1970

James D. Christensen and Betty Christensen v. Henry Cordova : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

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

vs.

HENRY CORDOVA,
Defendant and Appellant.

Case No.
11752

BRIEF OF RESPONDENTS

Appeal From the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable Stewart M. Hanson, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

vs.

HENRY CORDOVA,
Defendant and Appellant.

Case No. 11752

BRIEF OF RESPONDENTS

STATEMENT OF CASE

Plaintiffs filed this action against defendant to recover damages for personal injuries and property damage. It is from the proceedings of the Court below that defendant appeals.

DISPOSITION IN THE LOWER COURT

Plaintiffs filed their action against defendant for personal injury and property damage arising out of an automobile accident that occurred on the 24th of August, 1968. Defendant admitted liability and the issue of damages was tried to the Honorable Stewart M. Hanson,

sitting without a jury. The trial court entered judgment in favor of plaintiff Betty Christensen and against defendant for medical expenses in the sum of $998.29 and general damages in the sum of $5,000.00, and in favor of plaintiff James D. Christensen and against defendant for the following amounts: Medical expenses $232.50, property damage $393.64, and general damages in the sum of $750.00.

The trial court refused to grant defendant a jury trial, and defendant appealed.

RELIEF SOUGHT

Respondents seek to have the action of the trial court affirmed.

STATEMENT OF FACTS

In order for the appellate court to fully understand what has transpired in this case from its initiation to the appeal, respondents will set out the facts in detail.

On the 24th day of August, 1968, at the intersection of 2400 South Main, Bountiful, Davis County, Utah, defendant drove his car into the rear of an automobile owned and driven by plaintiff James D. Christensen, and in which his wife was riding as a passenger (R. 1, 4). Both plaintiffs sustained bodily injury as a result of the accident, and Mr. Christensen's automobile was damaged.

At the time of the accident, plaintiffs were insured under a policy of automobile liability insurance which

protected them against injury and damage from any uninsured motorist (R. 14). On August 30, 1968, plaintiffs employed Mr. Carman E. Kipp of the firm of Kipp and Christian to represent them in connection with filing suit against Mr. Cordova for the injury and damage sustained by them in the accident (R. 13). Accordingly, suit was filed in the District Court of Salt Lake County seeking damages for damage to plaintiffs' automobile and for bodily injury to plaintiff Betty Christensen, for special medical and hospital expenses incurred and general damages in the sum of $10,000.00 (R. 2). Defendant retained attorney Eldred J. Wilde to represent him in defense of plaintiffs' action, and accordingly, an answer was filed in his behalf on October 1, 1968 (R. 4). On October 14, 1968, defendant, by and through his counsel of record, admitted that on the day of the automobile accident in question he was not insured under any policy of automobile liability insurance and was at that time an uninsured motorist within the definition of that term. A stipulation to that effect was filed by the parties and made part of the court file and the record in this case (R. 5).

On November 22, 1968, Carman E. Kipp, as counsel for plaintiffs, filed a Notice of Readiness for Trial requesting a non-jury trial and duly mailed a copy to Eldred J. Wilde, counsel for defendant, at his office, 616 Judge Building, Salt Lake City (R. 7). Thereafter, on November 25, 1968, and presumably after he had received plaintiffs' Notice of Readiness for Trial, Mr. Wilde, defendant's counsel, filed his Withdrawal of

Counsel which was received by the court on November 26. A copy of the withdrawal was mailed to plaintiff's attorney on November 26 which was several days after the filing of the Notice of Readiness for Trial (R. 6, 7). The record in this matter shows that on March 20, 1969, the District Court of Salt Lake County, Judge Aldon J. Anderson, set the matter for non-jury trial on June 24, 1969. Copies of the letter setting the case for trial were sent to both Mr. Kipp and Mr. Wilde (R. 10).

In September of 1968, Mr. Frank Nichols of Frank Nichols and Guiver Company, insurance adjusters, contacted Mr. Kipp, plaintiffs' counsel, and advised him that Mr. L. D. Wrigley of C. W. Reese Company, insurance adjusters, was the adjuster for Reserve Insurance Company on the claim for bodily injury sustained by both Mr. and Mrs. Christensen under the uninsured motorist provisions of their automobile liability insurance policy with that company (R. 14). Therefore, on September 13, 1968, Mr. Kipp wrote a letter to Mr. Wrigley advising him that an action had been filed by the Christensens against Mr. Cordova. The letter also advised the adjuster that Mr. Kipp was representing Reserve Insurance Company's insureds, and copies of the Summons and Complaint were enclosed in the letter along with a list of medical bills and other specials for both plaintiffs incurred up to that itme (R. 14).

On numerous occasions thereafter, Mr. Kipp contacted Mr. Wrigley or someone in the office of C. W. Reese Company advising them of the status of the law-

suit and furnishing them with up to date medical specials as incurred by both plaintiffs and supplying them with current medical reports (R. 14). As a part of the continuous contact between Mr. Kipp and the adjuster, Mr. Wrigley, on behalf of the company, requested that both Mr. and Mrs. Christensen submit to an independent medical examination by Dr. Reed Clegg. Accordingly, the plaintiffs were examined by Dr. Clegg and copies of the medical report were sent to the adjuster. A copy of the stipulation between plaintiffs and defendant wherein Mr. Cordova admitted that he did not have automobile liability insurance at the time the accident occurred was also sent to the adjuster (R. 14).

On two occasions, Reserve Insurance Company, by and through its adjuster, requested that Mr. Kipp submit an offer of settlement on the claims of both plaintiffs. Offers to settle were submitted to the company pursuant to both requests, neither of which was accepted and without any counter-offer having been made by the company (R. 15).

On or about June 18, 1969, Reserve Insurance Company employed Mr. L. E. Midgley to represent defendant Henry Cordova because of the uninsured motorist provision in the policy issued to plaintiffs, and on that day, Mr. Midgley filed a Demand and Motion for Jury Trial and mailed a copy of same to plaintiffs' attorneys. The Motion for a Jury Trial was resisted by counsel for plaintiff who advised the presiding judge, Bryant Croft, of the matters essentially set forth in the statement of

facts herein. Plaintiffs' counsel was instructed to file his affidavit setting forth the facts as related at the hearing on the motion. The affidavit was filed (R. 13-15), and the Motion for a Jury Trial was denied on June 23, 1969 (R. 12). Defendant did not file his counter affidavit to the assertions made by plainitffs' counsel as to what the facts were in this matter, nor did he request permission to file one.

The case was tried on June 24, 1969, before the Honorable Stewart M. Hanson, sitting without a jury. At the commencement of the trial, Mr. Midgley, counsel for the insurance company and defendant, admitted liability on the part of Mr. Cordova. Plaintiffs' counsel made a motion to include the bodily injury claim of plaintiff James D. Christensen for trial, which motion was granted over Mr. Midgley's objection (R. 17).

Counsel for the insurance company and Mr. Cordova did not call any witnesses at the trial but contented himself with cross-examining plaintiffs' witnesses. Dr. Reed Clegg, who performed the independent medical examination on behalf of the insurance company, was not called by the company's counsel to reveal to the court his findings as to the nature and extent of the injuries of both plaintiffs.

It is from the court's refusal to grant a jury trial in this action that Reserve Insurance Company prosecutes this appeal.

ARGUMENT

POINT I

THE JUDGMENT AND PROCEEDINGS IN THE LOWER COURT ARE PRESUMED TO BE CORRECT BY THE REVIEWING COURT ON APPEAL.

The cases overwhelmingly support the general proposition of law stated in Point I., and especially as it applies to the instant case. No cases have been found by respondents stating a contrary position.

Not only is there a presumption of validity on appeal of the judgment and proceeding in the lower court, but the burden is on the appellant affirmatively to demonstrate error, and in the absence of such the judgment must be affirmed by the reviewing court. *Leithead v. Adair,* 10 U.2d 282, 351 P.2d 956; *Coombs v. Perry,* 2 U.2d 381, 275 P.2d 680. Again, on appeal the judgment of the trial court is presumptively correct and every reasonable intendment must be indulged in by the appellate court in favor of it. *Burton v. Zions Co-operative Mercantile Institution,* 122 Utah 360, 249 P.2d 514; *Nagle v. Club Fontainblue,* 17 U. 2d 125, 405 P.2d 346; *Petty v. Gindy Manufacturing Corporation,* 17 U.2d 32, 404 P.2d 30.

This proposition of law is correct and is binding upon the appellate court whether the proceedings in the lower court are before a judge only or a judge and jury.

Other cases supporting this proposition are *Charlton v. Hackett,* 11 U.2d 389, 360 P.2d 176; *Universal In-*

vestment Company v. Carpets, Inc., 16 U.2d 336, 400 P.2d 564; *Taylor v. Johnson*, 15 U.2d 342, 398 P.2d 382; *Wendelboe v. Jacobson*, 10 U.2d 344, 353 P.2d 178; *Hadley v. Wood*, 9 U.2d 366, 345 P.2d 197; *Daisy Distributors, Inc., Local Union* 976, *Joint Council* 67, *Western Conference of Teamsters*, 8 U.2d 124, 329 P.2d 414.

POINT II.

THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT A JURY TRIAL.

Rule 38 (b), Utah Rules of Civil Procedure, provides as follows:

> "Any party may demand a trial by jury of any issue triable of right by a jury by paying the statutory jury fee and serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than shall be fixed by rule of the court in which the action is pending. Such demand may be endorsed upon a pleading of the party."

This particular provision reserving the right to a trial of any issue triable of right by a jury not to be in conflict with the Constitution of the State of Utah, Article I, Sec. 10. *State v. Cherry*, 22 Utah 1, 60 Pac. 1103.

It is obvious, then, that the failure of a party to pay the statutory jury fee and make his demand for a jury trial in accordance with the rules promulgated by the court where the action is pending constitutes a waiver by that party of a trial by jury. Rule 38(d), Utah Rules of Civil Procedure.

In the instant case, plaintiffs counsel filed a Notice of Readiness for Trial demanding that the matter be set for non-jury trial. A copy of said notice was duly mailed to Eldred J. Wilde at his office on November 22, 1968 (R. 17). It is important to note that Mr. Wilde was still acting as defendant's attorney at that time. He did not file his withdrawal as counsel until November 25, 1968 (R. 6). There can be no doubt that defendant was put on notice that plaintiff demanded a non-jury trial and certainly at that time he took no action to demand a jury trial.

Subsequently, and on March 20, 1969, the District Court of Salt Lake County, the court in which the case was pending, sent notice to both parties by sending said notice to their respective counsel, and in the case of defendant, his last known counsel, which notice provided in part as follows:

> " * * * 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 ten days from the date of this letter, with notice thereof being served on opposing counsel.
>
> Very truly yours,
> s/ Aldon J. Anderson
> Aldon J. Anderson
> Presiding Judge
> Courtroom No. 9
> 5th Floor, Courts Building
> 240 East 4th South
> Salt Lake City, Utah
>
> AJA:mts
> cc: Eldred J. Wilde
> 616 Judge Building"

Whether or not Mr. Wilde advised defendant of his receipt of the notice from the District Court is not known; however, the court acted properly in sending the noitce to Mr. Wilde since he was defendant's last known attorney and no notice had been sent to either plaintiffs or the court of the appearance of or the name and address of new counsel.

Title 78-51-34, Utah Code Annotated, 1953, provides as follows:

> "Change of attorney.—The attorney in any action or special proceeding may be changed at any time before judgment or final determination as follows:
>
> (1) Upon his own consent, filed with the clerk or entered upon the minutes.
>
> (2) * * * * * "

The next following section of the Code, Title 78-51-35, states:

> "Effect—Notice of change.—When an attorney is changed as provided in the next preceding section, written notice of the change and of the substitution of a new attorney or of the appearance of the party in person must be given to the adverse party; until then he must recognize the former attorney."

The record shows that Eldred Wilde, defendant's attorney, voluntarily withdrew as counsel for Mr. Cordova pursuant to 78-51-34(1), Utah Code Annotated, 1953. After his withdrawal and until Mr. Midgley appeared as counsel for defendant, both the court and plaintiffs counsel were compelled to recognize Eldred

Wilde as attorney for defendant pursuant to 78-51-35, Utah Code Annotated, 1953. This was necessitated by the failure of defendant and Reserve Insurance Company to notify counsel or the court of the name and address of defendant's new lawyer. As a matter of fact, neither Mr. Cordova nor Reserve Insurance Company were interested enough to even bother about new counsel for defendant until sunrise of the trial day.

In the case of *Salina Canyon Coal Company v. Klemm,* 76 Utah 372, 290 Pac. 161, the Utah Supreme Court held, on construing the provisions of 78-51-35, Utah Code Annotated, 1953, that an attorney who has appeared for a party in a case may be treated as such by opposing counsel until opposing counsel are notified by the dismissal or change of attorneys. A Notice of Appeal may be served upon him and that shall be sufficient notice to the opposite party.

Title 78-51-36, Utah Code Annotated, 1953, is not in point or controlling in this case since Mr. Cordova's attorney, Eldred Wilde, did not die, nor was he removed as counsel, nor was he suspended from the practice of law, nor did he cease to act as an attorney. He only ceased to act as attorney for defendant while remaining very actively engaged in the practice of law.

Our high court has also addressed itself to the problem of interpreting 78-51-36, Utah Code Annotated, 1953. In the case of *Security Adjustment Bureau, Inc. v. West,* 20 U.2d 292, 437 P.2d 214, the court held that this particular statute did not entitle defendant to have a de-

fault judgment set aside which had been taken against him when his attorney withdrew even though plaintiff had not demanded that defendant get new counsel and there was nothing in the record to indicate that defendant's withdrawing counsel had died, was removed or was suspended from the practice of law.

Plaintiffs could not agree with defendant more when he states the law to the effect that where a demand for a jury trial is not timely made, it is in the sound discretion of the trial court as to whether a belated demand for a jury trial will be granted. *Thompson v. Anderson,* 107 Utah 331, 153 P.2d 665; *Hunter v. Michaels,* 114 Utah 242, 198 P.2d 245; *Webb v. Webb,* 116 Utah 115, 209 P.2d 201;*Farmers and Merchants Bank v. Universal C.I.T.,* 4 U.2d 210, 390 P.2d 127; *Sweeney v. Happy Valley, Inc.,* 18 U.2d 113, 417 P.2d 126.

Defendant, Mr. Cordova, was not without counsel on the day that the Notice of Readiness for Trial was filed. Mr. Cordova knew that his counsel had withdrawn for he received a copy of the Notice of Withdrawal on November 25, 1968, the same day it was mailed to plaintiffs' counsel. Undoubtedly, Mr. Wilde advised defendant of the Notice of Readiness that had been filed. Neither Mr. Cordova nor Reserve Insurance Company, his alter ego, took any action to have new counsel appointed for defendant until five days before the trial. Until then the court and counsel for plaintiffs recognized Eldred Wilde as defendant's attorney.

After sitting on their hands for some seven months, the insurance company breathlessly rushed into court on June 20, 1969, waving its legal arms shouting platitudes about the right of defendant to a jury trial. It is interesting that the company had never shown so much interest before in the rights of Mr. Cordova and even before hiring Mr. Midgley it reserved its rights under the Christensen policy giving it the right to recover against Mr. Cordova any amount the company is required to pay plaintiffs.

This is a strange relationship indeed unless we realize that Reserve Insurance Company is not at all concerned about the rights of the uninsured defendant but only with what result will ultimately affect its inner pocket.

POINT III.

THE DEFENDANT, BY RECEIPTING HIS ATTORNEY'S NOTICE OF WITHDRAWAL, WAS NOT DEEMED TO BE APPEARING PRO SE, AND FAILURE TO GIVE HIM NOTICE OF ALL SUBSEQUENT PROCEEDINGS WAS NOT REVERSIBLE ERROR.

In the interest of brevity, plaintiffs incorporate the applicable and relevant portions of Point II into Point III of this brief.

Defendant's point that after the withdrawal of his counsel he was deemed to be appearing pro se and it was error to fail to personally give him notice of all

subsequent proceedings is not well taken. The law and discussion under Point II of this brief is cited and especially as that discussion relates to 78-51-34, Utah Code Annotated, 1953.

But the gut issue in this case is not at all whether Mr. Cordova had notice of the trial setting but whether Reserve Insurance Company was aware of the status of the case at all times. Mr. Cordova never employed an attorney to represent him after Eldred Wilde withdrew as his counsel. He did not approach the insurance company and request that it obtain legal help to assist him in his defense of this case. The company contacted him, explained to defendant what it proposed to do and the greatest effort to which it could spur defendant was to merely obtain his consent to having the insurance company's attorney represent him.

Surely Mr. Cordova was advised by the company that he would be protected from plaintiffs' claim and that it would employ their counsel to do it. However, the company, while assuring defendant that in the interests of justice it would protect the downtrodden and the uninsured, especially if the company could be injured in any way by its not doing so, and at the same time reserved its right to collect from this same downtrodden and uninsured any amount that his savior should have to pay plaintiffs.

The statements in Appellant's Brief to the contrary notwithstanding, we are confronted here, not with Mr. Cordova, but with Reserve Insurance Company who

was not responsible enough to reject the offers of settlement solicited from plaintiffs' counsel or to make a counter-offer.

One more interesting aspect of the case should be noted here. Appellant has made no issue with the amount of the judgment awarded plaintiffs and has therefore impliedly admitted that the amount awarded was reasonable—and so it was. Other than having the case tried by a jury, appellant makes no claim of any prejudicial error in the trial. Defendant does not contend that if the matter is remanded for a jury trial that the amount of damages will be less than awarded by the court. Certainly he could not hope to have eight just men and true pass on the liability of the case since counsel for the insurance company admitted liability at the trial.

It is obvious that a new trial would achieve nothing but a multiplicity of suits.

POINT IV.

THE TRIAL COURT DID NOT ERRONEOUSLY PERMIT PLAINTIFF JAMES D. CHRISTENSEN ADD A CLAIM OF PERSONAL INJURIES AT THE TIME OF THE COMMENCEMENT OF THE TRIAL.

Again it should be pointed out that we are here discussing Reserve Insurance Company and not Mr. Cordova. In this case, judgment has been entered against defendant but no effort has been made by plaintiffs to satisfy the judgment against him even though no supersedeas bond has been filed in this matter. Plaintiffs have

an insurance policy with Reserve Insurance Company whereby the company agrees to pay plaintiffs for damages caused to them by any uninsured motorist. Mr. Cordova is uninsured. The amount of the judgment is within the policy limits of the uninsured motorist coverage provided. How says, then, appellant that the company is not involved. It is attempting to disguise, hide and mingle its monetary interests with those of an uninsured and probably impecunious individual in order to gain sympathy for its dollar position.

After plaintiffs' counsel filed the complaint setting forth the bodily injury claim of plaintiff Betty Christensen and the property damage claim of plaintiff James D. Christensen, Mr. L. D. Wrigley, the company's adjuster, was notified of the bodily injury claim of Mr. Christensen. Copies of medical bills and reports on Mrs. Christensen were mailed to the adjuster. On behalf of the company, he demanded an independent medical examination on both plaintiffs by a doctor of the company's choosing. Twice the adjuster requested that offers of settlement be made for the claims of both plaintiffs and twice offers were made. On neither occasion did the offer generate a yea or nay from the Company.

It is not known by counsel for plaintiffs whether Mr. Midgley was employed by L. D. Wrigley, the adjuster, or directly by the company. In either event, he would have the company's file on the whole case which would reveal the contents of the adjuster's file. How says appellant, then, that the claim for bodily injury of

plaintiff James D. Christensen came as a bolt out of the blue so that the company's counsel was shocked into insensibility at the trial and was caused to stumble about the court room in wonder and amazement at the recent turn of events.

Plaintiffs respectfully assert that the real party in interest in this case, Reserve Insurance Company, was well aware of the bodily injury claim of Mr. Christensen and certainly well knew that such a claim would be asserted at the trial and that because of its course of conduct with plaintiffs' counsel, waived its right to resist the presentation of said claim at that time and is estopped from so resisting it.

CONCLUSION

Based upon the foregoing facts, authorities and argument, plaintiffs urge the Court to affirm the judgment of the trial court and award plaintiffs their costs expended on this appeal.

Respectfully submitted,

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