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Declaratory Judgments - Subjects of Declaratory Relief - Suit by Insurer to Determine Duty to Defend on Automobile Liability Policy

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or of a nature to cause shock to the plaintiff.[9] Finally, as a third prerequisite, the plaintiff should recover only for fright or mental anguish suffered at the time of the mishap and not for consequential injuries arising later.[10] Such a restriction of the right of action would alleviate the court's fear of increased litigation. Of course this policy reason is not present and recovery is granted, where the shock is caused by an intentional act of the defendant.[11] Modern achievements in medicine make it possible in most cases to distinguish valid from fraudulent claims.[12]

The shock of a mother at the sight of her child in danger or that of a wife present at her husband's negligent death is real and raises human sympathies in favor of recovery against the negligent defendant,[13] and within the above restrictions recovery should be allowed.

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DECLARATORY JUDGMENTS — SUBJECTS OF DECLARATORY RELIEF — SUIT BY INSURER TO DETERMINE DUTY TO DEFEND ON AUTOMOBILE LIABILITY POLICY. — Defendant was sued for damages arising out of an automobile accident allegedly due to his intoxication. Before termination of that suit, plaintiff brought this action for a declaratory judgment to have its rights determined as insurer under a contract with defendant. The insurance policy contained a clause suspending coverage when the car was operated by a driver "under the influence of alcohol". The Supreme Court of Utah, one justice dissenting in part, *held* that this was a proper action for a declaratory judgment. *Utah Farm Bureau Ins. Co. v. Chugg*, 6 Utah 2d 399, 315 P.2d 277 (1957).

A suit for declaratory judgment is proper where there is an actual and justicable controversy.[1] A controversy between an insurer and the insured as to the existence or extent of liability to injured persons by the insurer under the policy is the proper subject of a declaratory judgment.[2] The same is true where the parties seek to determine the insurer's duty to defend the insured.[3] However, this presupposes the fact that the insurance company is not a party to another action where the same facts and same parties are involved.[4] In

9. Renner v. Canfield, 36 Minn. 90, 30 N.W. 435 (1886); Norris v. Southern Ry., 84 S. C. 15, 65 S.E. 956 (1909).

10. See Kalleg v. Fassio, 125 Cal. App. 96, 13 P.2d 763 (1932).

11. Recovery has been allowed where the defendant commits a willful wrong toward a third person although no bodily injury accompanies the mental anguish and the plaintiff's person is not threatened. Alabama Fuel & I. Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951). Mental distress caused by negligent threats or actual injury to property is not compensable. State v. Baltimore Transit Co., 197 Md. 528, 80 A.2d 13, (1951). But if defendant's conduct is willful recovery may be allowed. *Cf.*, Bryson v. Phelps, 23 Ala. App. 346, 125 So. 795, *cert. denied*, 220 Ala. 389, 125 So. 798 (1929).

12. 19 Albany L. Rev. 320 (1955).

13. Prosser, Torts, § 37, (2d ed. 1955).

1. Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U. S. 270 (1941); G. W. Jones Lumber Co. v. City of Marmarth, 67 N. D. 309, 272 N.W. 190 (1937); N. D. Rev. Code § 32-2306 (1943); See Langer v. State, 69 N.D. 129, 284 N.W. 238 (1939), in which the court held that a declaratory judgment would not be given where there was no "actual, justiciable controversy", and what was sought was merely an "advisory opinion."

2. Travelers Indemnity Co. v. Cochrane, 155 Ohio St. 305, 98 N.E.2d 840 (1951); *cf.*, Aetna Life Ins. Co. v. Haworth, 300 U. S. 227 (1937).

3. Reed v. Fidelity & Cas. Co. of N. Y., 254 Ala. 473, 48 So.2d 773 (1950); State Farm Mut. Auto. Ins. Co. v. Skuluzacek, 208 Minn. 443, 294 N.W. 413 (1940); New Amsterdam Cas. Co. v. Kirschenbaum, 194 Misc. 104, 85 N.Y.S.2d 866 (Sup. Ct. 1948).

4. Brillhart v. Excess Ins. Co., 316 U. S. 491 (1942); Hudson v. Travelers Ins. Co., 145 Kan. 732, 67 P.2d 593 (1937).

states where the insurer may be and is joined as a defendant, or sued directly by the injured party, the issue is triable as a part of the main cause and the courts deny declaratory relief.[5]

The propriety of a declaratory judgment where another action is pending involving the same set of facts is a matter of dispute.[6] Generally such relief will be granted, provided (1) the trial of the main cause will not determine the matter in controversy,[7] (2) such relief will not prejudicially affect the injured party by a trial of the issue,[8] and (3) the parties and facts are not identical in both actions.[9]

North Dakota would presumably follow the reasoning of this case in granting declaratory relief although no cases directly in point were found.[10] There is a plausible policy argument against permitting such an action on the part of an insurer.[11] In a case of this nature the insurance company must in effect attempt to prove the insured to be liable, i. e., a drunken driver, and upon failing must turn around and defend against that which they had formerly sought to establish.[12] However, the weight of authority allows such actions to be brought, and it would appear that where an actual controversy exists an insurance company should be entitled to have its rights determined without the expense of an unwarranted claim.

WILLIAM J. MCMENAMY.

INSURANCE — INSURER'S DUTIES TO INSURED — LIABILITY OF INSURER FOR JUDGMENT IN EXCESS OF POLICY LIMITS. — Action against insurer, who had agreed to indemnify insured for damages to insured's employees, to recover amount in excess of policy limit paid by insured in discharge of judgment against it for injury to employee. The Supreme Court of Oklahoma *held*, two justices dissenting, that the finding that insurer had not exercised good faith in handling claim for less than the policy limit was sustained by the evidence, and hence insurer was liable for excess over policy limits. *Ameri-*

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5. Auto Mut. Indem. Co. v. Moore, 235 Ala. 426, 179 So. 368 (1938); New Amsterdam Cas. Co. v. Simpson, 238 Wis. 550, 300 N.W. 367 (1941).

6. 1 Anderson, Declaratory Judgments § 209 (2nd ed. 1951).

7. Continental Cas. Co. v. National Household Distributors, 32 F.Supp. 849 (E.D. Wis. 1940); Strawn v. Sarpy County, 146 Neb. 783, 21 N.W.2d 597 (1946).

8. United States F. & G. Co. v. Savoy Grill, 51 Ohio App. 504, 1 N.E.2d 946 (1936). N. D. Rev. Code § 32-2311 (1943): "PARTIES. When declaratory relief is sought, all persons who have or claim any interest which would be affected by the declaration, shall be made parties, and no declaration shall prejudice the rights of persons not parties to the proceeding . . ."; see Northern Pac. Ry. Co. v. Warner, 77 N. D. 729, 45 N.W.2d 196 (1950).

9. See note 4 *supra*.

10. *Cf.*, Iverson v. Tweeden, 78 N. D. 132, 48 N.W.2d 367 (1951); Northern Pac. Ry. Co. v. Warner, 77 N.D. 729, 45 N.W.2d 196 (1950); Great Northern Ry. Co. v. Mustad, 76 N.D. 84, 33 N.W.2d 436 (1948); Asbury Hospital v. Cass County, 72 N.D. 359, 7 N.W.2d 438 (1943); Langer v. State, 69 N.D. 129, 284 N.W. 238 (1939); G. W. Jones Lumber Co. v. City of Marmarth, 67 N.D. 309, 272 N.W. 190 (1937). Minnesota has followed the rule of the principal case in State Farm Mut. Auto. Ins. Co. v. Skuluzacek, 208 Minn. 443, 294 N.W. 413 (1940).

11. McFarland v. Cremshaw, 160 Tenn. 170, 22 S.W.2d 229 (1929). See also Heller v. Shapiro, 208 Wis. 310, 242 N.W. 174 (1932).

12. In the instant case the dissenting justice stated, "Here the insurance company tried and did prove its own assured to be a drunkard to the satisfaction of the trial judge, who made findings to that effect, and now that we reverse the case; the selfsame insurance company is duty-bound to reverse its role and do everything in its power to prove that the assured was as sober as the trial judge, under the very covenant from which unsuccessfully it attempted to extricate itself."