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# Alfred Duane Johnson v. The Employers' Fire Insurance Company Of Boston, Massachusett : Brief of Defendant And Respondent

# In the Supreme Court of the State of Utah

ALFRED DUANE JOHNSON,
*Paintiff and Appellant,*

vs.

THE EMPLOYERS' FIRE INSURANCE COMPANY OF Boston, Massachusetts,
*Defendant and Respondent.*

Case No. 11949

## BRIEF OF DEFENDANT AND RESPONDENT

Appeal from Judgment of Dismissal
The Third District Court in and For Salt Lake County
The Honorable Merrill C. Faux, Judge

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# INDEX



## CASES CITED

TABLE OF CONTENTS — Continued



AUTHORITIES CITED

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## NATURE OF THE CASE

This is an action for a declaratory judgment brought by an injured person against the liability insurer of the person alleged to have caused the injuries.

## DISPOSITION OF THE CASE IN THE LOWER COURT

The lower court, The Honorable Merrill C. Faux, District Judge, dismissed this action for failure of the Complaint to state a claim upon which relief can be granted.

## RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the Judgment of Dismissal.

## STATEMENT OF FACTS

It is alleged in the Complaint that Respondent The Employers Fire Insurance Company issued an automobile liability insurance policy to Homer E. Richard, which policy was in effect when Mr. Richard became involved in an automobile accident in Parley's Canyon, Salt Lake County, Utah, as a result of which accident Appellant Alfred Duane Johnson brought suit against Mr. Richard (R. 1).

It is also alleged that Employers' has denied that its policy provides coverage for the liability, if any, of Mr. Richard as a result of the accident (R. 2).

Mr. Johnson asserts by way of conclusion from those facts that he is entitled, as a third party beneficiary of the policy, to the benefits of the policy and that Employers' denial of coverage is an anticipatory breach of the terms of the policy (R. 2).

The demand of the Complaint is for determination that the policy was in effect at the time of said accident and that Employers' is obligated to pay any judgment in the suit brought by Johnson against Richard (R. 3).

Employers filed a Motion to Dismiss which was heard and granted on December 10, 1969. The Judgment of Dismissal recites the grounds accepted by the court, namely, that a plaintiff in a personal injury suit may not maintain an action against the liability insurer of the defendant before judgment against the defendant, that the claim asserted by Johnson was not appropriate for declaratory relief and that Johnson was not a proper party to an action determining the legal effect of the policy (R. 22).

This appeal followed.

## ARGUMENT

### POINT I.

### A PLAINTIFF IN A PERSONAL INJURY SUIT MAY NOT MAINTAIN AN ACTION AGAINST THE LIABILITY INSURER OF THE DEFENDANT PRIOR TO JUDGMENT AGAINST THE DEFENDANT.

It is, of course, a well settled general rule that in the absence of a contractual provision or statute to the contrary, an injured person has no right to direct action against an insurer of the alleged wrongdoer.

In *Young v. Barney,* 20 Utah 2d 108, 433 P.2d 846 (1967) Young sought to join Barney's insurance company as a party defendant. The trial court dismissed the Complaint against the insurance company. This

Court affirmed saying that the rule regarding joinder of parties was never intended to change the practice which had been so long established and consistently followed in the courts of Utah and that it was not proper to join a tort action based on negligence with an action supplemental thereto in contract.

Appellant seeks to distinguish *Young v. Barney*, supra, on the ground that his is a suit for declaratory judgment, but cites no authorities making this distinction. If there is a distinction, it is not one from which different consequences follow.

In either case, the injured person is trying to enforce a contract to which he is not a party and in which he has no present interest.

In *Southern Cal. Edison Co. v. State Farm Mutual Auto. Ins. Co.*, (Cal. D.C. App. 1969) 76 Cal. Rptr. 909. the plaintiff sought declaratory relief, among other things, against the wrongdoers and their insurers for damage to power poles struck by insured automobiles. The court held that the insurance companies were not proper parties to the action until judgment had been obtained against their insuredss, citing *Spencer v. State Farm Mut. Auto Ins. Co.*, 152 Cal. App. 2d 797, 313 P.2d 900 (1957).

## POINT II.

## APPELLANT'S CLAIM IS NOT APPROPRIATE FOR DECLARATORY RELIEF.

It is established in Anglo-American practice that the court in its discretion may refuse to render a declaratory judgment where such judgment would not terminate the uncertainty giving rise to the proceeding. *Gray v. Defa*, 103 Utah 339, 135 P.2d 251 (1943).

This rule was incorporated in the Utah Declaratory Judgment Act, and the Uniform Act, in this language:

> "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Section 78-33-6, U.C.A., 1953.

In this case, if Employers were to successfully defend this suit, the judgment would not bind its insured who is not a party. Therefore, Employers could be subjected to a second suit by its insured after judgment in the injury suit with the possibility of inconsistent results.

The court should not entertain an action for declaratory judgment when the judgment would not bind a party to the contract sought to be interpreted. See *South Kamas Irr. Co. v. Provo River Water Users Assn.*, 10 Utah 2d 225, 350 P.2d 850 (1960).

The court should consider the absence from the controversy of a party who has an interest and consider the danger of inconsistent decisions, the desirability of avoiding a multiplicity of actions and be reluctant to enter a judgment that will not end litigation. *State, Department of Highways v. Crosby,* (Alaska, 1966) 410 P.2d 724.

Judge Faux considered these things and concluded appellant's claim "not appropriate for declaratory relief." (R. 22).

## POINT III.

### APPELLANT IS NOT THE PROPER PARTY TO MAINTAIN AN ACTION DETERMINING THE LEGAL EFFECT OF A POLICY OF INSURANCE BETWEEN RESPONDENT AND ANOTHER.

Appellant is not a party to the insurance contract. He has no interest in it until he has obtained a judgment against the insured. See *Ammerman v. Farmers Ins. Exch.* 19 Utah 2d 261, 430 P.2d 576 (1967).

A party seeking declaratory relief must have a legally protectible interest in a controversy ripe for judicial determination. *Lyon v. Bateman,* 119 Utah 434, 228 P.2d 818 (1951).

The reverse of this coin was considered in *Utah Farm Bureau Ins. Co. v. Chugg*, 6 Utah 2d 399, 315 P.2d 277 (1957). There the insurer brought a suit for declaratory judgment against its insured and the driver who was in an accident with the insured to determine the insurer's obligations under the automobile liability policy.

This Court held that a person who claims to be damaged by the negligent act of another is not a proper party to an action by the insurer whereby a declaratory judgment its sought declaring the legal effect of the terms of the policy, saying:

> "The 'transaction' involved in this action is one between the insurer and insured, namely, their contract. Such contract can be construed without reference to any liability having accrued thereunder. This being so, there is no issue of law or fact in common between the insurer and the plaintiff, or potential plaintiff, to a tort against the insured. The tort victim has *no present legal interest* in the insurance contract. To drag him into the declaratory judgment action is to import into it a totally different controversy, and then assert that there are issues of law or fact in common. Indeed, if such tort victim is a proper party to the present action, then it would appear that the insurance company, and other companies similarly situated, is a proper party to a tort action against the insured — a proposition which, it is safe to assume, such companies would not espouse."

*Peterson v. Western Cas. & Sur. Co.*, 19 Utah 2d 26, 425 P.2d 769 (1967) relied upon by appellant to show a present interest in the insurance contract, was a direct action after the plaintiff had obtained a judgment against the insured.

*Ellis v. Gilbert*, 19 Utah 2d 189, 420 P.2d 39 (1967) also relied upon by Appellant, holds only that the injured party may discover the existence and limits of any liability insurance.

## CONCLUSION

This court has consistently prohibited the joinder of a liability insurer in a negligence case. It should not now permit a direct declartory judgment action to circumvent the long established practice.

But even if declaratory relief were permissible, the trial judge had discretion to refuse to enter a declaratory judgment under the facts of this case, considering the non-conclusive effect of such a judgment and the absence of a present interest in the Appellant.

Respectfully submitted,

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