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DISCOVERABILITY OF INSURANCE LIMITS

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The main question or problem which will be covered in this article is the problem of discoverability of insurance limits in pretrial preparation. The basis for discovery of the insurance policy limits is based either upon Colo. R. Civ. P. 26(b) as respects the scope of examination in a discovery deposition, or Rule 45(d) as respects production of documentary evidence which is to be produced at the time a discovery deposition is taken. The more important of these two rules is 26(b):

> *Scope of Examination.* Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge or relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.[1]

Rule 26(b) was copied after the Federal Rules of Civil Procedure and neither it nor the Federal Rule originally contained the last sentence. The early federal decisions interpreting this rule held that the information to be elicited from the deponent had to be evidence which would be admissible at the time of trial. As this was not the real intent of the rule, the federal rule was modified in 1946 and then in 1951 the Colorado Rules of Civil Procedure was amended to conform with the federal amendment to the effect that: "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."[2]

It should be pointed out and emphasized that under this amendment testimony which would still be inadmissible at the trial may be elicited from the deponent in the discovery deposition, or interrogatories, if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. In other words, it would appear clear in a reading of this amendment that testimony which would not reasonably be calculated to lead to the discovery of admissible evidence would not be proper. This certainly was the belief of many trial attorneys until the case of *Lucas v. District Court*,[3] which holds that an interrogatory as to the limits of an automobile policy is proper and that the defendant must answer such a question. Since this decision was handed down in 1959, most

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1 Colo. R. Civ. P. 26(b) as amended 1951.

2 *Ibid.*

3 140 Colo. 510, 345 P.2d 1064 (1959).

attorneys have assumed that in any case involving an automobile policy the defendant, when requested, must advise as to the policy limits. The opinion that this is not the case and that the ruling in *Lucas v. District Court* is limited in its scope, is hereafter pointed out.

The background of the *Lucas* case, as well as what occurred at the oral argument, is quite interesting and most helpful in analyzing that case.[4] The *Lucas* case arose out of an automobile damage action in Pueblo. The plaintiff, upon taking defendant's deposition, had inquired of the defendant as to the name of his insurance carrier and the limits of his policy. The defendant readily disclosed the name of his carrier, with no objection from his attorney, since there are many decisions in Colorado holding it proper on voir dire jury examination to inquire whether or not the jurors are officers, employees or policyholders of a specific insurance company. Certainly, with such a rule of law, the plaintiff is entitled to know the name of the insurance company involved, so as to properly interrogate the jury. There would be no legitimate reason for refusing to give this information, even though it would not be admissible in evidence at the trial.

The attorney for the defendant did, however, object to defendant's disclosing the limits of his policy and instructed him not to answer. The trial court sustained the defendant's position in that respect and the plaintiff then proceeded to the supreme court, asking the court to issue a writ of mandamus ordering the trial court to require the defendant to answer this question. Counsel for the defendant filed a motion to dismiss the petition in the nature of a writ of mandamus on the ground that this was not the proper procedure to follow. An order of court was obtained authorizing a specified time within which to file an answer brief on the question of discoverability of the policy limits, in the event the court denied their motion to dismiss.

Through a misunderstanding in the supreme court, the court, after having this matter under consideration for some time, handed down its decision, holding that the defendant was required under Rule 26(b) to disclose the policy limits. When the court's attention was called to the fact that the defendant had never filed an answer

[4] Editor's note: Mr. Wormwood appeared as *amicus curiae* on the petition for rehearing in Lucas v. District Court, taking the position that the defendant should not be forced to disclose the limits of his automobile insurance policy.

brief on this issue, the court immediately granted a petition for rehearing and also granted permission for a brief to be filed by amici curiae. During the oral argument, it was pointed out to the court that amicus curiae felt the opinion requiring this disclosure was exactly contrary and opposed to the Colorado rule of law regarding supplemental proceedings in aid to execution, as provided for under Rule 69(d) Colorado Rules of Civil Procedure:

> *Order for Appearance of Judgment Debtor; Arrest.* At any time when execution may issue on a judgment, the judgment creditor shall be entitled to an order requiring the judgment debtor to appear before the court or a master at a specified time and place to answer concerning his property....[5]

It will be seen from this rule that the right to interrogate a party as to his assets, which we contended included an insurance policy, is a right that the judgment creditor has against the judgment debtor after a judgment has been obtained. In other words, these are supplemental proceedings and not such proceedings as are permitted prior to judgment.

It was pointed out to the court that while the particular question before it only involved an automobile insurance policy, if the court ruled the defendant was required to disclose the limits of the policy, it was going against the rule as to supplemental proceedings and was simply the first wedge opening the door that would lead to a rule of court which could eventually mean that in any damage action a plaintiff could interrogate the defendant as to any assets he might have even though later the defendant might be victorious on the issue of liability. It was also pointed out that if the court's opinion held the defendant must answer this question as to an automobile policy, it would follow that a defendant would have to answer this question as to any type of policy, such as a malpractice policy, landlord and tenant's policy, or other type of insurance which a defendant might carry. Mr. Justice Doyle, who wrote the majority opinion, stated from the bench that the court did not intend to go that far and had limited its opinion to simply an automobile policy.

The *Lucas* case was a four to three decision. Mr. Justice Doyle's majority opinion was concurred in by two other justices. Mr. Justice Sutton wrote a strong dissenting opinion, concurred in by two other justices, and Mr. Justice Frantz tipped the scales by specially concurring in the majority opinion. It is quite interesting to note that prior to the *Lucas* decision, in 1954 when Mr. Justice Frantz was on the district bench as a trial judge, he wrote an opinion in the case of *Kessler v. Petersen*,[6] wherein he held the defendant was not required to disclose the policy limits and stated:

> As the Court views it, the testimony sought to be elicited in the taking of the defendant's deposition would not have a tendency in the remotest degree to establish the probability or improbability of any of the allegations in the complaint.[7]

5 Colo. R. Civ. P. 69(d).
6 Civil No. A-95697, District Court, City and County of Denver, 1954.
7 *Ibid.*

It should be noted that in Mr. Justice Frantz' specially concurring opinion he changes his thinking, based solely on the fact that Rule 26(b) allows examination as "to the claim or defense of any other party," and states that as soon as an assured is involved in an accident covered by his insurance policy he has a claim against the insurance company and, consequently, the plaintiff has the right to interrogate him concerning that claim.

Mr. Justice Doyle in the majority opinion readily agrees that the amount of the insurance coverage would not lead to any evidence which would be admissible at trial, but seems to base his opinion on two grounds. First, that if the limits are disclosed to the plaintiff it will lead to a settlement of claims, and second, that: "In the light of our Safety Responsibility Act and taking into account its objects and purposes, we are of the opinion that the inquiries concerning the existence of liability insurance and extent of coverage are 'relevant to the subject matter involved in the pending action.' "[8] To date there has been no other case before the supreme court on this question of disclosure of the policy limits.

We might state that the rule in the *Lucas* case is not the universal rule on this point. As a matter of fact, the majority of the states seem to hold that disclosure of policy limits prior to judgment is not proper. For instance, in the case of *Jeppesen v. Swanson*,[9] the Minnesota Supreme Court, in ruling that the defendant did not have to disclose the limits of his insurance policy, made the following cogent remarks:

> It would seem to us that, even though the discovery is not to be limited to facts which may be admissible as evidence, the ultimate goal is to ascertain facts or information which may be used for proof or defense of an action. Such information may be discovered by leads from other discoverable information. The purpose of the discovery rules is to take the surprise out of trials of cases so that all relevant facts and information pertaining to the action may be ascertained in advance of trial. Where it is sought to discover information which can have no possible bearing on the determination of the action on its merits, it can hardly be within the rule. It is not intended to supply information for the personal use of a litigant that has no connection with the determination of the issues involved in the action on their merits. . . .
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> Under the guise of liberal construction, we should not emasculate the rules by permitting something which never was intended or is not within the declared objects for which they were adopted. Neither should expedience or the desire to dispose of lawsuits without trial, however desirable that may be from the standpoint of relieving congested calendars, be permitted to cause us to lose sight of the limitations of the discovery rules or the boundaries beyond which we should not go. If, perchance, we have the power under the enabling act to extend the discovery rules

8 Lucas v. District Court, *supra* note 3, at 516.

9 243 Minn. 547, 68 N.W.2d 649 (1955).

> to permit discovery of information desired for the sole purpose of encouraging or assisting in negotiations for settlement of tort claims, it would be far better to amend the rules so as to state what may and what may not be done in that field than to stretch the present discovery rules so as to accomplish something which the language of the rules does not permit.[10]

It is interesting to note that in the recent case of *State v. Elliott*,[11] the Missouri Supreme Court rejects the *Lucas* case, and in so doing states:

> The question presented is one of first impression in this state. It has seldom arisen in other jurisdictions and the cases on the subject are not in agreement. The respondent cites *People ex rel. Terry v. Fisher*, 12 Ill. 2d 231, 145 N.E.2d 588; *Lucas v. District Court*, 140 Colo. 510, 345 P.2d 1064, and *Pettie v. Superior Court*, 178 Cal. App. 2d 680, 3 Cal. Rptr. 267. These cases reject the concept that the information sought must be admissible in evidence and apparently give no effect to the provision of the rule that the matter must be reasonably calculated to lead to admissible evidence if the matter itself is not admissible. . . .
>
> The more persuasive cases from other jurisdictions have held against requiring disclosure of policy limits. They are better reasoned and more consistent with the primary purpose of the rules relating to pretrial discovery.[12]

In reading the *Lucas* case and the grounds set forth in the majority opinion, the ruling of that case appears to be that the only time a defendant should be required to disclose the limits of his automobile policy is when such policy has been issued to him by reason of the Safety Responsibility Act.[13] This interpretation of the decision is shared in A.L.R. which states, in citing the *Lucas* case,

> In action arising from automobile accident, since any liability policy is subject to state safety responsibility law, questions may be propounded in pretrial depositions as to existence of liability insurance and policy limits thereof.[14]

As a matter of fact, the interpretation of the *Lucas* case suggested here does not go as far as that of the A.L.R. author, who recognizes that the *Lucas* case is based on the Safety Responsibility Law, but seems to feel the case holds that "any liability policy is subject to the State Safety Responsibility Law." It is not believed that this is a correct interpretation.

Except for subsequent decisions by the Colorado Supreme Court, it might be said that the *Lucas* case was authority for the proposition that in any automobile policy the defendant was required to disclose the policy limits. In the *Lucas* decision it did not appear whether the defendant's policy was a voluntary policy

10 *Id.* at 656, 658.
11 363 S.W.2d 631 (Mo. 1963).
12 *Id.* at 636.
13 Colo. Rev. Stat. § 13-7-19 (1953).
14 A.L.R.2d Supp. 911 (1962).

or an involuntary policy, that is, one required by the Safety Responsibility Act.

In a subsequent case, *Safeco Ins. Co. of America v. Gonacha,*[15] the insurance company had denied coverage under the insurance policy, due to misrepresentations made by the assured at the time the policy was issued. Subsequent thereto, the injured party instituted suit against the assured, Gonacha, and obtained judgment. Thereafter Gonacha and his judgment creditors instituted an action against Safeco, alleging that at the time of the accident Gonacha was insured against public liability by Safeco. The trial court ruled that the misrepresentation by Gonacha in obtaining the policy was not binding upon the judgment creditor, that under the Safety Responsibility Law the liability of the insurance carrier became absolute when the accident occurred, and that the insurance company could not raise the defense of misrepresentation in obtaining the policy against the judgment creditor. The supreme court reversed the lower court, holding that this was a voluntary policy, not one required under the Safety Responsibility Law, and that this law was therefore inapplicable. The court stated:

> C.R.S. '53, 13-7-19 applies to a driver having prior accidents, who has manifested financial irresponsibility and submits to the Director a policy "as proof" of future responsibility in order that he may continue to operate an automobile. Substantially identical enactments have been construed to apply only to "mandatory policies" as distin-

15 142 Colo. 170, 350 P.2d 189 (1960).

guished from "voluntary policies." This is manifest from a careful reading of C.R.S. '53, 13-7, commonly referred to as 'Colorado Financial Responsibility Law' . . . .

The policy sued on in the instant case was not issued as the consequence of Gonacha's previous accident record under the provisions of this enactment, and was not delivered to and approved by the Insurance Commissioner as assurance of Gonacha's ability to meet the demands of future accidents. Colorado has no compulsory automobile insurance law, and the policy here considered was a "voluntary" one. In such circumstances the trial court erred in directing a verdict for plaintiffs.[16]

The *Safeco* case was immediately followed by *Drake v. State Farm Mut. Auto. Ins. Co.*,[17] which was in turn followed by *Western Mut. Ins. Co. v. Wann.*[18] In the latter case the automobile insurance policy had a clause which excluded injuries to employees of the insured "while engaged in his employment." Wann was injured while working for the insured when struck by a car driven by a co-employee. The employer had only two employees and was not subject to the Workmen's Compensation Act. Wann sued the employer for damages and recovered judgment, and thereafter in a garnishment proceeding attempted to recover against the insurance company. Wann's position was that under the Colorado Financial Responsibility Act the company could not have such an exclusion in its policy. The trial court agreed with Wann and entered judgment for him. The supreme court reversed, holding that the exclusion was proper and applicable, and as regards the Colorado Financial Responsibility Act, stated:

Counsel for Wann urge that the exclusion provision runs contrary to the Colorado Financial Responsibility Act and that the contract of insurance is subject to all of the provisions thereof. Complete answer to this is found in the admission of counsel that taking of this insurance by Hamacher was entirely voluntary on his part—he was under no compulsion to have any insurance. In such a situation the Financial Responsibility Act does not come into play.[19]

It is suggested that under the authority of the last three cited cases when applied to the *Lucas* case, the trial courts, and eventually the supreme court, should hold that the requirement to disclose policy limits should be limited to those policies which are required under the Safety Responsibility Act, that is, "involuntary policies," and not to policies which are not required under the Act, that is, "voluntary policies."

As stated above, Mr. Justice Doyle, at the time of the oral argument, indicated that the *Lucas* ruling was confined solely to automobile liability policies. Other jurisdictions which have allowed discoverability of policy limits prior to judgment have gone further and have allowed such discoverability in other

16 *Id.* at 175, 350 P.2d 192.
17 142 Colo. 244, 350 P.2d 566 (1960).
18 147 Colo. 457, 363 P.2d 1054 (1961).
19 *Id.* at 460, 363 P.2d 1055.

types of insurance policies. For instance, California has allowed discoverability of the policy limits in a malpractice case.[20] The California court states in its opinion that it sees no difference between a policy of insurance for liability for negligent practice of the healing arts and an automobile liability policy. Further, in California it has been held that discovery concerning liability insurance is proper in a malpractice and fraud case against a civil engineer.[21]

The United States District Judge for the District of Montana has held that such discoverability regarding policy limits may be had as regards a boat liability policy.[22] In Michigan the defendant Board of Regents of the University of Michigan was required to disclose a liability policy obtained by the Board, and the limits thereof, for the purpose of showing that as far as those limits were concerned there was no governmental immunity.[23]

Another interesting situation arises under this subject. Colo. Rev. Stat. § 41-2-2 (1953) provides for exemplary damages in all civil actions, under certain circumstances. The Colorado Supreme Court has held in several cases that where exemplary damages are sought to be recovered in an action, it is proper at the time of the trial to question the defendant as to his financial worth; that exemplary damages being punitive in nature, the financial condition of the defendant may be shown in order for the jury to determine what amount of punitive damages should properly be awarded.[24]

With the supreme court holding that evidence of the financial worth of a defendant may be introduced at the time of trial, where punitive damages are sought, it would certainly follow that the plaintiff in pre-trial discovery could interrogate the defendant regarding his financial worth, if exemplary damages are sought. The next question arises as to whether such discovery procedure could include the question of the limits of the automobile insurance policy. Clearly, if exemplary damages were covered under an automobile insurance policy then the question would be proper. However, exemplary damages are not covered under an insurance policy, and if in fact the insurance company attempted to cover such damages, the provision would be void.

We have only one Colorado case involving this exact question, *Universal Indem. Ins. Co. v. Tenery*.[25] The supreme court in this case held exemplary damages were not covered under that particular policy, and stated:

> Included in the total amount of the judgment entered against the garnishee herein was the award of exemplary damages against defendant Callahan in the sum of $1,000. This award was primarily for the punishment of Callahan for his wrongful acts and as a warning to others. It was

20 London v. Superior Court, 167 Cal. App. 2d 39, 334 P.2d 638 (1959).

21 Rolf Homes, Inc. v. Superior Court, 186 Cal. App. 2d 876, 9 Cal. Rptr. 142 (1960).

22 Schwentner v. White, 199 F. Supp. 710 (D. Mont. 1961).

23 Crriste v. Board of Regents, 364 Mich. 202, 111 N.W.2d 30 (1961).

24 E.g., Starkey v. Dameron, 92 Colo. 420, 424, 22 P.2d 640 (1933) (concurring opinion); McAllister v. McAllister, 72 Colo. 28, 209 Pac. 788 (1922); Courvoisier v. Raymond, 23 Colo. 113, 47 Pac. 284 (1896).

25 96 Colo. 10, 39 P.2d 776 (1934).

> in no wise compensation to the injured party for bodily injuries or actual loss occasioned by the negligence of Callahan. The insurance company did not participate in this wrong, and was under no contract to indemnify against such. In this particular matter the policy indemnifies against damages for bodily injuries, and nothing in addition is contracted for, and there is no further liability. *The injured will not be allowed to collect from a non-participating party for a wrong against the public.*[26] (Emphasis supplied.)

This is the general rule all over the United States. The most recent decision in that respect is *Northwest Nat'l Cas. Co. v. McNulty*,[27] wherein the Federal court goes into the question fully, holding that it would be against public policy for an insurance company to issue insurance covering a person for exemplary damages.

It will be seen from this article that there are still many questions involving discoverability of insurance policy limits which have not been decided by the Colorado Supreme Court. It is suspected that the ingenuity of both the plaintiffs' bar and the defense bar is such that many of these questions will eventually find their way to the supreme court for determination.

26 *Id.* at 17, 39 P.2d 779.
27 307 F.2d 432 (5th Cir. 1962).