1980

Dairyland Insurance Corp. v. Susan B. Smith And Danial Defriez And Patrick Hall And Robert Hall : Brief of Appellants

IN THE SUPREME COURT OF THE
STATE OF UTAH

DAIRYLAND INSURANCE CORP., Plaintiff and Respondent, vs. SUSAN B. SMITH, Administratrix of the Estate of JACK ELLIS, and DANIEL DeFRIEZ, Defendants, and PATRICK HALL and ROBERT HALL, Defendants and Appellants.	)	Case No. 17109

BRIEF OF APPELLANTS

Appeal From Judgment of the Second Judicial
District Court for Davis County
Honorable Calvin Gould, District Judge

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IN THE SUPREME COURT OF THE
STATE OF UTAH

DAIRYLAND INSURANCE CORP., Plaintiff and Respondent,	)	
vs.	)	
SUSAN B. SMITH, Administratrix of the Estate of JACK ELLIS, and DANIEL DeFRIEZ, Defendants,	)	Case No. 17109
and	)	
PATRICK HALL and ROBERT HALL, Defendants and Appellants.	)	

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

On October 2, 1976, Jack Ellis applied for and plaintiff bound coverage on an automobile liability insurance policy insuring Ellis' 1963 Ford van.

On November 20, 1976, Ellis drove his van across the center line in Sardine Canyon head on into a vehicle owned and operated by Patrick Hall and in which Robert Hall was riding as a passenger. The Halls both suffered serious injuries, and Ellis was killed. Plaintiff thereafter obtained Ellis' driving record, appointed

Susan B. Smith personal representative of his estate, and filed to void the policy, joining Halls and Daniel F. DeFriez, the named insured, as defendants.

DISPOSITION IN LOWER COURT

Defendants Hall answered the complaint and filed a counterclaim and a crossclaim against the Ellis Estate and Daniel F. DeFriez, the named insured in the policy, seeking a declaratory judgment the policy was in effect at least as to Halls and damages for Halls' personal injuries, and the damage to Patrick Hall's vehicle suffered in the accident.

The lower court dismissed Halls' counterclaim and crossclaim on plaintiff's motion prior to trial, and the case proceeded to trial on only plaintiff's complaint. After the trial, the lower court entered judgment in favor of plaintiff, holding that the policy was obtained by misrepresentation; that plaintiff was entitled to void the policy from its inception; that Section 41-12-21(f) U.C.A. had no application to the policy; that plaintiff had no duty to defend against Halls' claims and that plaintiff was entitled to its costs as against Halls.

RELIEF SOUGHT ON APPEAL

Halls seek reversal of the judgment of the lower court and a determination that Halls' counterclaim and crossclaim were improperly dismissed.

STATEMENT OF FACTS

(a) Testimony of Insurance Agent Howard Musselman:

On October 2, 1976, Jack Ellis and Daniel F. DeFriez, single men 50 years of age, (Pl. Ex. B; Def. Ex. 2) came to the office of Howard Musselman, plaintiff's commissioned sales agent (R. 127) in Ogden, Utah. (R. 110)

Agent Musselman was made aware that Ellis' 1963 Ford van was in impound and that a document showing insurance coverage was in force was required to get it out, and Musselman was asked for enough insurance to get the van out of impound. (R. 125, 145)

Agent Musselman had authority to write insurance for several insurance companies, including Dairyland Insurance Company, a company generally known as one that may charge higher premiums, but accepts higher risks. (R. 128) Musselman told them the limits of the liability, no fault and uninsured motorist coverage offered by Dairyland and that Dairyland Insurance would satisfy the state minimum coverage requirements as to liability, no fault and uninsured motorists insurance and provide an additional $5,000 property damage insurance. (R. 140-141)

Musselman wrote the insurance for Dairyland rather than another insurer because, "I would have considered that it was not ready for USF&G". (R. 128)

Musselman filled out a Dairyland Automobile Insurance Application by hand (R. 112), making entries showing DeFriez as the named insured, although Ellis was the applicant who signed the policy; Ellis' address on Childs Avenue in Ogden under DeFriez's name; Defriez's address on Madison Avenue in Ogden (some 1 to 1½

miles away) in a space asking if the insured resides at the above address during the work week; and "none" in the space for other drivers. He wrote Ellis' name as the owner of the insured described 1963 Ford van; added a notation after Ellis' name that "does not due to eyesight, has the above drive"; inserted a policy period of three months starting October 2, 1976, filled in the amount of the premium, wrote "no" after a question: Is SR-22 filing required?; struck lines through the space for describing accidents and traffic violations, inserted the time the application was completed, 11:30 10/2/76; had Ellis sign the application and inserted what appears to be Ellis' phone number as the phone of the "insured". (Pl. Ex. 3; R. 112, 130, 132-33, 152)

The whole visit and application process in Musselman's office was over in not more than 15 minutes. (R. 130)

Musselman testified (over Halls' objection based on the dead man statute, Section 78-24-2, UCA (1953) (R. 114-117) that Ellis had stated what was written on the application -- "does not drive due to eyesight. He has the above (referring to Mr. DeFriez) drive the car", but said that DeFriez made no statement as to his own intent to drive the vehicle. (R. 117)

The reason Musselman made such notation on the application was "because I always fear that people don't always do what they say, and I wanted that entry as a matter of record." (R.123)

Musselman was a long time resident of Ogden and further testified that even though the two addresses on the application on 12th and Madison Avenues were a mile or a mile and a half apart he "would normally assume" the car was kept with the driver, but that matter was of no importance to him and he was sure he made no inquiry as to where the car would be kept. (R. 133-134)

As to Ellis' eyesight, Musselman testified there was no question about his ability to read and sign the application and that Ellis was not wearing eye glasses or anything else to indicate that he had an eyesight problem. (R. 136)

To the question, "Do you recall whether or not he actually read through the application before signing it on page three," Musselman responded, "Most people don't read that application before signing it, sir. They watch me fill it out. They know that I have asked the questions, and I ask for their endorsement, and they simply do it." (R. 136)

Musselman issued the insurance and bound coverage to be effective at 11:59 a.m., October 2, 1976 (R. 131), explaining that action put the vehicle in compliance with the financial responsibility, no fault and uninsured motorist laws of Utah. (R. 140) Musselman issued a document to Ellis Musselman knew would be accepted as evidence of coverage and was required before the vehicle would be released from the impound and put on the road. (R. 135)

The policy was issued and apparently mailed to Ellis' address (R. 138) without any endorsement, rider or other document indicating that coverage would cease or be denied if Ellis ever undertook to drive. (Def. Ex. 1; R. 145-46) Musselman made no investigation of any sort before issuing the insurance and was not asked by Dairyland to make any investigation after Dairyland received the application. (R. 132-33) He testified that any investigation was done by Dairyland's office and not by his office (R. 133). Musselman admitted that even though he had written 6 or 7 insurance applications each business day for some years, only 2 or 3 times in his past 5 or 6 years experience had he been told by an applicant that a friend of the applicant would be doing the driving, (R. 141) and that such was pretty unusual. (R. 143) He conceded that if either DeFriez or some acquaintance of his had been driving at the time of the accident there would have been no question as to the policy's effectiveness to provide coverage (R. 143-44); that the policy by its terms provided coverage when any third person used the vehicle with permission of the named insured (R. 144) and that there was nothing in the contract of insurance precluding Ellis from driving with DeFriez' consent (R. 145-147).

(b) Testimony of Underwriter Marlene Hotchkiss:

Marlene Hotchkiss, a Dairyland underwriting service supervisor who first reviewed Dairyland's file on the matter about 3 1/2 years after the accident and about a week and one-half before the

March 1980 trial (R. 176) testified at trial what Dairyland did on the application. She said Dairyland "would presume" Musselman had determined Ellis "would not be driving" (R. 169) because Ellis was not listed as a driver on the application (R. 170), and so when the application was received by Dairyland's office on October 5, 1976, the sole and only investigation done was to request only DeFriez's Utah driving record (Pl. Ex. C) which was satisfactory. (R. 168-171) Hotchkiss said that if she had known that Ellis would be driving she would have requested his driving record (R. 172) and since his record showed various arrests and license revocation matters back in 1972 and 1973 (Def. Ex. A., P. 106-107) (his record showed nothing since October 16, 1973--nearly a three year period prior to the Dairyland application) she would have cancelled the policy. (R. 172-73) She explained that the policy cancellation procedure (that would have been followed had Ellis' driving record been obtained and a decision been made to cancel the policy) included the giving of a 12 day notice at the expiration of which 12 days the cancellation would be effective:

> "We probably--our normal procedure is to receive these MBR back from the State of Utah within five days. At that time, when we would have noticed that he did not have a valid license, and because of his driver record, it would have been given to the cancellation department for twelve days from that date.
>
> Q. And what date are we using so we can tie that down?
>
> A. Okay, we received this approximately on 10/10. She would have sent a twelve-day notice 10/10, making it effective on 10/22." (R. 173)

Ms. Hotchkiss admitted that Dairyland's experience is that it is expectable that an owner will drive his own car and fairly

common for people to drive in Utah on out-of-state licenses and that Dairyland was further aware that people commonly drive on suspended and revoked licenses. (R. 182) She further agreed that there was nothing in the application statement, "does not drive due to eyesight, has the above drive", that meant Ellis would never in the future drive, and she conceded Dairyland had made no effort at all to determine or check up on the nature of any eyesight problems or whether such was expected to improve. (R. 183-84)

Ms. Hotchkiss said Howard Musselman had authority from Dairyland to bind insurance coverage into immediate effect and and put the Ellis vehicle on the road with that coverage (R. 177) and that the primary reason Dairyland's office reviewed the application was to see that the agent charged the right premium:

> "Q. . . . is that primarily why the application is reviewed by the underwriter, to determine whether the rate made sense?
>
> A. Yes.
>
> Q. And that is really the thing the underwriter is looking for?
>
> A. Right.
>
> Q. But you agree that there is surely nothing to preclude Dairyland from picking up the phone, calling Mr. DeFriez or calling Mr. Ellis about where is the car or what about the addresses, or anything of that nature?

A. That is not our normal procedure, no.

Q. But there is nothing to preclude that from happening, is there?

A. No.

Q. But it is simply not done?

A. Right.

Q. You rely on Mr. Musselman interviewing and filling out the application for that sort of thing?

A. Right.

Q. And he has been in business with Dairyland at least written for Dairyland, perhaps others as well, from 1966, so you are satisfied that's good enough for Dairyland?

A. Yes.

Q. There is nothing -- is there anything that you know of that would preclude Dairyland from looking at this application, and when preparing the policy then attaching a rider, an endorsement of some sort, saying there is no insurance if Ellis drives, in substance?

A. I know of none, no. (R. 178-79)

(c) Testimony of Daniel DeFriez:

Daniel DeFriez testified he was a long time acquaintance of Jack Ellis (R. 151); that Ellis' van had stalled, been parked illegally and impounded by the police (R. 159-60); that before going to Howard Musselman's insurance office Ellis told DeFriez that Ellis had a Idaho license, but no Utah license; that DeFriez

asked Ellis why Ellis had no Utah license and Ellis said he was waiting for a larger lens so he could see more clearly and better apply for a Utah license (R. 163-64); and that Ellis lived in Idaho for a time. (R. 165)

DeFriez further stated that as he recalled the visit to Howard Musselman's office he asked Musselman, "if the application--what we were doing was legal, and he said that it was." (R. 157)

> "I wanted to be sure what we were doing was legal--to keep on a legal basis, and get his car out of impound legally; that he could drive it legally." (R. 162)

DeFriez said he gave Musselman the answers to the questions asked (R. 158), but had no recollection of the questions asked by Musselman and had sat some distance away from the desk where he could hear Ellis and Musselman's voices, but not what was being said. (R. 157, 161-62)

DeFriez further stated he had no knowledge of Ellis' driving record (R. 156) but knew Ellis had had a cataract removed from an eye about two months before, and that Ellis had a bad leg and didn't walk very well. (R. 155) DeFriez had been Ellis drive his 1963 Ford van both before and after October 2, 1976 (R. 152) and had ridden in it twice with Ellis driving (R. 153). DeFriez never did drive Ellis' van (R. 160). It was not his intent to drive Ellis' van and Ellis was going to drive his own van (R. 150). Ellis had DeFriez's permission to drive on November 20, 1976 (R. 162)

but in fact the question of DeFriez' authority to let Ellis drive never entered DeFriez' mind. (R. 165-66) "I thought he would drive freely". (R. 166)

Agent Musselman neither showed nor read the application to DeFriez after it was prepared. (R.160)

Ellis paid the premium for the insurance to Musselman and DeFriez then went with Ellis down to the Ogden office of the Tax Commission where the "clearance" sheet Musselman gave Ellis was presented and license plates and clearance for the impound was received. They then proceeded to the impound yard and obtained the van. (R. 159)

(d) Events after issuance of the policy:

On November 20, 1976, 49 days after the insurance was issued, Ellis drove his van across the center line into the path of the Hall's automobile and a head-on collision resulted in which appellants Hall were both seriously injured and Ellis was killed. According to the Highway Patrol Accident Report, Ellis had been drinking. (Def. Ex. 2)

After the accident Dairyland discovered Ellis' bad driving record in connection with claims made by counsel for the Halls and on November 16, 1977 filed Plaintiff's complaint in Weber County seeking to avoid liability on the policy. (R. 1-2) The officer who explained Ellis' bad driving record at the trial

further testified that the information was available from the central office of the Drivers License Department in Salt Lake City, Utah on October 2, 1976 and was available for a nominal fee. (R. 108)

Approximately 11 months after the accident and on October 4, 1977, Plaintiff appointed Susan B. Smith as administratrix of the estate of Jack Ellis (R. 49) and on November 16, 1977 filed a complaint in the Weber County Court against Smith as administratrix of the estate of Jack Ellis, Patrick Hall and Robert Hall, the injured third parties, and Daniel F. DeFriez, seeking to avoid liability of the policy. (R.1-2) On November 17, 1977 Plaintiff tendered the policy premium to Daniel F. DeFriez and Susan B. Smith as administratrix of the estate of Jack Ellis. (R. 185; Def. Ex. 3)

Defendant Daniel F. DeFriez sent a hand-written answer to the complaint to counsel for Dairyland dated September 1978. That document is in the exhibit envelope (R-74). Susan B. Smith filed no answer. Defendants Patrick Hall and Robert Hall filed an answer, counterclaim and crossclaim on December 23, 1977 in which Halls sought damages against the estate of Jack Ellis and Daniel F. DeFriez for the personal injuries and property damage suffered by them in the accident; judgment that Dairyland was liable on the policy and judgment over against Daniel F. DeFriez should

the Court determine the insurance policy did not provide coverage for the subject accident. (R. 5-9) Dairyland filed a motion to dismiss Halls' counterclaim and crossclaim (R. 10) and after submission of memorandum (R. 12-15, 16-22), the lower court ordered Halls' counterclaim and crossclaim dismissed. (R. 29) Such action necessitated the Halls filing another separate lawsuit, Civil 73908 against the estate of Jack Ellis to avoid the running of the statute of limitations, which suit still pends waiting the final outcome of this proceeding. (R. 93)

Following the March 20, 1980 trial of the issues raised by plaintiff's complaint, the lower court entered findings of fact, conclusions of law and a judgment in favor of plaintiff which found that the policy was obtained by misrepresentations, omissions, concealment of facts and incorrect statements made in the application for insurance which were either fraudulent or material to the acceptance of the risk; that if the true facts had been known, Dairyland would not have issued the policy; that Dairyland was therefore entitled to void the policy from its inception date; that the policy was not the kind contemplated by Section 41-12-21(f) U.C.A. (1953); that Dairyland had no liability or duty to defend any of the defendants respecting the claims made by the Halls and awarding plaintiff its costs of court, with interest. (R. 79-83)

From such judgment Halls filed the instant appeal.

ARGUMENT

POINT I

SECTION 41-12-21(5) OF THE UTAH SAFETY RESPONSIBILITY ACT PRECLUDES PLAINTIFF AUTOMOBILE INSURANCE CARRIER FROM RESCINDING THE POLICY BY REASON OF ANY STATEMENTS MADE AT THE TIME THE INSURANCE APPLICATION WAS TAKEN AFTER THE OCCURRENCE OF THE ACCIDENT IN WHICH APPELLANTS WERE INJURED

As appears from the statement of facts, the sole reason plaintiff contends it may rescind the policy is a claimed misrepresentation by Jack Ellis that he did not drive, which took place in the short meeting of less than 15 minutes duration in the agent's office when the application was taken. Both of plaintiff's witnesses who testified concerning issuance of the policy admitted the policy provided coverage as to liability and no fault required by Utah's Safety Responsibility Act (Title 41 Chapter 12) and No-Fault Insurance Act (Title 31 Chapter 41). (R. 140-41, 185-86)

The policy (Def. Ex. 1) shows on its face that it provides minimum coverage as required by the terms of these statutes and in addition provides double ($10,000) the property damage liability required by the Safety Responsibility Act.

A critical point is that Utah's 1973 Automobile No-Fault Insurance Act makes mandatory insurance policy coverage that qualifies under Chapter 12 of Title 41 (the Safety Responsibility Act)(unless the department has approved some other method of security). A policy that qualifies under the latter act is described in Section 41-12-21 U.C.A., and that Section makes such a qualified policy non-cancellable after an accident occurs and specifically provides that no such

by or in behalf of an insured and no violation of the policy will defeat or void the same.

Section 31-41-4 of the No-Fault Insurance Act specifically states in material part:

> "(1) Every resident owner of a motor vehicle shall maintain the security provided for in Section 31-41-5 in effect continuously throughout the registration period of the motor vehicle. . . ." (emphasis added)

The referenced Section 31-41-5 specifically provides in material part:

> "(1) The security required by this act shall be provided in one of the following methods:
>
> (a) Security by insurance may be provided with respect to each motor vehicle by an insurance policy that qualifies under Chapter 12 of Title 41 (The Safety Responsibility Act), except as modified to provide the benefits and exemptions provided for in this Act, and has been approved by the department; . . . ." (emphasis added)

In specific terms, Section 31-41-13 of the No-Fault Insurance Act makes it a crime, a misdemeanor, for an owner to operate a vehicle without the security required by the Act. It also makes it a misdemeanor for any other person to operate a motor vehicle upon a highway with knowledge that the owner does not have the security mandated by the No-Fault Insurance Act, to-wit, an insurance policy qualifying under the provisions of Section 41-12-21, U.C.A. (1953).

Section 31-41-13(2)(b) of the No-Fault Insurance Act requires the owner of a motor vehicle with respect to which security

is required under the Act to exhibit evidence of the security [illegible] in effect as a condition to obtaining license plates and a safety inspection of the vehicle. It clearly appears from the evidence that this section of the Act was being enforced against the Ellis van at the time it was impounded, requiring Ellis to obtain and exhibit evidence of the insurance made mandatory by the No-Fault Insurance Act as a condition of getting license plates and the van released from impound.

The section of the Safety Responsibility Act which sets forth the requirements of a policy that qualifies under that act is Section 41-12-21(b) U.C.A. (1953). That section sets forth certain policy requirements, including a requirement that the policy designate explicitly all motor vehicles with respect to which coverage is granted, and a requirement that the policy:

> "(2) shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each motor vehicle in the amount specified in Section 41-12-1(k) of this act."(Section 41-12-21(b)(2), U.C.A. 1953)

Subdivision (f) of the same statute further explicitly provides:

> "(f) Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

(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 annulled 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; (emphasis added)

There is every policy reason against and no policy reason in favor of refusing to give the above statutes effect in accordance with their plain terms. Dairyland's agent issued the insurance and evidence thereof to get the Ellis van out of impound and on the road by putting Ellis in compliance with the literal terms of the No-Fault Act with a policy complying with the Safety Responsibility Law and the policy itself by its express terms provides the minimum coverages required by these laws and this fact was freely conceded by Dairyland's representatives at trial:

"Q. And you do agree, do you not, with Mr. Musselman that the form of this policy, the amounts of the coverage, met the no-fault, uninsured motorist and safety responsibility law minimums of the State of Utah, SR22 or not?

A. Yes.

Q. And from your knowledge as an underwriter, and a person I presume familiar with the laws of the State of Utah, you are aware, are you not, that the laws do provide it is a misdemeanor for someone to operate a vehicle, and was so in '76, without this no-fault insurance?

A. Yes." (Testimony of Marlene Hotchkiss, R. 185-86)

The sole evidence presented by plaintiff in attempting to defeat coverage was limited to the claimed representation or misrepresentation by Ellis that he did not drive due to his eyesight and had DeFriez drive--a representation or misrepresentation made at the time the application form was completed by Mr. Musselman. The lower court should have applied the statute to exclude all evidence of such statement once it became apparent it was offered only to defeat or avoid the policy long after Appellants Hall were injured because the very plain unequivocal terms of the statute, Section 41-21(f)(1) clearly say the liability of the insurance carrier becomes absolute whenever injury or damage covered by said motor vehicle liability policy occurs, and that no statement made by the insured or on his behalf and no violation of the policy will defeat or void the policy.

Appellants Hall recognize that two Utah cases, Utah Farm Bureau Ins. Co. v. Chugg, 6 Utah2d 399, 315 P.2d 277 (1957) and Western Casualty and Surety Co. v. Transamerica Ins. Co., 26 Utah2d 50, 484 P.2d 1180 (1971) contain language that Section 41-12-21(b) of the Safety Responsibility Act is not applicable to policies no proof of which was furnished to the Department of Public Safety.

Utah's 1973 No-Fault Insurance Act was adopted by the Legislature after these cases were decided to change any such result by mandating non-cancellable post accident insurance. Since those cases involved vehicle usage expressly prohibited by the terms

of the policy (Chugg) or forbidden by the named insured (Western) they are quite unlike the case here where the usage was with the consent of the named insured. Further, the statements therein concerning the application of Section 21 of Title 41 were dictum and unnecessary to the results reached. Moreover, no reference was made by this court to any limited application of Section 21 of Title 41 in the case of State Farm Mutual Automobile Insurance Co. v. Wood, 25 Utah2d 427, 483 P.2d 892 (1971), discussed below, and the Utah Farm Bureau and Western Casualty cases are completely out of harmony with the rest of the cases in the United States which are virtually unanimous in holding that mandatory insurance making drivers financially responsible is noncancellable post accident insofar as injured third parties are concerned. In this regard, the court's particular attention is directed to the case of State Farm Mutual Automobile Ins. Co. v. Wall, 333 A.2d 282 (N.J. 1966). In that case, as here, the insurer had made a partial investigation and had thus not entirely relied on the representations made by the applicant. The court observed there was a compelling inference that the insurer did not want to know, or was it even concerned with whether or not certain representations as to the insured's driving record were true, preferring rather to be in a position in which if at some later date it served its interest to do so, it could seek rescission of the policy if the representations provided untrue. Said the court:

> "This is not reliance upon the truth of the representations; it is reliance on the expectation

> that relief will be afforded if the representations are untrue. As such, it is not sufficient to warrant rescission, just as it would not be sufficient reliance to warrant recovery of damages in an action for fraud and deceit."(222 A.2d 282, 286)

The same compelling inference exists in this case. The agent carefully wrote down the representation that Ellis did not drive due to eyesight knowing that people do not always do what they say and then, along with the company, blithely ignored the obvious batch of red warning signals that would have impelled any reasonable person to have checked out Ellis' driving record, content to accept the premium with the idea that if something went astray the policy could simply be avoided.

Most importantly, in Wall, the New Jersey motor vehicle security responsibility law was reviewed. That statute is similar to the Utah statute. It provided that the safety agency was to require proof of financial responsibility in certain amounts from persons whose licenses had been suspended or revoked. The policy there contained the same clause as to "financial responsibility" as the instant policy. The New Jersey statute provided that proof of financial responsibility might be in the form of a certificate signed by a duly licensed agent of the company issuing the motor vehicle policy. In Wall, the safety agency had made no demand upon the insured for any proof, and neither the insurer nor any of its agents had made any certification. The court reviewed the history of the statute and the numerous cases construing the statute and the various modifications thereto made over the years by the

legislature and concluded that it had been the rule in New Jersey and would continue to be the rule that if the insured was in the class of those who could have been called upon by the agency to furnish proof of financial responsibility, any policy subsequently issued to him was deemed to be in compliance with the act irrespective of whether the agency actually demanded the requisite proof. The New Jersey court unambiguously held the policy non-cancellable even without certification and predicated that result upon the statute itself and further held non-cancellability did not depend upon any assumption of liability independent of the compulsion of the statute. There, as in the case under the Utah statute, the statute did not expressly restrict its effect to certified policies and the court held there was no reasonable basis or justification for arriving at that result by implication.

In this case, certainly Ellis was one who not only could, but should have been required to furnish a certificate of insurance as proof of financial responsibility under the State's Responsibility Act and it was by mere chance that such proof was not filed.

The holding of the Wall case is that since the statute was designed to benefit injured innocent third parties by keeping financially irresponsible people off the road, the absence for whatever reason of a certification designed to insure a continuation of financial responsibility by those under license suspension does not operate and cannot be deemed to have been intended to operate to deprive already injured parties of their rights under a policy

in effect at the time of injury. (222 A.2d 282, 289) The court did hold in that case that the insured would be obliged to reimburse the insurer pursuant to certain terms of the policy for the sums the insurer was required to pay to settle the claims of the injured third parties.

In this case, both the agent Musselman and DeFriez testified that a document sufficient to prove that the insurance was in effect was issued by the agent for the express purpose of enabling Ellis to get the state to let the Ellis vehicle out of impound and that certainly ought to be held to have satisfied the intent of the statute under the circumstances of this case where that proof put the car legally out on the roads as far as the state was concerned. Appellants Hall most earnestly submit that the insurer ought to be held conclusively estopped to deny the policy once it issued the financial responsibility proof document that satisfied the state and a policy of insurance obviously providing all minimum coverage as required by law--explaining to Ellis in the process that the policy did just that--put Ellis in full compliance with the law.

A further compelling fact is that the insurer freely admitted that ever though it deemed Ellis an unacceptable risk it would not have summarily rescinded and voided the policy upon promptly learning his driving record, but instead would have sent out a twelve-day notice of cancellation and that had the accident occurred within the twelve day notice period there would have been no question as to coverage. (R. 187-88)

"Q. Then I take it from your direct testimony that upon learning that he had all these difficulties in the past recited by Mr. DeGroot, that you would have given him what was that, a 12 day notice?

A. Yes

Q. Why only 12 day's notice?

A. Because that's all that's required by law.

Q. Now supposting things had worked out in that fashion--well, let me ask another question first. Now if Ellis had come to Dairyland and said look, I have had a wreck and my last insurance has been cancelled and I need new insurance, then this would have been SR22, do I understand that correctly?

A. If he would have required one, yes.

Q. Well, he would have been required to have had one if he had been cancelled out and there was an accident pending and so forth?

A. Probably, Yes.

Q. Okay. And so if this had been the case, how much longer would this notice have had to have been before you could have cancelled this insurance?

A. Well, it still would have been 12 days from the time that I would have received the driving record on Mr. Ellis.

Q. So it wouldn't have affected things at all, would it, noticewise, cancellation noticewise?

A. No.

Q. Well then, supposing this had happened, the 12 day's notice then would have run, you testified on direct, perhaps by October 22, 1976, by the time things had gone back and forth in the mail. Okay, then I take it so if that had happened, so far as Dairyland was concerned, this policy would have ended on that date?

A. Yes.

Q. But if that accident had occurred within that 12 day period, that is a month earlier than it really did occur, Dairyland would not have sought to deny coverage here, would it?

A. Well, that's a claims problem. I don't know. I would think they would still be on the policy until the policy was cancelled." (R. 186-88)

The testimony of Marlene Hotchkiss of Dairyland as to Dairyland's practice of giving a 12 day notice of cancellation when it deems risks no longer acceptable illustrates and underscores the thrust of the compulsory financial responsibility statute as applied by the plaintiff in practice, which allows prospective cancellation only. Section 41-12-22 UCA (1953) requires 10 days notice of cancel

The legislative abrogation of an insurer's common law post accident right to void the policy from its inception on the grounds that fraud or misrepresentation was practiced is that prej to innocent third parties already injured by the insured automobil would thereby occur. The insurance company, in a real sense, puts the risk on the road in the first instance by issuing evidence of insurance, enabling licensing and motor vehicle safety inspection to take place.

Those injured by automobile accidents are a legitimate concern of the legislature. In this regard, Aetna Cas. & Sur. Co. v. O'Conner, 170 NE2d 681, 83 ALR2d 1099, (1960) said:

> "That there is no right to rescind the assigned risk policy does not mean that the carrier is deprived of all reasonable redress against the insured who misrepresents material facts in order to obtain coverage. . . . the effect . . . . is to enforce upon the insurer the necessity to discover fraud at the earliest possible moment.

> before an accident occurs, and the rights of innocent injured third parties have intervened. . . . the oft repeated legislative recognition (is) that liability insurance is not the concern solely of the insured and his insurer.
>
> * * *
>
> Aetna did, in this case, actually conduct an early investigation of (its insured) and, if that investigation had been performed properly, the insured's misrepresentation would have been discovered and Aetna could have cancelled. . . . long before the Hamiltons were injured. While, therefore, Aetna may ultimately be held on a policy obtained by fraud, its liability is in a very real sense attributable to its own fault, and the true beneficiary is not the wrongdoer, but his innocent victims." 83 ALR2d 1099, 1103 (emphasis added)

In this case, as in Aetna, the insurance could easily have been cancelled after a thorough, reasonable, prompt investigation and the accident in which the Halls were injured avoided.

The cases which are virtually unanimous in holding that the insurer is precluded from denying liability post accident as to injured third parties, where the insurance is mandated by law, are collected in two annotations. ANNOT., "Cancellation of Compulsory, or 'Financial Responsibility' Automobile Insurance, 34 ALR2d 1297, and ANNOT., "Rescission or Avoidance, for Fraud or Misrepresentation, of Compulsory, Financial Responsibility, or Assigned Risk Automobile Insurance," 83 ALR2d 1104.

In the latter annotation, the rule of incontestability is stated as follows:

> "It has been universally held or recognized that an insurer issuing an automobile liability policy pursuant to any of the various statutory plans designed to protect the public against the inability to collect

> damages in tort from financially irresponsible owners or operators of motor vehicles cannot escape liability to a third party injured through the culpable operation of the vehicle insured, during and within the coverage afforded, because of any fraud or misrepresentations relating to the inception of the policy which might have afforded the insurer a cause for rescinding, reforming, cancelling ab initio,or otherwise avoiding, an ordinary, voluntary liability policy, so as to escape such liability. 83 ALR2d 1104, 1105-6.

Consistent with the legislative policy that only financially responsible drivers shall operate vehicles is the requirement set forth in Section 41-12-22, UCA (1953) mentioned above, which precludes cancellation or termination until at least 10 days notice of cancellation is given. The requirement of the statute that a copy of such notice be given the Department of Public Safety gives the State a chance to pull driver's licenses and automobile registrations so as to get the poor driver off the road before his insurance ceases to be effective. Such notice requirement certainly evidences again the legislative intent to exclude retroactive cancellation which, if allowed, would be totally inconsistent with the general scheme and purpose of the statute to protect the public.

In Atlantic Casualty Ins. Co. v. Bingham, 92 A2d 1, 34 ALR 1293 (N.J. 1952), the insurer, as in this case, argued that since the responsible state safety agency had not called for proof of financial responsibility nor was proof of financial responsibility actually filed, the insurance policy did not come within the statute scheme. The New Jersey court reviewed the statute and specifically disagreed with the insurer holding:

"Even if it was otherwise, we would concur in the interpretation sought by the appellant as we cannot conceive it to be the legislative design to infringe upon the public protection it had already wisely established. To blithely resolve to the contrary in construing the language here employed would not be justified or warranted." 34 ALR 1243, 1297.

By reason of the operation of the 1973 Utah No-fault Insurance Act and Section 41-12-21 of the Utah Safety Responsibility Act, Plaintiff was and is absolutely precluded from seeking to avoid and rescind the policy post accident to the detriment of the Halls by reason of any statement made by Ellis that he did not drive due to his eyesight at the time of the insurance application.

POINT II

PLAINTIFF FAILED TO DISCHARGE ITS DUTY TO APPELLANTS AND OTHER MEMBERS OF THE PUBLIC TO MAKE A REASONABLE, THOROUGH AND PROMPT INVESTIGATION RESPECTING THE INSURANCE APPLICATION WITHIN A REASONABLE TIME AFTER ISSUING THE POLICY AND THEREBY LOST ANY RIGHT TO RESCIND

In State Farm Mutual Automobile Ins. Co. v. Wood, 25 Utah2d 427, 483 P.2d 892 (1971) this court specifically held:

1. The insurer owes a duty not only to the insured but has a duty to the public as well to make a reasonable investigation of insurability within a reasonable time after accepting the application for the liability policy.

2. The insurer has the burden of showing the adequacy of its investigation.

3. The insurer cannot neglect its duty to make a reasonable investigation nor postpone that investigation until after it learns

of a probable claim and still retain its right to rescind.

This court observed that to delay making a reasonable investigation within a reasonable time would permit the insurer to retain the premiums while avoiding all risk under the policy.

In the Wood case, this court specifically observed that the lower court had based its judgment against the insurer, at least in part upon Section 41-12-21(f)(1) UCA (1953) discussed under Point I above, but that no claim had been made that the policy was issued to meet the requirements of the Safety Responsibility Act. This court did not say that the lower court was in error, but that this court preferred to base its decision upon the issue of whether the rescission right was lost by reason of failure to make a reasonable, prompt, thorough investigation of insurability.

Appellants Hall submit that, upon the basis of the unconverted facts, this court must rule, as a matter of law, that plaintiff neglected its duty to make a reasonable investigation, having postponed its investigation until after the accident and Halls' injuries, and therefore plaintiff lost its right to rescind. Appellants submit that plaintiff's burden of showing the adequacy of its investigation was not met as a matter of law.

First, any representation that Ellis did not drive and had DeFriez drive, could not be legally material in any event because the Safety Responsibility Statute specifically requires policies to insure "any" person using the vehicle with the consent of the insured without exceptions of any kind, and the policy by its very terms insures all persons using the insured automobile with the permission of the

named insured. Section 41-12-21(b)(2) UCA (1953);(Def. Ex. 1), even if the policy had some term specifically precluding Ellis from driving, or saying that coverage would not exist should Ellis drive, that provision would not be binding in any event since Section 41-12-21 (f)(4) UCA (1953) precludes any such provisions contrary to the statute from being deemed part of the policy.

Second, even apart from the effect of the statutes mentioned, a representation as to who does or does not drive the car presently, cannot, under any circumstances, be legally sufficient to void a policy unless made a continuing warranty and a part of the policy. Mulconery v. Federal Auto. Ins. Asso., 230 Ill. App. 236 (1923) and Pioneer Mut. Cas. Co. v. Pennsylvania Greyhound Lines, 37 NE2d 412 (Ohio 1941). In Mulconery, the insurer argued it had been represented that the vehicle would be operated only by the insured, members of his family, or duly authorized employees, and since the accident occurred when the vehicle was being driven by someone else, the insurer was justified in avoiding the policy. The court held that such a statement even in the policy as to who would be driving is certainly not a warranty that the facts stated therein shall continue true throughout the term of the policy, and that to constitute any kind of a continuing warranty, such must be expressed in proper warranty language and in the policy itself. Here there was no testimony or evidence that Ellis would, under no circumstances, ever recover his eyesight and would, under no circumstances, ever drive or anything of like nature, and certainly nothing approaching continuing warranty

language appears in the application and the policy itself is silent as to the matter, insuring in broad language all persons driving with the consent of the named insured.

Third, where Dairyland admitted that it was common for an owner to drive his own vehicle, and had notice from the application itself that the named insured lived a mile to a mile and a half away from the residence of the owner of the vehicle, and there was nothing in the statement "does not drive due to eyesight, has the above drive" to indicate that such eyesight would never improve, and indeed the owner signed the application and did not appear to even have an eyesight problem to the agent, the insurer grossly breached its duty to check out the driving record of the owner of the vehicle by paying another 50 cents or so and requesting his record as well as the record of DeFriez. The only explanation that can be surmised as to why Dairyland did not do so, was because it was not interested in doing so. Dairyland's representative admitted that the main reason the application was reviewed in the office of Dairyland was to see whether the correct premium was charged, and it must be surmised that it is only incidental in Dairyland's business that it happens to check the driving record of the named insured. Perhaps Dairyland's office, as well as the rushed insurance agent, figured the interests of the company were adequately protected by the little notation as to Ellis not driving due to his eyesight. It is obvious that if Dairyland can totally avoid liability under the facts of this case after accepting the premium and issuing a document satisfactory to

the Tax Commission for the purpose of putting the car on the road, Maryland and every other liability insurer can surely escape liability in nearly every case by simply having the application state that no one will ever drive who may have a bad driving record or bad eyesight or who may have a suspended or revoked license, or who may be or become under the influence of alcohol, or who is driving in violation of the law, or who has had more than two citations every five years or so, and the like, thus excluding absolutely all high risk events which cause nearly all of the accidents. Then with such a representation firmly inserted in the application, when a claim is made, all the insurer would have to do is check the matter out, and upon finding that the accident was caused by any of the events mentioned in the application, the insurer could simply void out the policy and refund the premium, and testify that it certainly would not have accepted the policy had it believed that the representations would not hold good throughout its life. Such an obviously easy route around the public policy evidenced by the statutes above discussed could hardly be deemed to have been contemplated by the Utah legislature.

The Utah State Farm Mutual Automobile Ins. Co. v. Wood case, 25 Utah2d 427, 483 P.2d 892 (1971) was cited as a significant case and was quoted with approval in State Farm Mutual Automobile Ins. Co. v. Kurylowicz, 242 NW2d 530 (Mich. 1976). In that case, the insured had falsely answered that his license had not been suspended nor revoked. After two accidents, the insurer sought rescission ab initio. The Michigan court held that a Michigan statute severely restricting

the right to cancel automobile liability insurance and Michigan's uninsured motorist and no-fault statutes made crystal clear that:

> "It is the policy of this state that persons who suffer loss due to the tragedy of automobile accidents in this state shall have a source and a means of recovery. Given this policy, it is questionable whether a policy of automobile liability insurance can ever be held void ab initio after injury covered by the policy occurs. Generally, it is held that:
>
> 'The liability of the insurer with respect to insurance required by the act becomes absolute whenever injury or damage covered by such policy occurs * * * no statement made by the insured or on his behalf and no violation of the policy provisions may be used to defeat or avoid the policy.' 1 Long, The Law of Liability Insurance, §3.25 pp.3-83-84. See Detroit Automobile Insurance Exchange v. Ayvazian, 62 Mich. App. 94, 233 NW2d 200 (1975)."

The Michigan court cited with approval and quoted the Wood case, supra, a significant California case, Barrera v. State Farm Mutual Automobile Ins. Co., 456 P.2d 674 (1969) and two New York cases, Allstate Ins. Co. v. Sullam, 349 N.Y.S.2d 550 (1973) and State Farm Mutual Automobile Ins. Co. v. Carrion, 341 N.Y.S.2d 488 (1973). The New York cases held, as a matter of public policy, that an insurance carrier cannot rescind automobile insurance ab initio. The Michigan court held:

> ". . . we hold that where an automobile liability insurer retains premiums, notwithstanding grounds for cancellation reasonably discoverable by the insurer within the 55-day statutory period (maximum cancellation period)* * * the insurer will be estopped to assert that ground for rescission thereafter." (242 NW2d 520, 535)

Plainly, plaintiff breached its duty to the public to conduct a reasonable investigation within a reasonable time, and instead

neglected its duty by postponing such investigation until after the accident. By reason of such act and the acceptance of the premium and its conduct in issuing a document sufficient to satisfy state requirements and put the car on the road, plaintiff is estopped from seeking rescission ab initio.

Plainly, plaintiff did not meet its burden of showing the adequacy of its investigation. Its failure to check out Ellis' driving record was unreasonable per se and it lost any right to rescind as a matter of law.

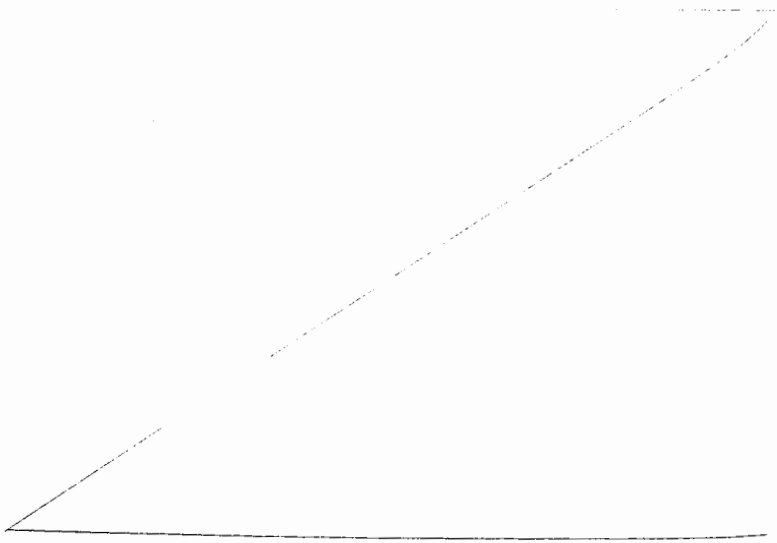
POINT III

ANY REPRESENTATION BY APPLICANT ELLIS THAT HE DID NOT DRIVE DUE TO EYESIGHT AND HAD DeFRIEZ DRIVE WAS INSUFFICIENT AS A MATTER OF LAW TO JUSTIFY RESCISSION

The discussion under Point II above of the legal irrelevance of Ellis' representation is equally applicable under Point III. Appellants Hall wish to emphasize first, however, under Point III the factual deficiency of plaintiff's proof. Plaintiff proved only a representation of a present condition, i.e., Ellis "does not drive due to eyesight, has the above drive." That representation certainly does not constitute a representation or warranty Ellis would not drive in the future. Indeed, nothing could be more expectable. A "does not" representation is simply not a "will never" representation and there is thus no support in the evidence for the trial court's finding No. 3 (R. 80) that DeFriez would be the sole operator and that Ellis would not operate the vehicle.

Further, there is substantial case law holding that even actual misrepresentations as to who will be driving in the future will not constitute misrepresentation legally sufficient to relieve an insurer of liability under an automobile insurance poli The cases are collected in ANNOT.,"Representations as to Age or Identity of Persons Who Will Drive Vehicle or As to the Extent of Relative Use, as Avoiding Coverage Under Automobile Insurance Poli 29 ALR3d 1139.

Even had Ellis said that he would not be driving the veh any time in the future, still such a misrepresentation is insuffic



justify rescission particularly in view of the fact that Dairyland could not, under the terms of the statute, exclude operation of the vehicle by any person at all who happened to be operating the vehicle with the consent of the named insured. The nature of such representation is such that it is really only an estimate of future activity and not a representation of an existing fact. The case is particularly strong against Dairyland where it did not even attempt to include a provision excluding Ellis as a driver. Surely, if such had been a matter of real importance it would have at least attempted to include such a provision or, realizing it could not include such a provision, would have cancelled the policy upon making a proper investigation, thus pulling the vehicle off the road and Halls would never have been injured. In Zepczyk v. Nelson, 35 Wis.2d 140, 150 NW2d 413 (1967), the insurer was held liable for damages resulting from a collision in which the son of the insured was the driver, not withstanding the insured had, in the application, represented prospectively that only the insured would be driving the vehicle 100% of the time. That was certainly a much stronger representation as to future intent than any conceivable inference arising out of the "does not drive" language here employed. In any event, Zepczyk held that even if the insured had knowledge of the clause in the application representing he would drive the vehicle 100% of the time, and the statement was false and made with the intent to deceive or increase the insurer's risk of loss or contributed thereto, still the insurer could not avoid liability to an innocent third person where the insurer could not, under the statute, exclude operation of a vehicle by the insured's son. The

court said that if the insurer were permitted to avoid liability under circumstances for which such avoidance was specifically pro... by statute by merely inserting provisions in the application for insurance which would not be valid in the policy by reason of the statute, the result would certainly be inconsistent with the purpo... of the statute and the purpose of the legislature to protect the members of the public who might be injured under such circumstances.

Plainly, any representation by Ellis that he did not dri... due to eyesight and had DeFriez drive was insufficient as a matter of law to justify rescission.

POINT IV

HALLS' COUNTERCLAIM AND CROSSCLAIM WERE IMPROPERLY DISMISSED

Plaintiff's Motion for Dismissal of the counterclaim and crossclaim filed by defendants Hall argued that the counterclaim a... crossclaim included actions in tort not in contract and asserted that the joining of any action sounding in tort with a contract action is in violation of the Utah Rules of Civil Procedure. (R. ... In plaintiff's memorandum in support of plaintiff's motion to dism... the Halls' counterclaim and crossclaim plaintiff's cited as its sole authority three Utah cases which this court has since indicat... should be overruled, to-wit: Young v. Barney, 20 Utah 2d 108, 4... P.2d 846 (1967); Christensen v. Peterson, 25 Utah 2d 411, 483 P.2... (1971), and Kesler v. Tate, 28 Utah 2d 355, 502 P.2d 565 (1972). (R.12)

The Halls' counterclaim and crossclaim contained three counts. Count I made claim on account of the accident and sought judgment against the estate of Jack Ellis and a judgment that plaintiff is obligated under the terms of the policy to pay the judgment or otherwise settle Hall's claims. Count II asserted that plaintiff issued the subject policy without proper investigation, without seeking to assure itself Ellis would not, in fact, drive, and that having issued the policy plaintiff led Ellis and DeFriez to believe Ellis and DeFriez were in compliance with the laws of the state of Utah and could lawfully operate Ellis' van upon the public highways. Count II further alleged that plaintiff did nothing to assure itself that Ellis would not attempt to drive and issued the policy without restrictions and conditions and duly collected the premium therefore, and was therefore estopped and precluded from denying liability on the policy. Count III alleged that Ellis would not have driven his van upon the public highways but for the fact of the issuance of the policy and that DeFriez had knowledge of any facts regarding any disability of Ellis and with knowledge that the probable effect of issuance of the policy was to assure Ellis that he could drive in accordance with the financial responsibility laws of Utah. Count III asserted a claim over against the estate of Jack Ellis and Daniel DeFriez should it ultimately be determined that there was no policy coverage on the basis of negligence and fraud practiced by Ellis and DeFriez in obtaining the policy, and the proximate result of such negligence or fraud to render the policy and proceeds unavailable

to Halls. (R. 6-9)

All claims asserted in Hall's counterclaim and cross-claim were properly assertable in the declaratory judgment action brought by the insurer under the plain terms of Rule 13(b) and Rule 13(f) Utah Rules of Civil Procedure.

Further, Appellants submit that Appellants' counterclaim against the insurer was, in substantial part, a compulsory counterclaim under the terms of Rule 13(a) Utah Rules of Civil Procedure.

Rule 13(a) U.R.C.P. requires that a pleading "shall" state as a counterclaim "any claim" which at the time of serving the pleading the pleader has against the opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require the presence of third parties of whom the court cannot acquire jurisdiction.

Rule 13(b) U.R.C.P. authorizes a pleading to state as a counterclaim "any claim" against an opposing party.

Rule 13(f) U.R.C.P. permits a pleading to state as a crossclaim"any claim" by one party against a copartner arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action.

There is absolutely nothing in the terms of any of these rules which precludes the joining of an action sounding in tort with an action for equitable relief, or contract relief.

Consistent with the theory of the Rules of Civil Procedure to bring the entire controversy before the court in one action is Rule 18, Joinder of Claims and Remedies, which provides that a complaint or counterclaim may join either as independent or alternative claims "as many claims, either legal or equitable or both" as the pleader may have against an opposing party. The rule further provides that there may be a like joinder of claims where there are multiple parties if the requirements of Rules 19, 20 and 22 are satisfied, and a like joinder of crossclaims or third party claims if the requirements of Rules 13 and 14 are satisfied.

Insofar as proper judicial administration of the case is concerned, Rule 18(b) makes it clear that whenever one claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims "may be joined in a single action"; but in that case the court is to grant relief, per the rule, only in accordance with the relative substantive rights of the parties.

Furthermore, Rule 20(a), Permissive Joinder, allows persons to join in one action if they claim any relief in common or in the alternative in respect of the same transaction, occurrence or series of transactions or occurrences. That rule allows joinder of defendants if common questions of law or fact arise, and a right to relief is asserted against them jointly, severally, or in the alternative, and makes it clear that a plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded, but that judgment may be given for one or more of the

plaintiffs according to their respective rights to relief and one or more of the defendants according to their respective liab

To preclude one party from being inconvenienced by bei compelled to be present while claims between other parties not i such party are litigated, Rule 20(b) allows the court to make su orders as will prevent embarrassment, delay or expense by making appropriate orders, including the ordering of separate trials or the making of other orders to prevent delay or prejudice.

There is absolutely nothing in those rules which preclu in an arbitrary fashion or at all the joining of a tort claim wit a contract claim. The effect of those rules is to encourage prec the opposite. There is no reason whatsoever why the court had t dismiss the Halls' crossclaim against DeFriez or the Halls' tort action. The court could have very easily separated the trials so as to determine the question of insurance coverage first and let the rest of the claims pend for later determination. Settlement would, of course, be affected by the determination of the issues raised by plaintiff. The Young v. Barney, Christensen v. Peterse and Kesler v. Tate cases are erroneous in principle, and in any event the same are not at all similar to the instant case, and in addition have been substantially discredited and should be overru

These three cases are wrong in principle. The injured ties, here theHalls, are really third party beneficiaries of the insurance contract and so are entitled, as a matter of law, to e the contract of insurance for their benefit as such beneficiaries

Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969). Shingleton specifically held that even though the identity of the third party injured by negligent operation of a vehicle was unknown at the time the contract of insurance was made, that fact does not prevent such persons from assuming the status of and becoming third party beneficiaries. The Shingleton court relied heavily upon the reasoning advanced in Gothberg v. Nemerovski, 58 Ill. App.2d 372, 208 NE2d 12 (1965). In Gothberg, the Illinois court took particular note of the fact that even the greater part of litigation in trial courts was concerned with claims arising out of property damage, personal injury or both caused by operation of motor vehicles, and that the legislature of every state in the Union long ago recognized the hazards and perils daily encountered and as a result have all enacted legislation aimed at the protection of the injured party. The procuring of automobile public liability insurance is required by law.

That fact has connotations extending protection to the general public above and beyond simply the private interests of two contracting parties. The Shingleton court further stated that it cannot be disputed that obtaining liability insurance coverage for a motor vehicle, regardless of whether the policy is secured to meet the requirement of a financial responsibility law, was obviously an act undertaken by the insured with the express intent of providing a ready means of discharging his obligations that would accrue to the public as a result of his negligent operation of a vehicle. Therefore, the Shingleton court held that there was sufficient reason to raise, by operation of law, an intent to benefit injured third

parties and thus to render motor vehicle liability insurance are to the third party beneficiary doctrine.

On consideration of the matter, the Shingleton court determined that it was convinced the time had arrived when the le reasons advanced in favor of joinder and direct action against an insurer clearly outweigh and preponderate over the traditional notions asserted by insurers to justify precluding an injured thi party from enjoying such rights. The primary basis for the court decision was the injection by the state into the area of the contr between an insured motorist and the insurer by reason of the over- whelming public interest in requiring financial responsibility of those driving motor vehicles. The Shingleton court further noted the total unrealism of the system's requiring multiple lawsuits an the like, while the constitution requires the courts to be open s that persons injured shall have remedy by the due course of law w denial or delay.

In this case, Dairyland filed suit, bringing in the inn injured third parties, seeking to escape liability on its policy while at the same time requiring those innocent injured third par first to defend the insurance company's separate case and then t file yet another action in the same court, thus promoting the gr inconvenience and delay possible, contrary to the express langua spirit and intent of the rules of civil procedure above cited, a to our own state constitution and the policy of the rules of ci procedure, and quite contrary to the overwhelming public policy expressed by and embodied in the no-fault, uninsured motorist an

special responsibility statutes of this state.

The absurd results of the artificial nonjoinder, improper party notions espoused in the Young v. Barney, Christensen v. Peterson and Kesler v. Tate cases, or at least some of them, are noted in the dissenting opinion of former Chief Justice Ellett in Wright v. Brown, 154 P.2d 1154 (1978). The majority opinion in the Wright v. Brown case clearly suggests that it is time to alter the course of the law as set forth in the three referenced cases. Additional discussion of the need to alter the supposed rule of those cases which is out of harmony with all notions of procedural due process of law, fairness, justice and judicial economy have been discussed in the dissenting opinions in the Christensen v. Peterson and Kesler v. Tate cases. The court's attention is also redirected to the cases of Schippers v. State Farm Mutual Automobile Ins. Co., 30 Utah2d 404, 518 P.2d 1099 (1974), and Rice v. Granite School District, 23 Utah2d 22, 456 P.2d 159 (1969). In the latter case, in a concurring opinion written by Justice Crockett, Justice Crockett specifically pointed out that insurance coverage must be assumed as a fact of life, in view of the statutory presumption of insurance coverage, and decisions which on the one hand prevent an insurance company from participating when it wants to, yet permit them to prevent the parties from participating when they want to, as in this case, are certainly out of step with reality. Certainly there is no reason why judges cannot know as much as every layman up and down the street knows, especially when these laymen regularly come to

court in cars duly covered by liability, no-fault and uninsured motorist insurance. Even when cars are driven without insurance the drivers do so under an acute awareness that they are not in compliance with law.

There is absolutely no just reason for the lower court to have dismissed the Halls' counterclaim and crossclaim.

The incongruity of the lower court's action here is highlighted by the fact the lower court assumed appellants Hall had sufficient interest in maintaining the policy to justify awarding against them in favor of the insurer, while preventing them from litigating their counterclaims and crossclaims arising in substantial part out of the same transaction and occurrence in the same legal

There was and is no proper legal justification for the lower court's action in dismissing Halls' counterclaim and crossc

CONCLUSION

1. Utah's 1973 No-Fault Insurance Act and Section 41-1 of the Utah Safety Responsibility Law, abrogate Dairyland's common law right to rescind the policy after the accident in which Halls were seriously injured.

2. Since Ellis was in the class of persons who should have furnished proof of financial responsibility, Dairyland's po should be deemed a motor vehicle liability policy within the ope of Section 41-12-21 U.C.A. (1953) including subparagraph (f) there irrespective of the fact the coverage evidenced thereby was not certified to the Department of Public Safety, under the doctrine

State Farm Mutual Automobile Ins. Co. v. Wall, 222 A.2d 282 (1966).

3. Dairyland lost its right to rescind as a matter of law neglecting its duty to promptly make a reasonable investigation. It was unreasonable per se for Dairyland to fail to review Ellis' driving record under the facts of this case, where it simply stretches credulity to the breaking point to believe that Ellis, age 50 and living a mile and a half away from his friend, would never in the future seek to drive his own vehicle.

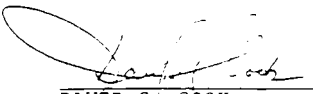
4. Any representation that Ellis did not drive due to eyesight could not, as a matter of law, suffice to prove a material misrepresentation of fact material to the risk where there was no endorsement to the policy precluding Ellis from driving. Such an endorsement would have been contrary to law and unenforceable in any event, and there was nothing in the nature of the representations made as to Ellis' present condition to suggest that Ellis would never in the future drive.

5. The lower court's dismissal of Halls' counterclaim and crossclaim was contrary to the Rules of Civil Procedure and totally unsupported by law. This court should now hold that a third party injured by the negligent operation of a motor vehicle may join both the tortfeasor and his insurance company in a single action to determine liability and the insurer's duty to defend, and such injured third party should be declared to have the right to litigate the entire controversy in the context of any action brought by an insurer to escape liability on the policy.

6. There was no basis in law for the lower court to dismiss Halls' crossclaim against Defriez nor any basis in law for the lower court to award costs as against Halls.

The decision of the lower court must be reversed.

RESPECTFULLY SUBMITTED, this 5th day of September, 1980.



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Served the foregoing Brief of Defendants-Appellants by mailing two copies thereof to Wendell E. Bennett, attorney for plaintiff, 370 East 500 South, Suite 100, Salt Lake City, Utah 84111 this 5th day of September, 1980.