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IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES D. CHRISTENSEN and
BETTY CHRISTENSEN, his wife,
Plaintiffs-Respondents

- vs -

HENRY CORDOVA,
Defendant-Appellant

Case No.
11752

APPELLANT'S BRIEF

Appeal from the Judgment of the Third Judicial
District Court for Salt Lake County
Hon. Stewart M. Hanson, Judge

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FILED

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CASES CITED

OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF UTAH

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APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This is an action for personal injuries and property damage arising out of an automobile accident.

DISPOSITION IN LOWER COURT

The case was tried without a jury, after a demand for jury trial was denied, as more completely set forth in Statement of Facts. During the trial, Plaintiff James D. Christensen was permitted to add a claim for his personal injuries, in addition to his claim for property damage. The Court granted Judgment for the Plaintiffs.

STATEMENT OF FACTS

For reasons appearing in this recital, we are separating the facts into two categories.

MATERIAL FACTS

This suit arose out of an automobile accident wherein Defendant drove his car into the rear of the Plaintiffs' vehicle. Liability was clear, and we need not go into more detail.

Mr. Christensen sued for property damage only. Mrs. Christensen sued for personal injuries. The suit was filed on September 4, 1968 (R-1). Attorney Wilde filed an appearance for the Defendant on October 1, 1968 (R-4).

On October 14, 1968, a Stipulation was filed, signed by the attorneys of record, and the Defendant, that the Defendant was uninsured — a peculiar stipulation in a tort action. On November 25th, a Withdrawal of Counsel was signed by the Defendant's Attorney, and signed as received by the Defendant. On the same date, November 25th, a Notice of Readiness for Trial was filed in the Clerk's office. No mailing certificate is attached indicating any notice was given to the Defendant, but indicating that notice was sent to the withdrawn attorney. Nothing appears that the Defendant himself was ever notified, as required by 78-51-36, U.C.A. A doctor's report was attached to the Notice of Readiness for Trial concerning only the injuries of Mrs. Christensen.

On June 19, 1968, five days before the scheduled trial, an Appearance was filed by Defendant's present

Attorney, and simultaneously therewith, a Demand for Jury Trial on the date scheduled, or in the alternative, a Motion for continuance to a later date with a jury trial.

By special agreement between counsel, a hearing was held before the Honorable Bryant Croft, Judge on June 20, 1969. The Court took the matter under advisement, and requested Plaintiffs' Attorney to file an Affidavit, and the Affidavit was immediately filed.

(See Stipulation for addition to record on appeal.)

Plaintiffs' Attorney filed an Affidavit (R-13) dated June 20th which concerned itself only with the actions of the Insurance Company for *Plaintiffs,* and its representatives, which affidavit was in opposition to the Motion for a Jury Trial. Not one allegation was made concerning the actions or omissions of the Defendant himself. Based upon the Affidavit, the Lower Court denied the Motion for a Jury Trial.

Trial, accordingly, proceeded without a jury. During the trial, Plaintiffs' Attorney moved to amend the Complaint in behalf of Mr. Christensen, to include a claim, for the first time, to a personal injury action, which was granted, over the objections of Defendant (R-17).

Judgment was rendered for Plaintiffs as follows:

Betty Christensen—Special Damages .....$ 998.29
General Damages 5,000.00

James D. Christensen—Special Damages $232.50
General Damages..... 750.00
Auto Damages 393.64

IMMATERIAL FACTS

The following facts influenced the Lower Court in its decisions against the Defendant.

The *Plaintiffs* were insured under a Liability Policy containing an Uninsured Motorist Provision. This coverage agrees to pay to the Plaintiffs the amount which they are legally entitled to recover from an uninsured motorist. The policy affords absolutely no insurance to the uninsured motorist. However, the uninsured motorist, (in this case Mr. Cordova), and the Company have a common interest — i.e. that the damages awarded be reasonable for the injuries sustained.

As recited in the Affidavit of Plaintiff's Attorney, negotiations for settlement between Plaintiffs' Attorneys and the insurance company, Reserve Insurance Company, did not result in a settlement. No notice was given to the Defendant personally of any of the negotiations, or of the progress of the suit. No notice was ever given him to secure counsel, or of the impending trial.

Inasmuch as the Plaintiffs and the Insurance Company could not agree on a settlement, and because of the imminence of the trial date, Plaintiffs and the Insurance Company were faced with the following:

1. That Plaintiffs were insistent on proceeding with the trial, which of course, would have been a default proceeding.

2. The insurance company, by the terms of the policy, would not recognize or be bound by a

Default Judgment, inasmuch as the language of the policy specifically provided:

> "No judgment againt any person or organization alleged to be legally responsible for the bodily injury shall be conclusive, as between the insured and the company, of the issues of liability of such person or organization or of the amount of damages to which the insured is legally entitled; unless such judgment is entered pursuant to an action prosecuted by the insured with the written consent of the company." (See Stipulation for Addition to Record on Appeal.)

3. Following the default judgment (had it been secured by Plaintiffs) a separate suit would necessarily be required to test the validity of the judgment, and the defenses under the policy, and the foregoing provision of the policy.

To avoid a multiplicity of suits, and to establish the legal liability of the uninsured motorist, the Company, in effect, agreed to a *jury* trial for that purpose, and to pay the attorney's fees involved. The Defendant, Mr. Cordova, was fully advised of the above, and consented to the arrangement. NO INSURANCE COVERAGE WAS PROVIDED HIM, and it was understood in writing that if the Plaintiffs were paid the amount of the judgment, the judgment would not be satisfied. Further, the Company reserved the right given by the policy, to take legal action in the name of the insured to recover said amount from the Defendant. However, again, the Defendant and the Company did not have a conflict in their mutual desire to establish the damages as reasonably as possible.

For the above reasons, L. E. Midgley, with Defendant's permission, appeared as Attorney for the Defendant and demanded a jury trial on the same date as the appearance was filed. The Plaintiffs' Attorneys successfully resisted the motion for a jury trial, and over Defendant's objections a non-jury trial was held.

POINT ONE

THE COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT A JURY TRIAL.

We fully appreciate the pronouncements of this Court to the effect that where a demand for jury trial is not timely made, it is in the sound discretion of the Trial Court as to whether a belated demand for jury trial will be granted.

Thompson vs. Anderson, 107 Ut. 331, 153 P2d 665.

Hunter vs. Michaelis, 114 Ut. 242, 198 P2d 245.

Webb vs. Webb, 116 Ut. 115, 209 P2d 201.

Farmers and Merchants Bank vs. Universal C.I.T., 4 Ut.2d 155, 289 P2d 1045.

James Manufacturing Company vs. Wilson, 15 Ut.2d 210, 390 P2d 127.

Sweeney vs. Happy Valley, Inc., 18 Ut.2d 113, 417 P2d 126.

The true test, we submit, for the Court to consider in granting or denying a belated demand for jury trial, is whether excusable neglect on the part of the party demanding the jury, is shown.

In *Thompson vs. Anderson, Supra,* this Honorable Court stated:

> "Nor is it an abuse of discretion to fail to grant a demand for a jury trial when made late, *if no excuse is shown for failure to make a demand within the time allowed by statute.*" (Emphasis ours)

In *Farmers and Merchants Bank vs. Universal C.I.T.,* Supra. this Court again stated:

> "Where, as here, *no valid excuse* for the failure to make the demand timely was offered, there is no abuse of discretion on the part of the Trial Court in denying a later demand."

In the instant case, the Defendant was without counsel on the very day a Certificate of Readiness for Trial was filed, and even that Notice was not served on the Defendant personally. He was never notified to secure counsel. Many months later, the clerk, over the signature of the Presiding Judge, forwarded a Notice of the trial date to the Plaintiffs' Attorneys and to the attorney who had long since withdrawn. That Notice (R-10) in the last paragraph states:

> "This matter is set for a non-jury trial, unless the jury fee has been paid heretofore. If a jury trial is desired, the statutory fee must be paid no later than 10 days from the date of this letter, with notice thereof being served on opposing counsel."

NO NOTICE OF TRIAL DATE WAS GIVEN THE DEFENDANT AND A COPY OF THE FOREGOING LETTER WAS NOT FORWARDED TO HIM.

When Defendant's present Attorney filed his Appearance, only six days before the scheduled trial, the

Defendant had been without representation by an Attorney for almost nine months, during which time, unknown to him, there was a fight going on in the bleachers, involving an insurance company he probably didn't know existed.

When his present Attorney moved for a jury trial immediately upon his filing the appearance, and upon argument of the Motion, the Honorable Judge Croft requested an Affidavit of the Plaintiffs' Attorneys concerning the fight in the bleachers, BUT NO TIME WAS GIVEN THE DEFENDANT PERSONALLY to file a counter affidavit, for the simple reason that no time was left before the trial date.

Never in the spotty career of the writer, have we seen first hand such a complete lack of interest of all parties, including the Court, of the rights of a litigant. Never have we seen an Affidavit covering absolutely immaterial actions of a non-litigant used so effectively in prejudicing the rights of a litigant.

In this case, we are concerned with the Defendant, Mr. Cordova, and not with Reserve Insurance Company, who had the unmitigated gall to disagree with Plaintiffs' Attorneys on the value of Plaintiffs' claim against the Defendant.

POINT TWO

THE DEFENDANT, BY RECEIPTING HIS ATTORNEY'S NOTICE OF WITHDRAWAL, IS DEEMED TO BE APPEARING PRO SE, AND FAILURE TO GIVE HIM NOTICE OF ALL SUBSEQUENT PROCEEDINGS WAS REVERSIBLE ERROR.

Article I, Sec. 11, Utah Constitution provides:

> ". . . and no person shall be barred from prosecuting or defending before any tribunal in the State, by himself or counsel, any civil cause to which he is a party."

78-51-36, Utah Code Annotated States:

> "NOTICE TO APPOINT SUCCESSOR — When an Attorney dies, or is removed or suspended, or ceases to act as such, a party to an action or proceeding for whom he was acting as Attorney must before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney *or to appear in person.*" (Emphasis added)

We are well aware of this Court's decision in *Security Adjustment Bureau, Inc. vs. West,* 20 Ut. 2nd 292, 437 P2d 214, and we agree with Mr. Justice Henriod's comment in footnote 4 to the effect that the rule is subject to "some legitimate criticism and analysis."

The "analysis," not considered in the above case, is clear. When a Defendant "appears" by counsel, the later withdrawal by his Attorney does not, and cannot alter the fact that the Defendant has still "appeared" in the law suit. His Answer to the Complaint denying the Plaintiffs' allegations is not affected, and remains as a general denial. By simple subtraction, therefore, when his Attorney withdraws, the Defendant's "appearance" is without counsel, or pro se.

The fact that the Defendant is not schooled in the niceties of pleading and practice is of no concern. He

has a constitutional right to be notified of all subsequent developments. If he receives notice of each step in the litigation, and takes no action, he is properly bound by the ultimate conclusion of the case.

But if it be the decision of the *Security Adjustment* case that it is justice and fair play to completely ignore the rights of a litigant even though his Attorney has withdrawn (when his rights should be more closely scrutinized) the facts in the case at bar are clearly distinguishable.

The Notice of Withdrawal of Defendant's Attorney was signed as received by the Defendant personally. By that action, he not only acknowledged but *consented* to the withdrawal. He also effectively "appeared" individually. Notice of this was given to Plaintiffs' counsel.

The form of his appearance is immaterial. The law is interested in justice, not forms. For example, a long hand note written by a Defendant to the Clerk of the Court, or the Court, in answer to a Summons and Complaint served on him, is universally accepted as an effective Answer, even though it does not in any way comply with the requirements of the Utah Rules of Civil Procedure. Certainly, in that analagous situation, all further notices and proceedings must be given to the Defendant, whether or not there is a further requirement that he be notified to secure counsel.

We further submit that there is a long standing custom and practice of the District Courts, and particu-

larly the Third District, that when an Attorney withdraws, the other party must give notice to the unrepresented party to secure counsel. If he does not, notices are mailed to him personally.

After his Attorney withdrew, the Defendant was completely ignored by Plaintiffs' Attorneys and the Clerk of the Court. The Honorable Presiding Judge sanctioned those actions denying this Defendant the right to represent himself, if he so chose.

The Defendant, therefore, is entitled to a new trial.

POINT THREE

THE TRIAL COURT ERRONEOUSLY PERMITTED PLAINTIFF JAMES D. CHRISTENSEN TO ADD A CLAIM OF PERSONAL INJURIES DURING THE TRIAL.

Again we are discussing the interests of the Defendant, Mr. Cordova, and not Reserve Insurance Company, Plaintiffs' insurer. There is no question that Reserve was aware of the claim for injuries by Mr. Christensen, which were advanced after the law suit was started. But the Defendant, personally, was completely unaware of such a claim. While he was originally represented by Attorney Wilde, no claim for injuries was advanced either in the Complaint, or otherwise. No Notice was given him of such a claim until during the progress of the trial. During the trial, the amendment was objected to by Defendant, through his Attorney, but the Honorable Trial Judge permitted the amendment and Judgment was awarded for injuries which Defendant had never known existed.

Rule 15 (a) AMENDMENTS, U.R.C.P.

"A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

Rule 15 (b) AMENDMENTS TO CONFORM TO THE EVIDENCE, U.R.C.P.

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the grounds that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court

shall grant a continuance, if necessary, to enable the objecting party to meet such evidence."

In *Hjorth vs. Whittenberg,* 121 Utah 324, 241 P2d 907 held that the test of whether the Amendment should be granted, was whether the amendment imported a new and different cause of action.

Certainly the addition of a new claim for personal injuries while the trial is in progress, injects a new and different cause of action, the merits of which create new and different defenses than to a claim solely for property damage.

True, Plaintiffs' insurer had been advised of the claim, as was Defendant's present Attorney. But by the same token, so were Plaintiffs' Attorneys, who failed to move for an amendment, as required by the Rules. The *Defendant* had no knowledge of such a claim, and his rights are at issue here.

The allowance of the amendment, therefore, was prejudicially erroneous.

Respectfully submitted,

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Appellant

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