

7-1-1959

Civil Procedure -- Discovery -- Insurance

A. Jay Cristol

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Recommended Citation

A. Jay Cristol, *Civil Procedure -- Discovery -- Insurance*, 13 U. Miami L. Rev. 489 (1959)
Available at: <https://repository.law.miami.edu/umlr/vol13/iss4/12>

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that the word "safety" was also included in the Coast Guard regulation.¹⁹ Liability was imputed for the violation of a statute in a Jones Act case,²⁰ however, this statute contemplated safety of seamen and foreseeability. The main contention of the majority in the instant case was "the purpose of allocating risks between persons who are more nearly on an equal footing as to financial capacity and ability to avoid the hazards involved."²¹ This reasoning was prognosticated when the Supreme Court of the United States referred to the Jones Act as welfare legislation.²²

This decision, like many of the decisions under the Jones Act, lightens the burden for future plaintiff litigants. Because of the vague statutory construction, it seems that the court often enters into the field of legislation. The thin line between statutory interpretation and actual creation of a new substantive right is indeterminable. If the present trend in government towards socialization is accepted, no criticism can be made of the altruistic purposes such decisions pursue. However, certainty in the law can never be achieved by obvious stretching of legal terms and theories to reach a decision.

H. T. MALONEY

CIVIL PROCEDURE—DISCOVERY—INSURANCE

Plaintiff, in a negligence action, sought discovery of the policy limits of defendant's automobile liability insurance. *Held*, policy limits are not proper matters of discovery under the Florida Rules of Civil Procedure. *Brooks v. Owens*, 97 So.2d 693 (Fla. 1957).

Since the adoption of the Federal Rules of Civil Procedure¹ and similar or identical rules by the several states, the interpretation of the scope of information obtainable by discovery has been in question. The general rule, as laid down in the leading federal case of *Hickman v. Taylor*,² is that discovery is not a "matter of unqualified right" but will be granted for "good cause shown" of all "relevant" matters. The purpose of discovery

29. 30 Stat. 102 (1951), 33 U.S.C. § 157 (1952). "The Commandant is empowered to establish rules as to the lights to be carried . . . as he . . . may deem necessary for safety . . ."

30. *Fegan v. Lykes Bros. S.S. Co.*, 198 La. 312, 3 So.2d 632 (1941). Here, a U.S. Department of Commerce regulation was violated and because of the violation, liability was imposed. However, the court in interpreting the statute said that adherence to the statute was mandatory, that safety of the employee was intended, and that foreseeability was present.

31. *Kernan v. American Dredging Co.*, 355 U.S. 426, 438 (1958). The Court used these words in stating that this is the reason magnifications have been made to aid employees in FELA case. Since the FELA reasoning was being applied the purpose of the reasoning was also applicable.

32. See cases cited at note 12 *supra*.

1. 335 U.S. 919 (1948); 329 U.S. 837 (1946); 308 U.S. 645 (1938).

2. 329 U.S. 495 (1947).

3. *Balazs v. Anderson*, 77 F. Supp. 612 (N.D. Ohio 1948).

under the rules was declared "to aid and assist the parties and the court in the orderly disposition of litigation, but not to supply information for the personal use of the litigants."³

The relevancy of liability insurance limits has been given diametrically opposed interpretations in different states.⁴ The earliest decision denying discovery of liability policy limits, decided prior to the new federal rules and without reference to state rules on discovery, held policy limits "neither material to the issue nor relevant and competent evidence . . ."⁵ Subsequent decisions in some state and federal courts held liability policy limits not proper subjects of discovery⁶ though in other jurisdictions discovery was allowed for "good cause shown" to establish "ownership of a car"⁷ and "control of a stoop."⁸ Other state and federal courts have held liability policy limits proper matters of discovery on a basis of relevancy.⁹ The opposing decisions in *Maddox v. Grauman*¹⁰ and *Jeppesen v. Swanson*¹¹ made the subject quite popular with legal writers.¹² This precise question of whether liability policy limits are proper matters of discovery under the Florida rules had not been decided prior to the instant case. The Florida rules involved are almost identical to the corresponding federal

4. *Held*, not a proper subject of discovery in federal district courts in Pennsylvania and Tennessee. State courts in Florida, Minnesota, Nevada, New Jersey and South Dakota; *Held*, a proper subject of discovery in federal district courts in New York and Tennessee; State courts in California, Illinois and Kentucky. See cases cited notes 5, 6 and 7 *infra*.

5. *Goheen v. Goheen*, 9 N.J. Misc. 507, 154 Atl. 393 (1931). (The admissibility as evidence is not in question even in jurisdictions which hold liability insurance limits a proper subject matter of discovery. "It has been judicially determined that the introduction of such facts and inquiries tends in actual operation to produce a confusion of issues in the mind of the jury and an unfair prejudice against one of the parties, in excess of, and, indeed, in the place of, the legitimate probative effect of such evidence; in fine, that the true issue before the jury is thereby obscured, rather than illuminated." *Sutton v. Bell*, 79 N.J.L. 507, 77 Atl. 42 (1910). See also Annot., 4 A.L.R. 2d 761 (1949). The question of admissibility as evidence is not treated in this note.

6. *McClure v. Boeger*, 105 F. Supp. 612 (E.D. Pa. 1952); *McNelly v. Perry*, 18 F.R.D. 360 (E.D. Tenn. 1955); *Brooks v. Owens*, 97 So.2d 693 (Fla. 1957); *Jeppesen v. Swanson*, 243 Minn. 547, 68 N.W. 2d 649 (1955); *Allen v. District Court*, 69 Nev. 196, 245 P.2d 999 (1952); *Bean v. Best*, 80 N.W. 2d 565 (S. Dak. 1957).

7. *Layton v. Cregan and Mallory Co.*, 263 Mich. 30, 248 N.W. 539 (1933).

8. *Martyn v. Braun*, 270 App. Div. 768, 59 N.Y.S. 2d 588 (1946).

9. *Orgel v. McCurdy*, 8 F.R.D. 585 (S.D.N.Y. 1948); *Brackett v. Woodall Food Products, Inc.*, 12 F.R.D. 4 (E.D. Tenn. 1951); *Superior Insurance Co. v. Superior Court*, 37 Cal. 2d 749, 235 P. 2d 833 (1951); *Demarre v. Superior Court*, 10 Cal. 2d 99, 73 P. 2d 605 (1937); *People v. Fisher*, 12 Ill. 2d 231, 145 N.E. 2d 588 (1957); *Maddox v. Grauman*, 265 S.W. 2d 939, (Ky. 1954).

10. 265 S.W. 2d 939 (Ky. 1954).

11. 68 N.W. 2d 649 (Minn. 1955).

12. *Morse, Discovery of Liability Limits in Suits Where Insurer is not a Party*, 25 Miss. L.J. 147 (1954); Notes, 9 Ark. L. Rev. 412 (1955), 34 Texas L. Rev. 129 (1955); 9 Okla. L. Rev. 412 (1956), 40 Minn. L. Rev. 183 (1956); Young, *Discovery by Plaintiff of Defendant's Liability Insurance Coverage*, Ins. L.J. 503 (1956); Lavorci, *Disclosure of Insurance Policy Limits*, 6 DePaul L. Rev. 225 (1957). See also Note, 32 Neb. L. Rev. 106 (1952).

rules.¹³ Prior to the adoption of the 1954 Florida Rules of Civil Procedure,¹⁴ the Supreme Court of Florida held "interrogatories seeking discovery . . . are properly excluded where they seem to elicit testimony wholly irrelevant."¹⁵ A party could not insist as a matter of right that his interrogatories be answered but the matter was within the "sound judicial discretion" of the trial court.¹⁶ The extent of examination was subject to the same limitations as a bill of discovery in equity in aid of an action at law,¹⁷

13.

FED. R. CIV. P. 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 of *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. [Emphasis supplied].

FED. R. CIV. P. 34

Upon motion of any party *showing good cause* therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to provide and permit the inspection and copying or photographing, by or on behalf of the moving party of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just. [Emphasis supplied.]

14. FLA. STATS. vol. 3 (1957).

15. Knight v. Empire Land Co., 55 Fla. 301, 45 So. 1025 (1908).

16. Mutual Beneficial Health and Accident Ass'n v. Bunting, 133 Fla. 646, 183 So. 321 (1938).

17. Kilgore v. Bird, 150 Fla. 702, 8 So.2d 665 (1942).

FLA. R. CIV. P. 1.21(b)

Scope of Examination. Unless otherwise ordered by the court as provided herein, 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 of *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. [Emphasis supplied].

FLA. R. CIV. P. 1.28

Upon motion of any party *showing good cause* therefor and upon notice to all other parties, and subject to the provisions of Rule 1.24(b), the court in which an action is pending may (1) order any party to provide and permit the inspection and copying or photographing, by or on behalf of the moving party of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 1.21(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 1.21(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just. [Emphasis supplied.]

that is, matters essential to the maintenance or defense of an action.¹⁸ The sole purpose of discovery was to procure evidence pertinent to the issues.¹⁹ Subsequent to the adoption of the 1954 rules, the court followed the language of the rules in holding "any matter, not privileged, which is relevant to the subject matter involved in the pending action, . . ." is a proper subject matter of discovery.²⁰ The test of relevancy was later defined as "relevancy to the subject matter of the action rather than the precise issues framed in the pleadings."²¹

In the instant case the court clearly and concisely explained the conflict of decisions in other jurisdictions. The California cases were distinguished in that the California Code of Civil Procedure lacks provision for discovery in aid of execution, while such discovery is provided for by the Florida²² and Federal²³ Rules. The court reasoned that the basic concept of our judicial system is to insure citizens of this state entry into the courts for the purpose of (1) proving liability for an injury and (2) proving damages occasioned thereby. Limits of insurance carried by a defendant in a cause of action are not relevant to either of those basic purposes. The court recognized that under some circumstances, information concerning a policy of insurance may be relevant to the issues of a pending cause, however, in adopting parts of the *Jeppesen*²⁴ opinion it concluded that the arguments presented for allowing discovery of policy limits were contrary to the intent of the rules.

The Florida court has taken a position with the majority of states which hold that discovery of liability policy limits will not be allowed as an unqualified right because such information in itself does not come within the scope of relevancy required by the rules. The court indicated that a party seeking such information may obtain it by discovery if he can show good cause why the information is relevant.²⁵

The decision of the court in the instant case is a sound interpretation of the intent of the rules. The theory that liability insurance policies inure to the benefit of every person who may be negligently injured by the insured overlooks the fact that many operators of motor vehicles are totally uninsured. "Every argument that can be made in favor of requiring . . . disclosure could also be made in favor of compelling a defendant in any civil case, tort or contract, to furnish the plaintiff with full information

18. 27 C. J. S., Discovery § 33 (1941).

19. *Jacobs v. Jacobs*, 50 So.2d 169 (Fla. 1951); *Fofford v. Wofford*, 47 So.2d 306 (Fla. 1950).

20. *Dupree v. Better Way, Inc.*, 86 So.2d 425 (Fla. 1956).

21. *Charles Sales Corp. v. Rovenger*, 88 So.2d 555 (Fla. 1956).

22. FLA. R. CIV. P. 1.40.

23. FED. R. CIV. P. 69 (a).

24. See note 11 *supra*.

25. *Brooks v. Owens*, 97 So.2d 693 (Fla. 1957) (dictum).

as to his financial resources, and in the case of an individual as to the full extent of his private fortune."²⁶

The theory that such information would lead to more purposeful discussions of settlement thereby coping with today's congested court dockets and resulting in more effective judicial administration is weak and open to attack. Its opponents contend that such procedure casts upon our judges the additional burden of being an insurance adjuster, and that only a small percentage of such cases actually go to court.²⁷

It is admitted that some cases are settled below the actual damages because the plaintiff is unaware of the amount of the defendant's assets. This is true also in cases not involving insurance. It is felt that this problem is for the legislature.²⁸ Today's highways are crowded with incompetent drivers and unroadworthy automobiles. Financial responsibility need not be demonstrated *until* the first accident. When these weaknesses in our laws are corrected by proper legislative enactments, there will be no need to bend our very excellent rules of procedure.

The dichotomy of decisions is based upon interpretation of the same rules. Both sides draw their conclusions from the same arguments. It is interesting to note that within a few days of the Florida decision,²⁹ the same point was decided conversely by the Supreme Court of Illinois.³⁰ The considerations of "the general welfare" as pointed out in Justice Drew's dissenting opinion and "effective judicial administration" referred to in *People v. Fisher*,³¹ the Illinois case, does not justify the straining of a good rule of procedure. It is strongly contended that the decision of the court in the instant case is a sound interpretation of the intent of the rules.

A. JAY CRISTOL

26. Annot., 41 A.L.R.2d 968 (1955).

27. See the Amici Curiae brief filed by insurance interests in *People v. Fisher*, 12 Ill. 2d 231, 145 N. E. 2d 588 (1957).

28. For some interesting aspects of the problem such as compulsory insurance, arbitration, or compensation, see Kuvin, *Auto Liability Insurance: What is Its Future Course?*, Ins. L. J. 407 (1956).

29. Oct. 25, 1957.

30. *People v. Fisher*, 12 Ill. 2d 231, 145 N.E. 2d 588 (1957); Sept. 20, 1957, Modified on Denial of petition of rehearing, Nov. 20, 1957; the court permitted The American Mutual Insurance Alliance, The Association of Casualty and Surety Companies and the National Association of Independent Insurers to file a brief as Amici Curiae. The brief was filed on Oct. 15, 1957 but failed to influence the court's ultimate decision.

31. *Ibid.*