (R 167)

On December 5, 1963, a minute entry was made stating Judge Jeppson's ruling:

> "Court grants plaintiffs' motion to amend and orders that plaintiffs may plead in rem and issue garnishment requested. Court finds defendant did not make general appearance and did not waive his defense of no jurisdiction." (R 67)

At the hearing on Cox's motion to dismiss and to quash summons, a question arose concerning Judge Jeppson's prior ruling on the motion to amend. On May 19, 1964, Judge Jeppson signed the following order:

> "Now, therefore, it is hereby ordered that:
>
> 1. Defendant Dennis P. Cox has a chose in action under a liability insurance policy which can be reached by plaintiffs to acquire in rem jurisdiction in these proceedings, and plaintiffs' motion to amend their complaint accordingly is hereby granted and garnishment may issue as requested.

> 2. Defendant Dennis P. Cox has made a special appearance herein challenging personal jurisdiction over his person, and that such appearance did not constitute a general appearance since the aforesaid ruling of the court that in rem jurisdiction can be had herein is considered by the court to be a special appearance." (R 60-61)

Judge Jeppson, after hearing all the argument by counsel, held that Cox's attorney had made a special appearance challenging juridsiction over his person and had not made a general appearance.

Rule 12(b) of the Utah Rules of Civil Procedure, which was amended slightly from Rule 12(b) of the Federal Rules, has abolished the old distinction of special and general appearance. A defendant need no longer appear specially to attack the court's jurisdiction over him. There is no penalty if the attorney undertakes a "special appearance" though the label will be of no legal significance.

> "There is no longer any necessity for appearing specially, as subdivision (b) provides that every defense may be made either in the responsive pleading or by motion. However, there is no penalty if the pleader, mindful of the old ways, undertakes a 'special appearance' though the label will be of no legal significance." Vol. 1A Barron & Holtzoff Rule 12 Sec. 343 p. 284.

In *Orange Theatre Corporation v. Ray Hertz Amusement Corp.* 139 F.2d 871 (3rd Cir. 1944) *cert. den.* 322 U.S. 740, 88 L.ed. 1573, 64 S.Ct. 1057, *it was held that Rule 12 of the Federal Rules of Civil Procedure has abolished the age old distinction between general and special*

appearances. The court stated that under the Rule, a defendant need no longer appear specially to attack the Court's jurisdiction over him and is no longer required "at the door of the Federal Courthouse to intone that ancient abra cadabra of the law de bene esse, in order by its magic power to enable himself to remain outside even while he steps within." However, the court pointed out that under the rules if the defense of lack of jurisdiction of the person was not raised by Motion before Answer or in the Answer itself, it would be treated as waived, not because of the defendant's voluntary appearance but because of his failure to assert the defense within the time prescribed by the rules.

A number of State Courts have adopted Rules of Procedure based on the Federal Rules. The Supreme Courts in those jurisdictions have recognized that the distinction between general and special appearances has been abolished.

In *D. W. Onan & Sons v. Superior Court,* 179 P.2d 243 (Arizona 1947) the Supreme Court of Arizona held that under Rule 12 (b), Sec. 21-429 ACA 1939, that special appearances to challenge jurisdiction over the persons were not necessary. The court stated that if the defendant so desires, he may present *every* defense or objection that he has in an answer without waiving any rights. The court further stated:

> "An objection that the court has not secured jurisdiction over the defendant may be pleaded in the answer. Often times a defendant might prefer to raise certain objections which he believes will

> be sustained before resorting to the trouble of pleading an answer. This he may do. Under this Rule 12 (b) he may raise any or all of the following objections which he may have by motion: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) improper venue; (4) insufficiency of process; (5) insufficiency of service of process; (6) failure to state a claim upon which relief can be granted."

In *Treadwell v. The District Court in and for the City and County of Denver,* 297 P. 2d 891 (Colo. 1956) the Supreme Court of Colorado held that Rule 12 (b) abolishes the distinction between general and special appearances. The court stated that if a motion to quash for lack of jurisdiction of a person is made before the Answer, then the jurisdiction of the Court over the person is properly raised and stands in question until the Motion is disposed of.

> *"The rule (Rule 12 (b)) is almost identical with the federal rule of procedure and the federal cases seem to hold that a party may appear generally and still raise objections to jurisdiction of person.* Such a motion, of course, must be filed in apt time, and the question cannot be raised after answers and other motions as to the merits have been filed. It cannot be contended that the written general appearance of counsel in the case is a defense; it cannot be considered as a pleading; and it neither adds to nor detracts from the motion to quash, which was the only plea before the court." (Italics ours)

See also *Weant's Admr. v. Ellis,* 287 S.W. 2d 446 (Ky. 1955); *Galler v. Slurzberg,* 92 A.2d 89 (N.J. 1952) holding

that Rule 12 (b) has eliminated the distinction between general and special appearances.

These cases clearly show that the distinction between general and special appearances has been abolished in those jurisdictions which have adopted rules similar to the Federal Rules of Civil Procedure.

In the instant case Cox's attorney appeared to resist the proposed Amendment to plaintiff's complaint on the ground Cox had *no property in the State of Utah which could be made the subject of an in rem proceeding. The substance of the appearance was to resist jurisdiction over the person of Cox.* If Cox could file a motion to dismiss because of lack of jurisdiction over the person or could plead such a defense in his answer, then clearly, an appearance to raise the question of jurisdiction over the person before an answer or motion were required would not waive that defense. There would only be a waiver of jurisdiction over the person if Cox's attorney answered the amended complaint without raising the defense of lack of jurisdiction over the person. Rule 12 (h) provides that a party waives all defenses and objections which he does not present either by motion or in his answer, except the defense of failure to state a claim upon which relief can be granted, failure to join an indispensable party and whenever it appears the court lacks jurisdiction over the subject matter.

As the court stated in *Orange Theatre Corp. supra.*

> "If the defense of lack of jurisdiction of the person is not raised by motion before answer or in the answer itself it is by the express terms of paragraph (h) of Civil Procedure Rule 12 to be treated

> as waived, *not because of the defendant's voluntary appearance but because of his failure to assert the defense within the time prescribed by the rules.*" (Italics ours)

The appearance of Cox's attorney to resist the motion to amend the complaint did not give the court jurisdiction over the person of Cox. The Trial Judge who heard the arguments of counsel, held Cox *made a special appearance and did not waive his defense of lack of jurisdiction over the person.* (R 61) His ruling should be sustained.

POINT II.

COX HAS NO PROPERTY IN THE STATE OF UTAH WHICH CAN BE THE SUBJECT OF AN IN REM ACTION SO THE SUMMONS SERVED ON HIM IN BETHESDA, MARYLAND, WAS PROPERLY QUASHED.

Cox was served with a summons and amended complaint in Bethesda, Maryland. (R 27) A writ of garnishment was served on Travelers. It answered by denying that it was indebted to Cox in property or money and denying that it knew of or had any property, effects, goods, chattels, rights, credits or choses in action owing to Cox. Travelers admitted issuing a liability policy to Anaconda which insured persons using motor vehicles with the permission of the named insured. (R 43-47) *Plaintiffs never replied to the answer of the garnishee.* Subsequently, Cox filed a motion to dismiss the amended complaint against him on the ground the court did not have jurisdiction over his person and to quash the summons. (R 33) The motion was

supported by an affidavit in which Cox stated he was a resident of the State of Utah at the time of the accident and shortly thereafter moved to South America. The motion to dismiss and to quash summons was heard by Judge Aldon Anderson. The Judge granted the motion to quash summons after the issues had been fully briefed and argued. (R 82, 127)

Defendants contend that the liability insurance policy issued by Travelers to Anaconda does not constitute a "chose in action" under Rule 64 (D) Utah Rules of Civil Procedure which can be the subject of an in rem proceeding.

Rule 64 (D) of the Utah Rules of Civil Procedure contains the following provision relating to garnishment:

> **"When plaintiff entitled to writ; affidavit.** The plaintiff, at any time after the filing of the complaint, may have a writ of garnishment issue, and attach the credits, effects, debts, choses in action, money, and other personal property of the defendant in the possession or in the control of any third person, as garnishee, whether the same are due at the time of the service of the writ or are to become due thereafter, under the same circumstances and by filing with the court in which the action is pending an affidavit as required by subdivision (a) of Rule 64C, relating to Attachments; provided, that in addition to the requirements of the Affidavit for a writ of attachment the affidavit for a writ of garnishment shall state that plaintiff has good reason to believe and does believe that a particular person, firm or corporation, private or public, has property, money, goods, chattels, credits or effects in his or its hands or under his or its control be-

> longing to the defendant, or that such person, firm or corporation is indebted to the defendant."

Subparagraph (g) and (i) of Rule 64D contain the following provisions:

> (g) * * * The garnishee may also deliver to the officer serving the writ the property belonging to the defendant, together with the money due to such defendant, as shown by the answer of the garnishee, and the officer shall make return of such property and money with the writ to the court, to be dealt with as thereafter ordered by the court. Thereupon the garnishee shall be relieved from further liability in the proceedings, *unless his answer shall be successfully controverted as hereinafter provided.* (Italics ours)
>
> * * *
>
> (i) Judgment on Answer of Garnishee. *If the plaintiff fails to reply to the answer of the garnishee, he shall be deemed to have accepted it as correct, and judgment may be entered thereon.* * * *" (Italics ours)

The plaintiffs did not reply to the garnishee's answer. They are therefore deemed to have accepted as correct Traveler's answer that it had no property, effects, goods, chattels, rights, credits or choses in action of Cox. *Plaintiffs failure to reply precludes them from questioning the correctness of the answer.*

Regardless of plaintiffs' failure to reply to the Answer, the liability insurance policy is not a chose in action. A "chose in action" is defined as "A right to personal

things of which the owner has not the possession, but merely a right of action for their possession." Blacks Law Dictionary 3rd Edition, p. 323.

The term has also been held to include the right to recover sums of money from another:

> "The term "choses in action" is one of comprehensive import. It includes the infinite variety of contracts, covenants and promises which confer on one party a right to recover a personal chattel or a sum of money from another by action." Sheldon v. Sell 49 U.S. 441, 12 L.Ed. 1147 cited in Vol. 7 Words & Phrases, p. 167.

The language of the insurance policy issued by Travelers to Anaconda clearly shows that it does not constitute a "chose in action". The policy contains the following pertinent provisions:

> "INSURING AGREEMENTS
>
> 1. Coverage A-Bodily Injury Liability
> *To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury,* sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by accident. * * * (Italics ours)
>
> CONDITIONS
>
> 13. Action Against Company. No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount

> of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company."

Under the terms of the insurance policy Travelers has the obligation to pay on behalf of the insured (Cox) all sums which he shall *become legally obligated to pay as damages* because of bodily injury. *The insurance company has no obligation to pay on behalf of the insured until he becomes legally obligated to pay.* Since Cox is not legally obligated to pay the plaintiffs any sum of money, Travelers has no monetary obligation owing on his behalf. The contract of insurance is conditioned on the insured becoming *legally obligated* to pay. If there is no obligation on the insured to pay, there is no obligation on the insurance company. Unless a judgment is entered against Cox, Travelers will have no obligation to pay any money on his behalf.

The language of the paragraph relating to actions against the Company specifically provides that no action shall lie against the Company until its obligation to pay *shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.* It is clear from this language that there is no monetary obligation owing on behalf of Cox until a judgment has been entered against him, after actual trial, or a written agreement has been entered into between Cox, the plaintiffs and the Travelers Insurance Company.

Cox has no contractual rights against the Travelers to pay money on his behalf until a judgment is entered against him. The contract of liability insurance does not constitute a chose in action because Cox has no right to recover any money from Travelers.

The case of *Gray v. Houck,* 68 S.W. 2d 117 (Tenn. 1934) is on all fours with the facts in the instant case. In that case the plaintiff Gray brought a suit against the defendant Houck wherein jurisdiction was asserted by a petition for attachment by garnishment of the Travelers Insurance Company as the debtor of the defendant. The defendant Houck left the State of Tennessee before service could be had upon him and jurisdiction was asserted by garnishment of the Travelers Insurance Company as the debtor of the defendant. *The lower court found that the insurance company was not indebted to the defendant and for that reason denied the attachment by garnishment of the insurance company and dismissed the suit.* The language of the insurance policy in the Houck case was similar to the language of the insurance policy issued to the Anaconda Company. *The Supreme Court of Tennessee affirmed the decision of the lower court holding that under the automobile liability policy, the insurance company was not subject to garnishment as the insured's debtor.* The Court said that since the obligation of the insurance company to the insured was contingent and since there was no judgement rendered and no agreement made, no garnishment could issue. The Court said:

> "(1) The contract thus pleaded is clearly one of indemnity against liability, but by the clause last quoted the obligation of the insurer to pay

> and satisfy claims made against the insured arises only when such claims are matured by judgment or by written agreement of the parties interested, including the insurer. The language of the contract is that 'no recovery against the company shall be had until the amount of the insured's liability shall have been determined by judgment or written agreement.' A right of recovery is obviously essential to a right of action, so that, by the terms of the contract, the insured has no right of action for the indemnity stipulated, in the absence of judgment against him or an agreement fixing the amount of plaintiff's damages. The existence of such right of action is therefore contingent upon the rendition of judgment against the insured, the defendant to plaintiff's action for damages. That such event is uncertain and contingent is at least indicated by the plaintiff's inability to obtain service of process on the defendant, by reason of the defendant's nonresidence."

The Court pointed out that it is a rule of universal application that the plaintiff in garnishment is, in his relation to the garnishee substituted merely to the rights of his own debtor and can enforce no demand against the garnishee which the debtor himself, if suing, would not be entitled to recover. The Court also stated that there is an underlying principle controlling the right to attachment by garnishment, that the process can reach only debts absolutely existing and those not subject to the happening of a future event, rendering it uncertain whether the garnishee will or will not be indebted to the defendant. The Court then made the following observation:

> "The defendant herein has not suffered damage for which he is entitled to call upon his insurer for

> indemnity. Such damage wil arise only from a judgment against him, or from a written agreement fixing the amount of the liability, according to the terms of the insurance contract. Until such contingency occurs, there can be no breach of the contract to indemnify, and no right of action which the defendant or his creditors can prosecute against the insurer."

The Court concluded that under the liability indemnity contract which it was construing, the obligation to pay dated from the rendition of a judgment against the defendant and until such judgment was rendered the obligation was contingent and uncertain. The court held that *until the defendant's liability to the plaintiff was determined by judgment rendered in a personal action against him, the insurer was not subject to garnishment as the defendant's debtor.*

Inasmuch as Travelers has no obligation to Cox until his liability to the plaintiffs is determined by a judgment rendered in a personal action against him, there is no chose in action existing between Travelers and Cox.

Plaintiffs attempt to distinguish *Gray v. Houck, supra,* on the ground that the statutes of Tennessee prohibited garnishment upon "debts or demands not due when the debtor resides out of the state." *No reference is made to those statutes in the opinion.*

The Supreme Court of Tennessee did state that attachment by garnishment was authorized by statute:

> "This is an action for damages for personal injuries suffered in an automobile accident. The defendant, Houck, left the state before service could

> be had upon him, and jurisdiction is asserted in this action, begun several years later, by petition for attachment by garnishment of the Travelers Insurance Company, as the debtor of the defendant.
>
> Such process is authorized by statute in behalf of a tort claimed against one who is 'indebted' to the defendant. Code, Sec. 9397, 9428, p. 117

The Court further stated that garnishment could only reach debts *absolutely existing.*

> "* * * It is also an underlying principle, controlling the right to attachment by garnishment, that the process can reach only debts absolutely existing, and those not subject to the happening of a future event, rendering it uncertain whether the garnishee will or will not be indebted to the defendant. * * *" Page 118

The Tennessee court did not discuss the question of whether the debt was *due* or not but rather was concerned with whether the debt would ever *exist.* The Court found that the obligation of the insurance company was contingent and uncertain and until judgment was entered, the insurer was not subject to garnishment.

This court has previously held that contingent unliquidated contract claims are not subject to garnishment.

In *Acheson-Harder Co. v. Western Wholesale Notions Co.,* 72 Utah 323, 269 Pac. 1032 (1928) this court held accounts receivable placed with the garnishee for collection, but not collected, were not subject to garnishment. This court held that the service of the Writ of Garnishment renders the garnishee liable for only such property, money,

goods, chattels, credits or effects of defendant as were in the possession of the garnishee and such indebtedness of the garnishee in favor of the defendant as exists when the writ is served. This court stated:

> "It is one of the cardinal principles of the law of garnishment that the garnishee is under no greater liability to the plaintiff in whose behalf the writ of garnishment is issued than such garnishee was under to the defendant immediately before the writ was served. *The liability of the garnishee to account to the defendant for property or indebtedness must be absolute in order that such property or indebtedness is garnishable.*" (Italics ours)

While the applicable 1928 Utah statute did not contain the phrase "chose in action" as an item that could be subject to garnishment, plaintiffs construed the statute to include "chose in action" as the Writ commanded the garnishee to retain in its possession all personal property, effects, *choses in action* of the defendant debtor.

This court has held that an unliquidated tort claim is not subject to garnishment.

In *Paul v. Kirkendall,* 6 Utah 2d 256, 311 P.2d 376 (1957) this court held that an unliquidated tort claim against an automobile insurer was not a chose in action held by the insurer for the insured. This court further held that the insurer's liability, if any, was not subject to garnishment and could not be adjudicated in a garnishment proceeding brought by the holder of a judgment against the insured. In that case the plaintiff, Paul, recovered a

judgment against the defendant Kirkendall, in the sum of $20,000.00 for personal injuries arising out of an automobile accident. The Maryland Casualty Company had issued a policy of insurance in favor of the defendant and paid the judgment to the limit of its policy coverage of $10,000.00 Plaintiff then sued out a writ of garnishment which was served on the Maryland Casualty Company as garnishee. In the interrogatories it was asked if the garnishee was indebted to the defendant. The answer to this question was negative. Plaintiff replied to the answers alleging that the garnishee insurance company was indebted to the defendant in the amount by which the judgment taken against the defendant exceeded the amount of the policy coverage. The plaintiff claimed that the garnishee insurance company negligently and carelessly, and in violation of its duty, failed and refused to settle the case notwithstanding the garnishee knew, or in the exercise of reasonable care, should have known that the defendant was liable to the plaintiffs for damages far in excess of the limits of the policy. The lower court denied the insurer's motion for summary judgment and it appealed. *This Court reversed, holding that the insurer was entitled to a summary judgment in its favor.* The question presented on the appeal was whether or not the liability of the garnishee insurance company alleged in the plaintiff's reply to the garnishee's answer could be reached by garnishment. This court in analyzing Rule 64(D) (Garnishment) of the Utah Rules of Civil Procedure made the following statement:

> "It must be conceded that the purpose of our garnishment staute is to enable a creditor to reach

> and attach property described in Rule 64D belonging to the judgment debtor, in the possession or under the control of a third person. It must be apparent that Maryland Casualty Company was not at any time the holder or possessor of a chose of action against itself belonging to the defendant. The garnishment rule does not contemplate litigation of a chose in action between the creditor and the garnishee. All garnishee is required to do is to hold any property, goods, chattels, choses in action of the defendant which the garnishee has in his possession. Garnishee is not required to litigate his liability for a judgment under a chose in action held by him. If the garnishee surrenders the property of defendant being held by him and pays the money due to defendant from him, he has no further obligation except to truthfully report." * * *

The *Kirkendall* case *supra* held that an unliquidated tort claim is not subject to garnishment. Cox has no claim in tort or contract against Travelers.

The issue is not whether the chose in action will become due after the service of the writ, *but whether or not any chose in action exists*. The language of Rule 64D "whether the same are due or are to become due thereafter" means that the debt or chose in action *exists* and is due at the time the writ is served or will become due thereafter. The rule does not contemplate that a debt or chose in action which may come into existence after the writ is served is subject to garnishment. If Travelers should breach its insurance contract, Cox would have an unliquidated claim for breach of contract. The unliquidated contract claim (which Cox may or may not have at some future date) is no more subject to garnishment than the unliquidated

tort claim in the *Kirkendall* case. In both cases the claim is contingent and subject to the happening of future events which may or may not ripen the claim into a valid judgment.

Defendants contend that the Utah Safety Responsibility Act, has no application to the case at bar.

Section 41-12-21 (f) (1) and (2) of the Act provides:

> "* * * (1) the liability of the insurance carrier with respect to the insurance required by this act shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be canceled or annuled as to such liability by any agreement between the insurance carrier and insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy;
>
> (a) the satisfaction by the insured of a judgment for such injury or damage shall not be a condition precedent to the right or duty of the insurance carrier to make payment on account of such injury or damages * * *"

This section applies to policies that are required as proof of financial responsibility. In *Utah Farm Bureau Insurance Co. v. Chugg,* 6 Utah 2d 399, 315 P.2d 277 (1957), this Court held that Sec. 21 of the Motor Vehicle Safety Responsibility Act applies to those insurance policies required by the Department to be furnished as proof of financial responsibility after the owner or operator has been involved in an accident or has violated the motor

vehicle laws. This court further held that where the policy of insurance in question had not been issued because it was required by the Commission to furnish proof of financial responsibility in conformance with the Act, *the provisions of the Act did not apply to it.*

> *"It being conceded that the policy was not issued because Chugg had been required by the Commission to furnish proof of financial responsibility in conformance with the Act, it fol'ows that the provisions of the Act do not apply to it.* Unless Chugg had been within the purview of the Act when the policy was issued, its provisions, unless illegal, are subject to the same construction as any other contract, in accordance with the expressed intent of the parties." (Italics ours)

The defendants attached to their original memorandum the affidavit of Ralph Westwood, the Director of the Financial Responsibility Division of the State of Utah, in which he stated that at no time had Dennis P. Cox been required to file with such division proof of "financial responsibility" as defined in Sec. 41-12-1 (k) of the Utah Code Annotated (R 95).

Since the policy of insurance issued by Travelers to Anaconda was not required by the Commission to furnish proof of financial responsibility, the terms of the Act do not apply to the policy in question. The policy of insurance issued by Travelers is subject to the same construction as any other contract, in accordance with the expressed intent of the parties.

It is obvious that the language of Sec. 41-12-21 does not apply to the policy of insurance issued by Travelers to Ana-

conda and therefore its liability is not "absolute" as claimed by the plaintiffs. The language of Sec. 41-12-21 U.C.A. does not fix liability on the insurance carrier without a judgment entered against the insured. The Insurance Company is only liable if the insured is negligent and such negligence was a proximate cause of the plaintiffs' injuries. The language "the liability of the insurance carrier with respect to the insurance required by this Act shall become absolute", means that the Insurance Company cannot cancel the policy or attempt to escape its obligation under the policy. Its contractural obligation to the insured is "absolute" but it obviously is not liable to third persons unless the insured is also liable.

Plaintiffs cite *United States v. J. T. Hubbell,* 323 F.2d 197, 200 (5th Cir. 1963) as authority for the proposition that plaintiffs may garnish the alleged contractual right which Cox has against Travelers. That case involved the question of priority of a federal tax lien and the claim of certain contractors to determine which was entitled to the proceeds of a state court judgment. The judgment in the state court had been obtained by Lewis, a painting subcontractor, against the Housing Authority of the City of Dallas, which paid the amount of the judgment into court and interpleaded the United States and the general contractors. Lewis had been required by the Housing Authority to apply a second coat of paint on a housing project at no extra cost to either the prime contractor or the Housing Authority. As a result of this extra work Lewis became insolvent and one of his unpaid debts consisted of withholding taxes due the government. After the filing of the tax lien Lewis entered into an agreement with the

general contractors to give them 35% of the amount recovered from the Housing Authority in consideration of the general contractor's prosecuting the claim. The district court held the general contractors were entitled to the judgment pursuant to the assignment from Lewis. The Circuit Court reversed holding the tax lien was perfected prior to the assignment. In so holding, the court did rule that the tax lien attached to the unliquidated tort claim of Lewis. It is respectfully submitted that the question of when a tax lien attaches has no bearing on the issues in the instant case. There the court held the tax lien attached to an unliquidated tort claim. Here the plaintiffs are attempting to garnish an alleged contract claim. *This court has previously held that an unliquidated tort claim is not subject to garnishment.* See *Paul v. Kirkendall, supra.* A suit involving the priority of a tax lien has no application to an attempted garnishment of an alleged contractual right to obtain personal jurisdiction.

Plaintiffs also cite the case of *Ackerman v. Tobin,* 22 F. 2d 541 (8th Cir. 1927) *cert. den.* 276 U.S. 628, 72 L.Ed. 739, 48 S.Ct. 321 (1928) as *conclusive authority* in favor of the plaintiffs. *This suit involved a claim under a property insurance (robbery) policy and has no application to the case at bar.* The court held that an unadjusted claim for loss under an "insurance policy" is subject to garnishment. The cases cited by the court as authority for this proposition deal with claims under *fire insurance policies.* The courts generally hold that claims under *fire insurance policies* are subject to attachment or garnishment when the proof of loss has been made and the claim has been adjusted.

> "As a general rule, the right of an insured against an insurance company under a policy of insurance on property is subject to attachment or garnishment at the suit of creditors of the insured, at least where proof of loss has been made and the claim has been adjusted." 6 Am. Jur. 2d page 679.

See 38 ALR 1072, 53 ALR 724 (Garnishment of Fire Insurer)

An obligation exists under a fire insurance policy when the fire occurs. No obligation exists under a *liability* insurance policy until the liability of the insured has been established by judgment or agreement.

> "Sec. 210. Generally; right of action in absence of provision therefor. * * * If the contract is treated as a contract of liability insurance, as distinguished from a policy of indemnity insurance against actual loss, *the insurer is subject to garnishment by a person who has recovered judgment against the insured for an injury covered by the policy* where the company has waived any defense which it might otherwise have urged as against the insured. * * *" (Italics ours)
>
> 7 Am. Jur. 2d, page 554.

The question of jurisdiction was not presented in either of the cases cited by plaintiff as authority for their position.

Plaintiffs cannot convert an *in personam* action into an *in rem* action. The Supreme Court of the United States has held that if a suit involves the determination of personal liability of a defendant, he must he brought within its jurisdiction by service of process within the state or by

his voluntary appearance before the proceedings will have any validity.

The footnote in *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 contains the following:

> "The term 'due process of law', when applied to judicial proceedings, means a course of legal proceedings according to those rules and principles which have been established by our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution to pass upon the subject matter of the suit; *and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.*" (Italics ours)

In this case the cause of action against Cox follows him wherever he goes. The plaintiffs can sue Cox in Maryland and if they are successful in obtaining a judgment, then they may garnish the Insurance Company. But to permit a personal judgment to be entered against Cox under the label of an "*in rem* theory" would be completely contrary to the constitutional rights of Cox.

Cox has no chose in action against Travelers. No chose in action will come into existence until plaintiffs obtain a judgment against Cox. Personal jurisdiction is a fundamental prerequisite for an *in personam* action. If Cox has any rights against Travelers they are contingent and unliquidated. This court has held that neither unliquidated tort claims nor unliquidated contract claims are

subject to garnishment. See *Paul v. Kirkendall, Acheson Hardin v. Western Wholesale, supra.*

It is respectfully submitted that Cox has no property in the State of Utah which can be the subject of an in rem action. The order quashing summons should be affirmed.

POINT III

COX WAS NOT IN THE SCOPE OF HIS EMPLOYMENT AT THE TIME OF THE ACCIDENT, SO SUMMARY JUDGMENT IN FAVOR OF ANACONDA WAS PROPERLY GRANTED.

At the pretrial of this action Anaconda moved for summary judgment. (R 133)

The motion was supported by the affidavit of Cox in which he stated:

> "At the time of the accident I was on my way home to have lunch with my wife. I was living at 615 Grand Street, Salt Lake City, Utah. On a number of occasions I used the car to pick up laboratory equipment on my way back to my office in the Kearns Building. I picked up the laboratory equipment at Braun, Knecht & Heimann at 650 West 8th South, Salt Lake City, Utah. I cannot now recall whether I was going to pick up equipment after lunch on the day of the accident.
>
> I intended to return to the Anaconda office in the Kearns Building after lunch, but whether I was going to pick up laboratory equipment, I do not recall at this time.
>
> I had not intention of going into the field after lunch." (R 134-135)

There is nothing in the record to controvert the undiputed fact that Cox was driving home to have lunch with his wife when the accident happened. (Plaintiff's Brief, page 36). Cox stated that *on occasions* he used the car to

pick up lab equipment at Braun, Knecht & Heimann, 850 West 8th South, Salt Lake City, Utah. He could not recall whether he was going to pick up equipment on the day of the accident. Cox lived on the East side of town (Grand Street begins at 965 East 7th South) and the place where he was to pick up equipment was on the West side of town. It is also undisputed that Cox intended to return to the Anaconda office in the Kearns Building after lunch. He had no intention of going into the field. (R 135)

Roland B. Mulchay, the Assistant Chief Geologist in charge of geological work in the west for Anaconda, testified in his deposition that the company cars were not supposed to be used on personal business. (Mulchay deposition p. 10, 11) Mulchay had no knowledge of why Cox had the car at the time of the accident. (Mulchay deposition, p. 13) Mulchay further testified that Anaconda employees were permitted to take company vehicles to their homes in anticipation of field trips the following day. (Mulchay deposition p. 13) Mulchay stated that a Malcolm Kildale, now deceased, was the immediate supervisor of Cox. Mulchay had no knowledge of what Kildale might have authorized on the day of the accident. (Mulchay deposition p. 12)

Anaconda admitted in its answer to plaintiffs amended complaint that Cox was using the vehicle with express permission. At the pretrial Anaconda moved to amend its answer to deny that at the time of the accident Cox was using the vehicle with express permission. The motion to amend was denied by Judge Hanson. (R 133)

Whether Cox was using the vehicle with express permission or implied permission is immaterial. *The con-*

trolling question is whether or not Anaconda received a business benefit from Cox's use of the car.

This court has repeatedly held that an employer is not liable for damage caused by his employee, unless the employee is furthering his employer's business at the time such damage occurs. If the employee is engaged in a purpose of his own, or in purposes other than the master's business, he has departed from the scope of his employment and the master is not liable for his negligence. If the vehicle is being used in the servant's personal or social affairs, the master is not liable.

In *Wright v. Intermountain Motor Car Company,* 53 Utah 176, 177 Pac. 237 (1919) the servant who was employed to demonstrate automobiles, to accommodate an out-of-town customer, took the automobile out after business hours for his own social affairs. This court held, as a matter of law, that a master is not liable for injury caused by its servant where the automobile is being used by the servant for his own purposes.

In *Fowkes v. G.I. Case Threshing Machine Co.,* 46 Utah 502, 151 Pac. 53 (1915) this Court held that the master was not liable for the acts of the servant where, at the time of the accident, the servant was not discharging any duty or transacting any business for the master. This court stated that the test to determine whether a master is liable for his servant is as follows:

> "The test to determine whether a master is liable to a stranger for the consequences of his servant's misconduct is to inquire whether the latter was doing what he was employed to do at the time he caused the injury complained of."

In *Cannon v. Goodyear Tire & Rubber Company of California*, 60 Utah 346, 208 Pac. 519 (1922) the servant was employed to drive a delivery truck. After the servant finished his deliveries on the day of the accident, he drove his truck to his home and used it to move furniture for himself. While the servant was on his way back to the garage, he ran into and injured the plaintiff. This court held that the driver was not acting within the scope of his employment and that the employer was not liable.

In *Saltas v. Affleck*, 99 Utah 65, 102 P. 2d 493 (1940) the servant was employed to drive a delivery truck for the master. The servant was not authorized to take passengers in the grocery delivery truck without permission. On the day of the accident, the servant had made four deliveries when he agreed to give two girls a ride in the truck down to the business section of Salt Lake City. After picking up the girls, he made his last delivery. Thereafter the servant became involved in a collision in which the plaintiff's son was fatally injured. This Court held that the servant's action was not a mere deviation, but was a departure from the course of his employment and the master's responsibility for the servant's act had ceased as a matter of law.

These Utah cases clearly set forth the law in Utah that where a servant is using his master's vehicle in furtherance of his own personal affairs, he is not in the scope of his employment and his master is not responsible for injuries caused by the servant.

When an employee uses his employer's motor vehicle to go from his place of employment to a place to eat, he

is not in the scope of his employment in the absence of some special benefit to his employer.

> "An employee, in using his employer's motor vehicle to go from his work to a place where he intends to eat, is not ordinarily within the scope of his employment, in the absence of some special benefit to the employer, and therefore the employer is not liable for the negligent operation of his motor vehicle during such a trip. The mere fact that the employee's negligence while so doing where there is employer's motor vehicle in going to his meals does not change this rule and render the employer liable under the doctrine of respondeat superior for the employee's negligence while so doing where there is nothing to indicate benefit to the employer, although in some jurisdictions under such circumstances the employer could be held to the statutory liability of an owner for the negligence of one whom he permits to operate his vehicle."

8 Am. Jur. 2d Agency, Section 629

An annotation in 52 ALR 2d 350 entitled "Employer's liability for employee's negligence in operating the employer's car in going to and from work and meals" contains the following statement of the rule concerning employees going to meals.

Going to meals

> "Rule that employee is generally not within scope of employment.
>
> "It has frequently been recognized that an employee using his master's car to go from his work to a place where he intends to eat before returning to

> work is not ordinarily within the scope of his employment, in the absence of evidence of some special business benefit to the employer from this use of the car."

In *Miller v. Hoefgen*, 183 P.2d 850 (New Mexico 1947) an employer volunteered the use of his truck to an employee to go to lunch because the employee had worked one-half hour past his time. The accident occurred while the employee was driving the truck to lunch. The Supreme Court of New Mexico held that the employee was using the truck on a personal errand and was not acting within the scope of his employment.

The court stated:

> *"As we appraise the evidence in the case, the defendant, Hoefgen, as an accommodation to the defendant, Rinner, permitted him to use the truck on a personal errand.* Its use by the defendant, Rinner, did not shorten the lunch period, nor enable him to return to work earlier. There was no previous understanding that Rinner would be permitted to use the truck for working overtime. * * We, therefore, conclude that at the time of the accident Rinner was engaged in a personal mission and that his business relations with the defendant, Hoefgen, were terminated, or at least suspended, prior to the time the injuries were sustained by plaintiffs." (Italics ours)

The act of Cox in driving home to lunch did not bestow any business benefit on Anaconda.

In the case of *Larkins v. Utah Copper Co.*, 127 P.2d 354 (Oregon 1942) cited by plaintiffs, the employee was

returning from a *business trip* when he was involved in an accident with the plaintiff. Although the employee had deviated from his employment in going on a mission of his own, *the accident did not occur until after he had resumed the work of his master.*

Plaintiff's argument that Cox was in the scope of his employment because he was subject to call is without merit. Under this theory no employee would ever go out of the scope of his employment because theoretically he is always subject to call. Any employee *could* be called to handle a special project or replace an absent worker. A judge *could* be called to hear a special motion or sign an order. *The fact that we are all subject to call does not place us in the scope of our employment.* If the call comes, we would not resume our employment until we are engaged in some activity which bestowed a benefit on our employer. *In the instant case Cox did not receive a call to go on a field trip. He had no intention of going into the field after lunch.* (R 134, 135) It is respectfully submitted that the alleged possibility of a call is no evidence that Cox was in the scope of his employment at the time of the accident.

Rule 56(c) of the amendments to the Utah Rules of Civil Procedure effective October 1, 1965, contains the following provision relating to summary judgment:

> "(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts

> thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. *When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.* If he does not so respond, summary judgment, if appropriate, shall be entered against him." (Italics ours)

Summary judgment is a useful tool in the administration of justice. In the instant case the facts are undisputed. Cox's uncontroverted affidavit conclusively shows that he was on his way home to lunch at the time of the accident. He was not engaged in any activity which bestowed a business benefit on his employer. The order granting summary judgment should be sustained.

CONCLUSION

The Utah Rules of Civil Procedure have abolished the age old distinction between special and general appearance. The defendant is now required to raise all defenses, jurisdictional or otherwise, by motion or in the answer or they will be waived. Cox made a "special appearance" out of an abundance of caution to object to the proposed amendment to the complaint on the ground he had no property in the State of Utah which could be made the subject of an in rem proceeding. The objection was directed at the matter of jurisdiction over Cox. If the issue could be raised by motion,

or answer, it could obviously be raised by specific objection. The trial court properly held Cox had made a "special" appearance and had not waived his objection to jurisdiction.

Cox has no "chose in action" against Travelers so there is no property in the State of Utah which can be the subject of an in rem proceeding. Plaintiffs have not acquired jurisdiction over Cox. Plaintiffs cannot acquire an *in personam* judgment against Cox under the guise of an *in rem* action. The absence of personal jurisdiction would render any judgment against Cox a nullity and deprive him of his property without due process of law in violation of his constitutional rights. No action will lie against Travelers until a judgment is obtained against Cox. The summons served on Cox in Bethesda, Maryland, was properly quashed.

Cox was on his way home to lunch at the time of the accident. This activity did not confer a business benefit on Anaconda. The alleged possibility that Cox might have been called to go somewhere is not sufficient to place Cox in the scope of his employment. He never did receive a call and intended to return to the office after lunch. The order granting summary judgment should be affirmed.

Respectfully submitted,

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