4-17-1968

# Bashor v. Northland Ins. Co.

**No.** 24041

IN THE

# Supreme Court

OF THE

# STATE OF COLORADO

| | | |
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| THOMAS C. BASHOR, | ) | Error to the |
| | ) | District Court |
| Plaintiff in Error, | ) | of the |
| | ) | County of Adams |
| vs. | ) | State of Colorado |
| | ) | |
| NORTHLAND INSURANCE COMPANY, a Minnesota corporation, | ) | Honorable |
| | ) | Clifford J. Gobble |
| Defendant in Error. | ) | Judge |

BRIEF OF PLAINTIFF IN ERROR

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BRIEF OF PLAINTIFF IN ERROR

## I. STATEMENT OF THE CASE

The plaintiff in error, Thomas C. Bashor, was the plaintiff in the trial court and shall hereinafter be called the plaintiff, the insured, or the judgment debtor. The defendant in error, Northland Insurance Company, was the defendant in the trial court and shall hereinafter be called the defendant or the insurer.

On January 7, 1964, the insured collided with a vehicle in which the third party, Hilda Owens, was a passenger (ff. 1 & 9). The vehicle driven by the insured at the time and place of the collision was covered by a policy of liability insurance issued by the insurer in favor of the insured, but had a bodily injury liability limitation of $10,000 for damages that the insured might become legally liable to pay a third person (ff. 2 & 9). The third party claimed bodily injury as a result of the January 7, 1964, collision and ultimately underwent thoracic outlet-rib resection surgery in connection therewith (Exh. D).

The third party commenced a lawsuit against the insured in the District Court in and for the County of Adams, State of Colorado, Civil Action No. 15772, for bodily injuries sustained by her in the collision (ff. 3 & 9). Pending trial, the third party through her attorney repeatedly offered to settle the third party's claim within the limits of coverage afforded the insured through his policy coverage with the insurer (ff. 5 & 9). The insurer refused to settle on the basis of demands made by the third party and the matter was tried to a jury (ff. 5 & 9).

The third party was awarded a verdict by the jury and against the insured in the amount of $18,000.00, together with interest and costs (ff. 3 & 9, Exh. B). The insurer, on behalf of the insured, paid its policy limits and certain costs in partial satisfaction of the verdict, which

was reduced to a judgment (Exh. C). The insured's motion for a new trial was denied and no appeal was taken from the verdict and judgment.

Subsequently, the insured brought the within suit against the insurer based on allegations of bad faith and negligence on the insurer's part in refusing to accept the third party's repeated offers to settle her claims within policy limits.

The third party and the insured entered into a contract (ff. 36-52). While the aforementioned contract must be read in its entirety for one to become fully cognizant of its legal import, certain portions thereof summarize its intent and meaning. Section 2, in part, states:

> II. CONSIDERATION:
>
> For the mutual consideration hereinafter set forth:
>
> (1) The sum of $1,500.00 is paid to Owens by Bashor, the receipt of which sum Owens hereby acknowledges.
>
> (2) Bashor's attorneys, who will be selected by Owens with the consent of Bashor, will, within a reasonable period, commence litigation in a court of proper jurisdiction against Bashor's

insurance company, Northland Insurance Company, for the purpose of collecting any and all excess monies which are due and owing under the aforementioned judgment rendered by the jury in Civil Action No. 15772, Adams County District Court, Division "B" on September 30, 1965, for reasons relating to said insurance company's failure to settle Owen's claim within policy limits.

(3) Owens agrees that as a condition subsequent to Bashor's performance under this Agreement, she will hold Bashor harmless from any further executions under the judgment rendered by the Adams County District Court on September 30, 1965.

(4) Owens agrees she will withdraw any Transcript of Judgment of record and shall not refile said Transcript, will refrain from filing any liens of record relating to said judgment and will indemnify Bashor from any liens which may now be of record relating to said judgment, so long as Bashor performs his promises under this Agreement. In addition thereto, upon the signing of this Agreement, Owens agrees to deliver to Bashor a Quit Claim Deed conveying

all right, title and interest which she may have in any real or personal property, now owned by Bashor, as a result of her filing that Transcript of Judgment entered by the Adams County District Court, Civil Action No. 15772, on September 30, 1965.

(5) Owens warrants that she has executed a Satisfaction of Judgment of that judgment entered by the Adams County District Court, Civil Action No. 15772, entitled "HILDA OWENS and DARLENE DECKER vs. THOMAS C. BASHOR," on September 30, 1965, which has been executed as a condition subsequent to this Agreement, and which will be forthwith placed in escrow with Daniel S. Hoffman, Attorney at Law, and James D. McKevitt, Attorney at Law, Denver, Colorado, who, by mutual choice of the parties to this Agreement, shall serve as co-escrow agents and shall deliver said Satisfaction of Judgment, executed by Owens, in the future, on the date that the said Bashor has exhausted his remedies against Northland Insurance Company, both at a trial and/or appellate level. (Emphasis supplied)

Section III of the contract, in part, states that:

The prorata adjustment and formula is illustrated as follows: If Owens agrees to a settlement of Bashor's excess coverage claim in the amount of $4,500.00, Bashor will be entitled to 50 percent of $1,500.00, or a reimbursement of the sum of $750.00. As an additional example, in the event that Owens agrees to a settlement for a sum of $9,000.00 or in excess thereof, or Bashor is awarded such amount by the court or jury in his subsequent litigation with Northland Insurance Company, Bashor shall receive the sum of $1,500.00. Any settlement figure less than the sum of $9,000.00 shall be worked on a proportionate basis of the sum of $1,500.00 in comparison to the sum of $9,000.00, insofar as a prorata return to Bashor.

Section IV of the contract states that:

IV. GENERAL PURPOSE.

It is the purpose of this Agreement that Bashor shall proceed with litigation and/or appeal of the claim which he has against Northland Insurance Company in consideration

> of the Satisfaction of Judgment by Owens in the recital set forth above. The delivery of the Satisfaction of Judgment shall be determined by the performance of the conditions subsequent, namely, the exhaustion of legal and appellate remedies by Bashor as to his claim against the Northland Insurance Company as described in this Agreement and its terms. However, in no event, subsequent to the execution of this Agreement, shall Owens pursue any further execution of her judgment against Bashor, nor shall she file said judgment of record, nor pursue any lien against the real or personal property of Bashor subsequent to the date of this Agreement, and Owens shall also execute, upon the request of Bashor, any disclaimer of liens which may be of record, or which she may assert against the real or personal property of Bashor as to the time of this Agreement, all being subject to Bashor's performance of the covenants under this Agreement. (Emphasis supplied)

Based on its interpretation of the contract, the insurer filed a motion with the trial court entitled "Motion to Reduce Prayer" (ff. 32-35). The insurer contended that by virtue of the

contract, the insured's damages, if any, were reduced from the amount of the unsatisfied judgment to the $1,500.00 which was paid by the insured to the third party per Section II(1) of the contract above cited. The trial court ruled in favor of the insurer's motion and thereafter denied the insured's "Motion to Reconsider" (ff. 53-54, 72-81, 90).

On the morning of trial, in the absence of any written motion, the insurer moved to dismiss the insured's complaint on the grounds that the third party was the real party in interest. The insurer did not move to join the third party as an additional party. The trial court again ruled in the insurer's favor and, accordingly, dismissed the case and thereafter denied the insured's timely motion for a new trial (ff. 101-105; 177-180).

## II. SUMMARY OF ARGUMENT

### A.

The plaintiff is the real party in interest in his role as an insured seeking relief for the alleged bad faith and negligence of his own insurer with respect to the insurer's handling of the claim made against the plaintiff by a third party. The third party is neither the real party, nor an indispensable or necessary party to the present suit.

B.

The trial court erroneously limited the potential judgment of the insured against the insurer to $1,500.00 through a misinterpretation of the contract between the insured and the third party.

C.

At trial, the jury should only consider the issue of liability of the insurer to the insured. Damages, in the event of a verdict in favor of the insured and against the insurer on the issue of liability, should be resolved by the trial court as a matter of law. The contract between the insured and the third party and the partial payment of the judgment by the insured to the third party are immaterial as such relate to the issue of liability and the contract and partial payment should not be permitted in evidence or otherwise referred to during the presentation to the jury.

## III. ARGUMENT

### A. THE PLAINTIFF IS THE REAL PARTY IN INTEREST IN HIS ROLE AS AN INSURED SEEKING RELIEF FOR THE ALLEGED BAD FAITH AND NEGLIGENCE OF HIS OWN INSURER WITH RESPECT TO THE INSURER'S HANDLING OF THE CLAIM MADE AGAINST THE PLAINTIFF BY A THIRD PARTY.

## THE THIRD PARTY IS NEITHER THE REAL PARTY, NOR AN INDISPENSABLE OR NECESSARY PARTY TO THE PRESENT SUIT.

The third party is not the real party in interest, nor an indispensable or necessary party to the case before the bar, in that total relief can be afforded in the within cause to the parties already before the bar and the judgment herein will fully protect the insurer from any additional claim by the third party.

In Steen v. Aetna Casualty, 157 Colo. 99, 401 P.2d 254 (1965), the court ruled that a third party judgment-creditor of an insured was not a real party in interest in a suit against the insurer based on the insurer's "bad faith" breach of its responsibilities to its insured. This court clearly pointed out that the real party in interest in such a suit was the insured judgment-debtor.

This court said: "Should [the insureds] desire to ... complain [about the insurer's conduct], it will, perforce, have to be in a tort action not subject to garnishment proceedings, unless and until reduced to judgment. [The third party judgment-creditor], a stranger to the insurance policy involved, as a garnisher, can have no claim against the [insurer] as garnishee unless and until such transpires." (Colo. at p. 101)

In the instant case, under any circumstance, the insured judgment-debtor has a very viable and direct interest in the outcome of his claim against the insurer. Per Section III of his contract with the third party judgment-creditor, the insured stands to recoup some or all of the $1,500.00 paid to such creditor, which payment was in excess of his policy coverage with the insurer (ff. 48-49).

The contract between the third party judgment-creditor and the insured judgment-debtor is not a contract of assignment by its own clear terms as expressed in Section IV of the contract. The terms of the contract create a contractual claim on behalf of the third party and against the insured for part of the proceeds of any settlement or judgment in favor of the insured and against the insurer. Such a potential contractual claim does not make the third party, an assignee, a real party in interest, an indispensable party, or a necessary party. The general and applicable rules are stated as follows:

> The obligations of a contract are generally limited to those who are parties thereto, and it is a long and well-established general rule that an action upon a contract or for a breach of a contract can be brought and maintained by one who is a party to the contract sued upon; . . . (39 Am. Jur., Parties, § 20, p. 876).

... According to the view of most courts, however, real party in interest provisions, while authorizing one having the beneficial interest in a demand to sue in his own name, are not to be construed as precluding the person who holds the legal title thereto from suing in his own name whenever a judgment in his favor will discharge the defendant in regard to the liability sued upon, even though the amount recovered is for the benefit of another. According to the theory of these courts, the real party in interest is that person who can discharge the claim upon which suit is brought and control the action brought to enforce it, and not necessarily the person ultimately entitled to the benefit of the recovery or the person beneficially interested therein, although in many such cases the real party in interest will also be a person beneficially interested in the cause of action. It is enough, it has been said, for the defendant to know that the plaintiff is the party in legal interest, and that a recovery by him will be full protection against a subsequent suit by another. (39 Am. Jur., Parties, § 17, p. 872)

This court has adopted these general principles. In Koch v. Story, 47 Colo. 335, 107 Pac. 1093 (1910), this court said:

> ... where the trustee of an express trust also holds the legal title, he may maintain an action without disclosing the name of the beneficiary, or the nature of the trust. The objection [failure to join real parties in interest] is purely technical, and when, as in this case, the beneficiaries would be concluded by the judgment, which would be a bar to a subsequent suit on the same cause of action by them, the objection interposed ought not to be favorably considered.

The rule of the Koch case is fortified by Rule 19 of the Colorado Rules of Civil Procedure, which sets forth the requirement of joinder where needed if " . . . complete relief is to be accorded between those already parties . . ." In the present case, complete relief can be afforded the existing parties as to all claims between them without the joinder of additional parties.

Additionally, Rule 17(a) of the Colorado Rules of Civil Procedure would appear, by its own terms, to conclude this issue in favor of the insured.

> Rule 17(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but ... a party with whom or in whose name a contract has been made for the benefit of another, ... may sue in his own name without joining with him the party for whose benefit the action is brought ... (Emphasis supplied)

This case involves a suit by the insured against the insurer arising out of an insurance contract between the insured and the insurer.

The contract between the insured and the third party is a separate contract which clearly expresses an obligation of the insured to sue the insurer on the insured's claim, in part, for the benefit of the third party, but it is not the contract upon which the insured's claim is based in the within cause, nor does the third party have any claim against the insurer per the Steen case, supra.

Even if the third party had a claim against the insurer, it would derive through the claim of the insured and the third party would be subject to all defenses available against the insure and subject to the defense of a judgment in favo of the insurer and against the insured.

There is no present dispute between the third party and insured and, therefore, no

issuable action between them to be resolved in this case.

In summary, since the insured's claim in the present case arises out of his contract with the insurer, any judgment will preclude further action by the third party against the insurer relating to the same essential substantive matters. Thus, the test applied in most states and in Colorado, as above cited, has been met in all respects in the within case.

However, in the event this court rules that the third party is a real party in interest or an indispensable or necessary party, we respectfully request an opportunity to join the third party as an additional party plaintiff.

B. THE TRIAL COURT ERRONEOUSLY LIMITED THE POTENTIAL JUDGMENT OF THE INSURED AGAINST THE INSURER TO $1,500.00 THROUGH A MISINTERPRETATION OF THE CONTRACT BETWEEN THE INSURED AND THE THIRD PARTY.

Although the initial and immediately critical ground of this appeal relates to the trial court's dismissal of the plaintiff-insured's claim on the ground that the third party was the real party in interest, the trial court ruled on other matters of critical importance to an ultimate and just disposition of this cause.

The trial court ruled in favor of the defendant's "Motion to Reduce Prayer." The trial court reasoned that the insured had paid the third party $1,500.00 and that this sum represented the ultimate damage of the insured arising out of the insurer's alleged "bad faith" breach. The plaintiff-insured asserts that the ruling and reasoning of the trial court was erroneous as a matter of law.

The plaintiff-insured respectfully urges this court to rule on the propriety of the trial court's order limiting any potential judgment to $1,500.00 and to provide the appropriate guidelines for the trial court in this court's decision herein. The plaintiff-insured believes that the defendant-insurer concurs with our position that it is in everyone's best interest for this court to rule on the propriety of the trial court's damage limitation order in the event this court remands this cause to the lower court for trial. A ruling by this court at this time on the damage limitation issue will avoid the necessity of further costly and time-consuming appeals in such regard.

The trial court's ruling clearly violated the contractual intent of the third party judgment-creditor and insured judgment-debtor. The trial court interpreted the third party judgment-creditor and insured judgment-debtor contract in accordance with a self-serving construction of a stranger to that contract, namely, the insurer--and in diametric opposition to the

construction placed in the contract by the very parties to the contract, per Section III of the contract. The plaintiff-insured believes that this court laid aside such strained interpretations and results in Cox v. Pearl Investment Co., _____ Colo. _____, 450 P.2d 60 (1969).

The third party did not absolutely release the insured for a $1,500.00 payment (ff. 40-50). The third party has not entered a satisfaction of judgment in favor of the insured in exchange for the $1,500.00 payment (ff. 51-52). The obvious consideration given by the third party to the insured was that the third party would refrain from execution against the insured on the unpaid balance of the judgment if the insured went forward with the insured's existing claim against the insurer, per their contract, and paid the third party $1,500.00.

The contract between the third party and the insured contemplated ultimate potential payment to the third party of her full judgment with interest and a potential reimbursement to the insured of the $1,500.00 already paid by the insured to the third party, which payment was partial consideration for the third party's promises as above described.

The portions of the contract quoted in the insured's "Statement of Facts" unequivocally demonstrate the true intention of the parties.

The trial court apparently concluded that a $1,500.00 judgment in favor of the insured and against the insurer would make the insured whole under the terms of the insured's contract with the third party (but cf. ff. 178-179). This conclusion flies in the face of the provisions of the contract. If the insured was awarded $1,500.00 in the within cause, he would ultimately receive $250.00 of such amount after discharging his contractual obligation to pay over $1,250.00 to the third party. If the insured succeeds on the issue of liability against the insurer, he has a legal right to be made whole. He can only be made whole if he receives a judgment for the full "excess" over the policy limits.

If the insured receives a judgment against the insurer for $1,500.00, he will not be made whole and, in fact, will have suffered a loss of at least $1,250.00, per his contract formula with the third party. A brief reference to Section III of the contract, as previously cited, set forth the settlement or judgment distribution formula in patent terms.

In summary, the trial court has insisted on treating the contract between the third party and the insured as if it were a "one-liner." The trial court views the contract as providing that: the insured will pay the third party $1,500.00 and in consideration thereof, the third party will enter a satisfaction of her judgment in favor of the insured. The contract is

not that simple; the trial court has created a new and different contract.

C. AT TRIAL, THE JURY SHOULD ONLY CONSIDER THE ISSUE OF LIABILITY OF THE INSURER TO THE INSURED. DAMAGES, IN THE EVENT OF A VERDICT IN FAVOR OF THE INSURED AND AGAINST THE INSURER ON THE ISSUE OF LIABILITY, SHOULD BE RESOLVED BY THE TRIAL COURT AS A MATTER OF LAW. THE CONTRACT BETWEEN THE INSURED AND THE THIRD PARTY AND THE PARTIAL PAYMENT OF THE JUDGMENT BY THE INSURED TO THE THIRD PARTY ARE IMMATERIAL AS SUCH RELATE TO THE ISSUE OF LIABILITY AND THE CONTRACT AND PARTIAL PAYMENT SHOULD NOT BE PERMITTED IN EVIDENCE OR OTHERWISE REFERRED TO DURING THE PRESENTATION TO THE JURY.

The trial court did not clearly rule on whether it would permit the contract between the third party and insured or reference to the $1,500.00 already paid by the insured to the third party to be allowed in evidence before the jury (ff. 161-176). The insured respectfully requests this court to set forth proper guidelines

for the trial court in the event the case is remanded for trial.

The insured contends that the jury should render its decision on the issue of liability only, assuming that the insured presents a prima facie case during the trial presentation. The trial court should then rule on damages as a matter of law and direct a verdict in such regard. Either the insurer is liable for the "excess" judgment with interest or it is not liable for said "excess." The jury could not properly find in the insured's favor, but render a verdict for part of the "excess." Similarly, the contract between the third party and the insured and the $1,500.00 partial payment by the insured to the third party are totally immaterial to the issue of liability and would only serve to confuse or prejudice the jury with respect to its proper consideration of the liability issue before it.

The distribution of any judgment in the within cause is a matter of sole concern between the third party and the insured. The insurer would be fully protected from subsequent litigation by the third party by the judgment in the within cause.

## IV. CONCLUSION

The plaintiff-insured respectfully urges this court to set aside the trial court's dismissal of his complaint on the grounds that the plaintiff-

insured is the real party in interest and that the third party is neither a real party in interest nor an indispensable or necessary party to the within claim.

The plaintiff-insured further urges this court to avoid the necessity of a further appeal and to set guidelines for the trial of the within cause by instructing the trial judge to rule on damages as a matter of law and award the plaintiff the full "excess" judgment with interest if the issue of liability is found in favor of the plaintiff by the jury, and to direct the trial court to preclude reference to the contract between the third party and the insured and the payment of $1,500.00 by the insured to the third party during the presentation of evidence and argument before the jury.

Respectfully submitted,

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