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Evidence--Disclosure of Defendant's Liability Insurance

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EVIDENCE—DISCLOSURE OF DEFENDANT'S LIABILITY INSURANCE.—

In an action for damages resulting from an automobile accident, *P*'s attorney solicited from an apparently disinterested witness on cross-examination that *D* had indemnity insurance. This witness's testimony was contradictory to testimony of some of *P*'s witnesses. Held, that while the broad general rule is that in a negligence case evidence showing that *D* carried indemnity insurance is inadmissible and constitutes reversible error if admitted, such evidence is admissible to show interest or bias of an apparently disinterested witness if the jury is properly instructed to consider such testimony as bearing only on the witness's credibility. *Butcher v. Stull*, 82 S.E.2d 278 (W. Va. 1954).

In *Christie v. Mitchell*, 93 W. Va. 200, 116 S.E. 715 (1923), the court says the effect of letting the jury know that the defendant was protected by indemnity insurance cannot be wholly cured by the court's ruling that such question is improper and by instructing the jury to disregard the answer. Accord, *Bradford v. Board of Education*, 128 W. Va. 228, 36 S.E.2d 512 (1945). In short, the court implies that a new trial is necessary. But *Ambrose v. Young*, 100 W. Va. 452, 130 S.E. 810 (1925), holds that testimony volunteered by a witness in such a case to the effect that the defendant was protected by indemnity insurance is not reversible error where it clearly appears that counsel for the plaintiff did not solicit such testimony and could not have anticipated the objectionable answer of the witness and where the court instructed the jury to disregard it. So, it is seen that there is some confusion in this state as to just what the rule is. To further illustrate this point, consider *Moorefield v. Lewis*, 96 W. Va. 112, 123 S.E. 564 (1924), in which it is said that improper remarks (referring to the fact that the defendant had indemnity insurance) by counsel during the trial and in the presence of the jury are not cause for reversal if the jury are properly instructed to disregard them and the court is unable to see that substantial prejudice resulted. On the other hand, note the holding in *Fleming v. Hartrick*, 105 W. Va. 135, 141 S.E. 628 (1928): "This court has held on numerous occasions that the jury should not in any manner be apprised of the fact that the defendant in an action for the negligent operation of an automobile is protected by indemnity insurance, notwithstanding that the court may instruct the jury not to consider the same in arriving at a verdict."

Judging from all of these cases we can see that admitting such evidence may be: (1) reversible error under all circumstances; (2)

not reversible error if the jury was instructed to disregard it and the court is unable to see that substantial prejudice resulted; (3) not reversible error if the examining attorney did not solicit and could not have anticipated the objectionable answer and the jury is instructed to disregard it. Other jurisdictions seem to have the same problem. In both *Beatty v. Palmer*, 196 Ala. 67, 71 So. 422 (1916), and *Spoornick v. Backus Brooks Co.*, 89 Minn. 354, 94 N.W. 1079 (1903), it is said that admitting such evidence is not reversible error if the examining attorney did not solicit and could not have anticipated the answer. The *Beatty* case says the attorney's good faith is presumed. It even goes so far as to say that the question and answer are not sufficient to create bias, which moves one to ask why require good faith on the part of the attorney?

The instant case comes within a well-recognized exception to the general rule barring such evidence. This exception providing that evidence that the defendant is protected by indemnity insurance is admissible and does not constitute reversible error where it is introduced to show interest or bias on the part of an apparently disinterested witness seems to be generally accepted in most jurisdictions. *Vindicator Consol. Gold Min. Co. v. Firstbrook*, 36 Col. 498, 86 Pac. 313 (1906); *Gibson v. Gray Motor Co.*, 147 Minn. 134, 179 N.W. 729 (1920). The reason for this exception is that the general rule is in conflict with the rule of evidence allowing the credibility of a witness to be attacked. The courts have weighed these two rules where they conflict, as here, and have decided that the latter outweighs the former. 3 WIGMORE, EVIDENCE § 282a (3d ed. 1940).

Lynch v. Alderton, 124 W. Va. 446, 20 S.E.2d 657 (1942), held that it was reversible error to ask the whole jury panel, "Are any of you officers, employees, agents or stockholders in any liability insurance company?" This informed the jury indirectly that the defendant was protected by indemnity insurance. This case may be distinguished from the instant case by quoting from the *Lynch* case: "Such an inquiry might have been proper, as applied to an individual juror, out of the presence of the balance of the panel, had the matter been brought to the attention of the trial court, and reasonable ground therefor shown." *Id.* at 452, 20 S.E.2d 660. Elsewhere in the opinion the court refers to the objectionable qualities of the question under the circumstances in which it was asked. In the *Lynch* case the question could have been asked the individual juror out of the presence of the rest of the panel, thereby refraining from lodging in the minds of the panel that the

defendant was protected by indemnity insurance. In the instant case there was no other way to attack the witness's credibility except by asking the question in the presence of the jury. On this basis the two cases are distinguishable.

It is interesting to note that there is another exception to the general rule. Where the defendant denies control of the injuring instrumentality, evidence that he carried indemnity insurance to protect himself if anyone were injured by the instrumentality may come in to show his control over that instrumentality. *Barg v. Bousfield*, 65 Minn. 355, 68 N.W. 45 (1896); *Perkins v. Rice*, 187 Mass. 28, 72 N.E. 323 (1904). It is hardly likely that the defendant would carry indemnity insurance on an instrumentality over which he has no control.

The West Virginia court implies in its opinion that if such witness was *P*'s witness in chief, it would constitute reversible error for the indemnity insurance fact to be disclosed, which is to say that *D* should not have brought this particular witness into the case at all, and having done so, must bear the consequences of it.

C. W. G.

MISTAKE OF LAW—RECOVERY OF MONEY PAID UNDER SUCH MISTAKE.—*P* borrowed \$4,000 from *H*, giving a negotiable promissory note secured by a trust deed conveying certain realty. *H* employed *D*, an attorney, for collection purposes and *P* paid *D* installments amounting to \$500, receiving receipts from him. *D* applied this sum to debts owing him from *H*. Subsequently *P* sold the real property and sought a necessary immediate release of the lien. *H* refused to release until the amount withheld by *D* was credited on the debt. *P* then paid an additional \$500 to *H* and received the release, and later instituted a notice of motion for judgment proceeding against *H* and *D* to recover the \$500.

D entered a special plea, to which *P* demurred. The demurrer was sustained. The matter being submitted on the pleadings, the trial court entered judgment against *H* and *D*. The supreme court granted a writ of error to *D*, *H* having made no defense below. The court found no contractual basis for the proceeding against *D* and reversed, overruling *P*'s demurrer. *Case v. Shepherd*, 84 S.E.2d 140 (W. Va. 1954).

D's special plea contended that *P* showed no contract, express or implied, between *D* and *P* and that the payment to *H* constituted a voluntary payment made with full knowledge of all material facts at the time and no recovery should be permitted.