1972

Jerry K. Lanier v. Harold D. Pyne And Gibbons & Reed Company And Liberty Mutual Insurance Company : Brief of Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

JERRY K. LANIER,
Plaintiff-Respondent,

vs.

HAROLD D. PYNE and GIBBONS & REED COMPANY, a corporation,
Defendant-Respondent,

LIBERTY MUTUAL INSURANCE COMPANY,
Intervenor-Appellant.

Case. No. 12918

BRIEF OF APPELLANTS

Appeal from the Judgment of the Third District Court
In and for Salt Lake County, Utah
The Honorable Joseph G. Jeppson, Judge

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STATEMENT OF THE KIND OF CASE

This action as it is now before this Honorable Court is to determine whether the plaintiff's attorneys are entitled to attorneys' fees from the appellant who is the Trustee of the cause of action upon which the plaintiff's suit was brought, and to determine what the Trustee of the cause of action in a Workmen's Compensation case must do in order to protect itself against being

required to pay attorneys' fees under an involuntary employment of attorneys with whom it has no contract, no attorney-client relationship and no control.

DISPOSITION IN LOWER COURT

After the filing of a "Petition" and the hearing of argument thereon and the admitting of no oral testimony or evidence but only three written exhibits, the Court below held that respondent's attorneys were entitled to a fee of one-third (1/3) of the amount of the subrogation claim of the appellant, which is the Trustee of the cause of action, and charged a proportionate share of the costs against the appellant.

RELIEF SOUGHT ON APPEAL

The appellant seeks to have, in the alternative, reversal of the judgment with the finding of this Court that the insurance company gave respondent's attorneys adequate notice that they were not to represent the appellant's interest and therefore they are not entitled to a fee for the recovery of the subrogation claim of the appellant, or the judgment of the Court below set aside and the matter remanded for a new trial.

STATEMENT OF FACTS

This case was commenced by filing of the complaint by the plaintiff against Harold D. Pyne and Gibbons

& Reed Company to recover damages for the plaintiff's injuries sustained in an automobile accident when he was driving in the course of his employment (R. 1-2). The complaint was filed on November 30, 1970, the accident having occurred on October 15, 1970, (R. 1-2). Liberty Mutual paid Workmens' Compensation to the plaintiff or on his behalf in the total sum of $3,301.22 (R. 54, 64, 78, and Exhibit #2). By letter of November 16, 1970, plaintiff's attorney was put on notice that the appellant had subrogation rights in the matter and that it expected to participate in the terms of any settlement and expected that the subrogation rights would be given consideration (Exhibit #1 and R. 77). By letter dated September 9, 1971, plaintiff's attorney was advised that appellant had its own representation and that no fee would be paid to plaintiff's attorney on account of any recovery for appellant, the Trustee of the cause of the action,and any help that plaintiff's attorney desired was offered (Exihbit #2). Thereafter, on December 3, 1971, appellant's attorney was advised that plaintiff's attorney was not in agreement as to the participation on fees which action precipitated filing an appearance of record dated December 9, 1971, and an amended appearance of record dated January 25, 1972, (R. 45 and R. 49). On January 26, the date set for trial, plaintiff's attorneys, Mr. Hunt having associated with Mr. King, the attorneys for the defendant and the attorneys for the Trustee of the cause of action, appeared ready for trial and a satisfactory settlement was negotiated between the plaintiff and defendant's counsel. At that

time, a discussion ensued between the Court and plaintiff's attorneys and the attorneys for the Trustee of the cause of action regarding the attorneys fees. (See Reporters Transcript of Proceedings of January 26, 1972, R. 109-124). Plaintiff's attorneys then filed in plaintiff's name a "Petition" in which they set forth their claim for attorney's fees against the interest of the Workmen's Compensation carrier. Hearing was held on that petition on February 8, 1972, at which time the only evidence introduced was introduced by appellant, Trustee of the cause of action, which consists of Exhibits #1, #2, and #3 which are letters. All of the other content of the transcript of that hearing are argument of counsel and statements not under oath.

Subsequently, an "Order" was entered on February 18, 1972, which was not supported by Findings of Fact. (R. 63-64) An objection to the entry of the "Order" and a Motion for filing Findings of Fact and Conclusions of Law was made (R. 68). That matter was argued on February 29, 1972, and resulted in the Court making the Findings of Fact and Conclusions of Law entered herein. (R. 76-79). Thereafter, objections to the Findings of Fact and Conclusions of Law and a motion for a new trial pursuant to Rules 50 and 52b of the Utah Rules of Civil Procedure was filed (R. 82-83). A hearing was had on that matter on April 13, 1972, which resulted in an order denying the objection to the Findings of Fact and Conclusions of Law and denying the motion for a new trial (R. 92-93).

ARGUMENT

POINT I.

THERE IS NO PROPER RECORD REGARDING THE ISSUES NOW BEFORE THE COURT AS THE "PETITION" FILED BY THE PLAINTIFF'S ATTORNEYS IS NOT AUTHORIZED BY THE RULES OF CIVIL PROCEDURE NOR BY STATUTE AND THERE WAS NO TAKING OF TESTIMONY TO PROVIDE FACTS UPON WHICH A DECISION COULD BE MADE.

The Court below allowed the filing of a "Petition" in the instant action to determine a question which was not before the Court and which by the filing of a "Petition" could not be placed before the Court. There is no authority in either Utah Rules of Civil Procedure, nor by statute for the filing of a "Petition" to determine a contested matter. The issue should have been resolved by the plaintiff's attorneys filing a complaint and commencing an action as provided by Rule 3 U.R.C.P. (1953).

Attorney for appellant objected to the procedure and suggested that the proper me thod would have been to file a complaint with the proper pleadings to get the issue before the Court (R. 113-119). The Court overruled the objections of appellant's counsel and in effect held that it would proceed to hear all issues in the petition (R. 126-127). The objections of the appellant relate not only to the fact that there is no rule or statu-

tory authority for the filing of the "Petition" in this matter, but further that, failing to commence an action by the issuance of a Summons and the filing of a complaint as provided by Rule 3 of the Utah Rules of Civil Procedure, the Court had no jurisdiction to proceed in the matter.

The appearance of the appellant was special in relation to the issues to be determined under the "Petition" (R. 126). The motion of the appellant to dismiss for lack of jurisdiction was denied (R. 59 and R. 76). However, there is no finding of jurisdiction in the Findings of Fact and Conclusions of Law, or in the Order, and jurisdiction must therefore be assumed, although not specially found, even though the issue was specifically raised. In this regard, there is no evidence before the Court whatsoever as to the jurisdictional facts, there being only the argument of counsel.

Under the procedure followed by the Court below, there was no clear cut determination of the issues by means of filing a complaint and answer, and the usual discovery procedures being followed. Instead, the matter was simply argued to the Court with assumptions being made in said arguments, but there being no evidence other than Exhibits #1, #2, and #3. All other matters are simply statements of counsel.

As the issues contained herein and as will be discussed later are of prime importance to Workmen's Compensation Insurance Carriers in this State, this matter should be remanded to the Court below for trial

with the issues to be framed by proper pleadings and proper discovery procedures.

POINT II.

THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT FINDINGS OF FACT VI, VII AND VIII.

If there is any basis in the record to support the "Order" which requires the payment of fees to the plaintiff's attorneys, they must be Findings of Fact VI, VII and VIII (R. 78). Finding VI is to the effect that the settlement made in the principal case of Lanier vs. Pyne was obtained solely by the efforts of plaintiff's attorneys and that the settlement included the subrogation amount due the Workmen's Compensation carrier. Finding VII sets forth that the net amount recovered by the plaintiff was $14,000.00 less costs and makes a finding that the amount due the Workmen's Compensation carrier is 23.59% of the total judgment making it responsible for $86.83 of the costs, and Finding VIII is that the compensation carriers share of the attorneys' fee expense is that same percentage, 23.59% or $1,071.92. It is interesting to note that this figure is also one-third of the amount that the insurance carrier was subrogated to. In other words, the finding of the Court imposes a one-third fee upon the amount the insurance carrier recovered.

However, nowhere in the record is there any evidence other than statements of counsel that support the

Findings summarized above. There is no evidence as to any of the Findings of Fact made in the three referenced exhibits. Although Finding III specifically notes that Exhibit #1, the Notification of the interest of the insurance carrier, was mailed to plaintiff's attorney among all other parties interested, there is no Finding as to whether or not that notice constituted a rejection of his services, a hiring of his services, or what effect it might have had. This raises the specific and only issue that needs to be decided by this Court and that is, what must a compensation insurance carrier do to protect itself from being forced into an involuntary employment arrangement with the plaintiff's counsel, who by ignoring notification of the carrier's interest and going forward with the action, can then claim that he is entitled to a fee from the insurance carrier?

POINT III.

THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT CONCLUSION OF LAW NUMBER III.

As noted in Point II in discussing the Conclusions of Law, Conclusion of Law III is the key conclusion that must stand in order to award attorneys' fees on the Workmen's Compensation portion of the judgment to plaintiff's attorneys. This conclusion is again, not supported by evidence in the record, and as a matter of fact, at the very least, there is a question of fact raised by the only evidence, being Exhibits #1, #2,

and #3, as to the right of plaintiff's attorneys to go forward in the matter and represent the interest of the appellant. These matters should have been decided upon a full trial with the introduction of testimony and the specific issues having been determined. As the evidence in the record does not support the critical Findings of Fact and Conclusions of Law, they obviously must fail and the "Order" which they must support therefore, must fail.

POINT IV.

NO ATTORNEY-CLIENT RELATIONSHIP WAS ESTABLISHED BETWEEN APPELLANT AND PLAINTIFF'S ATTORNEYS AND IN FACT, THEY WERE PUT ON NOTICE THAT THEY COULD NOT ACT AS ATTORNEYS FOR APPELLANT AND THEREFORE, THEY CANNOT CLAIM A FEE FROM APPELLANT.

The cases heretofore decided by this Honorable Court relating to the payment of attorneys fees for the insurance carrier's share of the recovery have all approached the matter from the point of view that to allow the carrier its recovery without paying a proportionate share of fees and costs would be an unwarranted windfall to the carrier resulting in an unjust enrichment. *Worthen v. Shurtleff and Andrews, Inc.*, 19 Utah 2d 80, 426 P.2d 223 (1967); *Graham v. Industrial Commission,* 26 Utah 2d 424, 491 P.2d 223

(1971); *Prettyman v. Utah State Department of Finance,* 27 Utah 2d 333, 496 P.2d 80 (1972). In none of those cases, however, were the attorneys for the plaintiff put on notice by the carrier that the carrier had hired its own counsel and would protect its own interest. In the present case the plaintiff's attorneys were given notice of the subrogation claim of the carrier and further, were given notice that the carrier had retained its own counsel and that they were not to represent the carrier, nor would the carrier participate in payment of their fee. (Exhibits #1 and #2). As set forth in 7 Am Jur 2d, Section 204, pg 166, "The creation of the relation of an attorney and client by contract, express or implied, is essential to the right of an attorney to recover compensation for services. In general there can be no recovery from one who did not employ or authorize employment of the attorney, however valuable the result of the attorney's services may have been. . . . "

The application of the *Worthen vs. Shurtleff and Andrews, Graham vs. Industrial Commission* and *Prettyman vs. Utah State Department of Finance* (Supra) decisions to the facts in this case would result in the impairment of the right of the insurance company to contract with counsel of its own choice and to refuse to deal with counsel who may have been retained by the plaintiff and proceeded with the action with or without notice to the insurance carrier.

In the instant case, there is no doubt that the plaintiff's attorneys knew of the interest of the insurance company and failed to give any notice of their intention

to the company; and there is also no doubt that the insurance company specifically rejected their services. While appellant does not argue that no fee would be due plaintiff's attorneys if it had simply sat on its rights and not given them any notice, it does seem crucial that the carrier should be able to refuse to deal with plaintiff's attorneys if it so chooses by giving them notice as was done in this case and retaining its own counsel. It is therefore respectfully urged that in the present case, plaintiff's counsel have no right to recover as against the appellant, they having gone forward in representation of the plaintiff knowing that they were not entitled to represent the interest of the appellant.

POINT V.

THE ONLY EVIDENCE IN THE RECORD SUPPORTS THE APPELLANT'S POSITION THAT PLAINTIFF'S ATTORNEYS WERE ON NOTICE THAT THEY WERE NOT TO REPRESENT THE APPELLANT'S INTEREST IN THE ACTION BELOW AND THAT THEY THEN IGNORED THAT NOTICE AND ARE NOW CLAIMING AN INVOLUNTARY EMPLOYMENT ARRANGEMENT WITH THE APPELLANT.

Exhibit #1 is a letter dated November 16, 1970, addressed by a claims representative of the appellant to Gibbons & Reed Company with carbon copies having been sent to the plaintiff and his attorney, among others.

In that letter, the parties are put on notice as to the subrogation interest of the appellant and told that the appellant expects to participate in the terms of any settlement and to have its subrogation interest given consideration.

Exhibit #2 is a letter from counsel for the appellant to plaintiff's attorney dated September 9, 1971, setting forth in detail that plaintiff's attorney or attorneys were not to represent the interest of the appellant and that the appellant did not expect to pay any fee to plaintiff's attorneys. In spite of these notices and without any notification to the appellant, plaintiff's attorneys went forward with the action on behalf of the plaintiff and assumed to represent the appellant. It was not until the letter of December 3, 1971, was written that any notice was given by plaintiff's attorneys that they did not agree with the terms set forth in the two previously mentioned letters. Upon receipt of Exhibit #3, an appearances was filed of record on behalf of the appellant, Trustee of the cause of action (R. 45).

Section 35-1-62 U.C.A. (1953) provides that

> "When any injury or death for which compensation is payable under this Title shall have been caused by the wrongful act or neglect of another person not in the same employment, the injured employee, or in the case of his death, his dependents, may claim compensation, and the injured employee or his heirs or personal representative may also have an action for damage against such third person. If compensation is claimed and the employer or insurance carrier becomes obligated

to pay compensation, the *employer or insurance carrier shall become Trustee of the cause of action against the third party and may bring and maintain the action either in its own name or the name of the injured employee,* or his heirs or the personal representative of the deceased, provided the employer or carrier may not settle and release the cause of action without the consent of the Commission." (Emphasis added.)

Under the Section stated above where compensation has been claimed or the carrier has become obligated to pay, the insurance carrier is the Trustee of the cause of action. That the insurance carrier is not entitled to a windfall and have its subrogation claim remitted to it in full without a proportionate charge for attorney's fees and costs is clear since the decision of this court in *Worthen vs. Shurtleff and Andrews,Inc.,* 19 Utah 2d 20, 426 P2d 223 (1967).

The subsequent case of *Graham vs. Industrial Commission,* 26 Utah 2d 424, 491 P2d 223 (1971), affirmed the holding in *Worthen* as did the most recent case of *Prettyman vs. Utah State Department of Finance,* 27 Utah 2d 333, 496 P2d 80 (1972). These cases are the most recent pronouncement of this court on the question of the obligation of the Trustee of the cause of action to pay attorney's fees for their share of the recovery. However, in those cases ,the issue before this Court has never been raised and that is, where the carrier acts and puts the plaintiff's attorneys on notice that they are not to represent the carrier and that it will protect it own interest, what must a carrier do to prevent

being forced into an involuntary employment arrangement with plaintiff's attorneys.

In none of the cases decided to date in Utah was there any indication that the Trustee of the cause of action advised the plaintiff's attorneys that it would protect its own interest, and that it did not want them to represent the carrier. However, in the instant case, such notification was given by Exhibits #1 and #2.

Appellant here does not take the position that it is not willing to pay attorney's fees and costs for the recovery of its subrogation claim. It does take the position, however, that it should be entitled to hire the attorneys it wants to hire and to have the attorney-client relationship that it is entitled to have with its legal representatives. In the instant case, such relationship did not exist and the appellant had no control over the attorneys who now claim that they have rendered a service to the appellant against its will and wish to be paid for rendering that service. If that is required the appellant will be obligated to pay a double fee for legal services in connection with this case .

It should be noted that if the present status of Utah Law is allowed to remain without any clarification, the only way that a carrier will be able to protect itself in a third party Workmen's Compensation case would be to file a lawsuit either in its own name or in the name of the injured employee as allowed by Section 35-1-62 at the earliest moment that it is aware that it is obligated to pay compensation. By so doing, it would

appear that it has proceeded in a manner which should protect its interest. However, this would obviously lead to the filing of many lawsuits which need not be filed and would appead not to be in the best interest of the carriers, the injured employee or the orderly administration of justice.

There is also the strong possibility that in any given case there can be a distinct conflict of interest between the injured employee and the interest of the compensation carrier. This can occur where the amount available for settlement or satisfaction of a judgment is close to or perhaps slightly more or slightly less than the amount of the subrogation claim. Particularly in the area of settling such a case, the interest of the insurance company pursuant to the provisions of Section 35-1-62 U.C.A. (1953) would be to settle the case without risking a trial if the amount offered was close to the subrogation claim whereas the interest of the injured employee would be to try the case as he would have little or nothing coming upon a settlement. Under these circumstances, the conflict which a single attorney representing both interests would have is apparent. If a compromise between those interests is to be reached, it should be done by each interest being represented separately.

It should be further noted that in the instant case, the amount of the attorney's fee as determined by the contract between the plaintiff and his attorney should not be the determining factor for the amount of the

fee that the party representing the insurance carrie should receive. The carriers have full and complet files by the time a Workmen's Compensation award i paid. They have complete medical reports, they have a investigative staff which investigates the facts and a a result, the file when turned to the attorney for th insurance company is much more complete and require much less expenditure of effort than the same ca being referred to plaintiff's attorney by the plaintif Plaintiff's attorneys must, of necessity, spend muc more time and effort in the average plaintiff's case t develop the facts than the attorney who receives a completed investigation file of the insurance carrie In this case, the plaintiff's attorneys contend that th level of compensation to which they are entitled, if an at all, is fixed by the contract they had with their client This just does not follow as a matter of logic. In th instant case, the record does not support and in fac there was no arrangement of any kind between th appellant and plaintiff's attorneys.

CONCLUSION

Appellant respectfully urges that the Court fin that the plaintiff's attorneys were given notice tha they were not to represent the appellant and that the are not entitled under the facts of this case to claim a fee as against the compensation carrier's share of th recovery. If the Court cannot make such a finding then it is respectfully urged that the matter be returne

to the court below with instructions to dismiss the "Petition" filed herein which would leave the plaintiff's attorneys free to file their complaint in a separate proceeding against the appellant wherein discovery can be had and testimony can be taken which will furnish an evidentiary basis for a decision herein.

Respectfully submitted,

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