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Discovery--In Tort Action Defendant's Personal Financial Ability to Respond to the Verdict Is Not Discoverable

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the person who parked the car.[10] The defendant contended the ordinance violated his right to be presumed innocent until proven guilty and was a violation of due process. The court upheld the ordinance stating that it merely created a presumption that the owner was the person who parked the vehicle, and that the burden was placed upon the owner to offer proof that he was not in possession or control of it. "This principle does not change the law as to presumption of innocence, but merely shifts [the] burden of going forward with proof,"[11] the court concluded.

Such a holding has at least two consequences: (1) by implication it prevents an Oklahoma court from adopting a contrary construction of a similar ordinance in order to hold a registered owner absolutely liable; and, therefore, (2) it means that if Oklahoma cities are to exert such power over car rental companies as was accomplished in Kansas City, they will need to pass additional ordinances. Even if they do, it is uncertain that the Oklahoma Court of Criminal Appeals, given its strong emphasis on due process in the *Cantrell* decision, would uphold such ordinances, despite the trend in the sister state.

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DISCOVERY—IN TORT ACTION DEFENDANT'S PERSONAL FINANCIAL ABILITY TO RESPOND TO THE VERDICT IS NOT DISCOVERABLE. *Sawyer v. Boufford*, — N.H. — , 312 A.2d 693 (1974).

The New Hampshire Supreme Court in *Sawyer v. Boufford* re-

10. OKLAHOMA CITY, OKLA., ORDINANCES tit. 21, ch. 16, § 10 states in pertinent part:

Presumption In Reference to Illegal Parking.

(a) In any prosecution charging a violation of any law or regulation governing the standing or parking of a vehicle, proof that the particular vehicle described in the complaint was parked in violation of any such law or regulation, together with the proof that the defendant named in the complaint was at the time of such parking the registered owner of such vehicle, shall constitute in evidence a *prima facie presumption* that the registered owner of such vehicle was the person who parked or placed such vehicle at the point where, and for the time during which, such violation occurred (emphasis added).

The city of Tulsa has passed an identical ordinance: TULSA, OKLA., REV. ORDINANCES tit. 37, ch. 3, § 127 (1971).

11. 454 P.2d at 680.

cently ruled that a defendant in a personal injury and wrongful death action is not required to reveal his personal financial status prior to trial when "his resources are not, and cannot be an issue in the litigation."[1] While the plaintiff in *Sawyer* was allowed to discover the defendant's liability insurance coverage, the court was unwilling to extend discovery to other assets. This decision is significant because it is an indication of the limitations which states such as New Hampshire are willing to place on a liberal discovery policy that is designed to promote a fair settlement out of court.[2] Though New Hampshire apparently has not adopted a general discovery statute, the New Hampshire court has recognized that discovery is based on the relevancy of the information to the issues and to the promotion of amicable settlements.[3]

Sawyer is not so important to states such as Oklahoma which apply a relevancy test to determine the limits of discovery and do not recognize "settlement" as a basis for discovering personal assets. However, for those states such as New Hampshire that have adopted the "settlement" theory of rule 26(b)(2) of the Federal Rules of Civil Procedure with regard to liability insurance, *Sawyer* is a good indication of the point at which settlement is sacrificed to protect the defendant from an unwarranted invasion of privacy. While other states have allowed discovery of the limits of liability insurance under the "settlement" theory,[4] it seems likely that discovery of other personal assets will be denied unless it can be shown that they are relevant or that exemplary or punitive damages may be awarded.[5]

In *Sawyer*, the plaintiff sought discovery by deposition of the defendant's net worth and the extent of the defendant's assets that might be reached in addition to the liability insurance. The policy was revealed to have a limit of $25,000. In rejecting the plaintiff's motion, the court noted that it had in previous cases granted discovery of federal income tax returns[6] and bank accounts,[7] but in all cases, the

1. Sawyer v. Boufford, — N.H. —, 312 A.2d 693 (1974).
2. Hartford Accident and Indemnity Co. v. Cutter, 108 N.H. 112, 229 A.2d 173 (1967).
3. State v. Cote, 95 N.H. 108, 58 A.2d 749 (1948); Farnum v. Bristol-Myers Co., 107 N.H. 165, 219 A.2d 277 (1966).
4. Lucas v. District Court, 140 Colo. 510, 345 P.2d 106 (1959); Terry v. Fisher, 12 Ill. App. 2d 231, 145 N.E.2d 588 (1959); Maddox v. Grauman, 265 S.W.2d 939 (Ky. App. 1954); Ellis v. Gilbert, 19 Utah 2d 189, 429 P.2d 39 (1967).
5. Coy v. Superior Court of Contra Costa County, 58 Cal. 2d 210, 373 P.2d 457, 23 Cal. Rptr. 393 (1962); Lewis v. Moody, 195 So. 2d 260 (Fla. App. 1967); Gierman v. Toman, 77 N.H. Super. 18, 185 A.2d 241 (1962); Hennessy v. Pearse, 167 N.Y.S. 792 (Sup. Ct. 1917).
6. Currier v. Company, 101 N.H. 205, 137 A.2d 405 (1957).
7. Calderwood v. Calderwood, 112 N.H. 355, 296 A.2d 910 (1972).

information was a material or an essential element to the issues before the court. Here, disclosure of financial assets was being sought merely to determine the defendant's ability to pay. The court considered a recently enacted statute which granted it the power to require disclosure of insurance limits when the court felt that discovery would aid in settlement.[8] The *Sawyer* court noted that the statute conformed to a previous holding where insurance policies were found to protect the insured as well as those injured.[9] By allowing disclosure, the statute reduced the risk to the defendant's personal assets and satisfied the plaintiff's claim before it crowded the docket. However, the court did not find that the statute or the policy of broad pretrial discovery allowed an invasion of the defendant's privacy when the merits of the case were in no way contingent on discovering whether the defendant could pay the judgment.

Sawyer recalls the split in federal courts over the proper scope of discovering insurance limits prior to the 1970 amendment to rule 26. When the original Federal Rules of Civil Procedure were adopted, one of the major benefits in providing a liberal discovery procedure based on relevancy was that it educated "the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlements out of court."[10] Federal courts which allowed discovery of insurance limits prior to the amendment argued that negligence cases arising out of automobile accidents would inundate the courts and that the information regarding "liability insurance coverage and its extent is conducive . . . to just settlements."[11] Federal courts which did not allow discovery argued that the existence or non-existence of liability insurance had no relevance to the issue of negligence and that rule 26(b) did not provide for such discovery.[12]

By specifically providing for discovery of the "existence and contents of any insurance agreement"[13] where the insurer may be liable for a part or all of the judgment, the 1970 amendment settled the controversy over insurance discovery in federal courts. Only insurance coverage was specifically included in the amendment and was

> [D]istinguished from any other facts concerning defendant's

8. N.H. REV. STAT. ANN. § 498:2-a (Supp. 1972).
9. American Mut. Ins. Co. v. Chaput, 95 N.H. 200, 60 A.2d 118 (1948).
10. 4 J. MOORE, FEDERAL PRACTICE ¶ 26.02[2] at 26-65 (2d ed. 1972).
11. Cook v. Welty, 253 F. Supp. 875 (D.D.C. 1966).
12. Bisserier v. Manning, 207 F. Supp. 476 (D.N.J. 1962).
13. FED. R. CIV. P. 26(b)(2).

> financial status (1) because the insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information about coverage is available only from defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy.[14]

While the amendment terminated the controversy in federal courts, it was merely influential in state courts. In states such as New Hampshire, the question was resolved by statute. Section 498:2-a appears to be much more restrictive than rule 26(b)(2) in that section 498:2-a grants discretion to the court to allow discovery of insurance "only if the court feels it would assist in the settlement of the case . . . ."[15] In New Hampshire, then, discovery of liability insurance is not automatic but must be counterbalanced by "whatever invasion of privacy is involved."[16] The *Sawyer* court found that the desire for settlement must give way to the defendant's right of privacy even though the information sought might be relevant in settling the case.

Oklahoma has not made a distinction between discovery of liability insurance and other personal assets and requires that either must be relevant to the issues of the case. The Oklahoma Supreme Court in *Carman v. Fishel*[17] found that the scope of interrogatories did not "include inquiry concerning whether the defendant had a policy of liability insurance covering the operation of her automobile at the time of the accident giving rise to the action . . . ."[18] The court premised its refusal to allow discovery of an insurance policy on the issue of relevancy. The plaintiff had sustained personal injuries arising out of an automobile accident and sought to discover the existence or non-existence of a liability insurance policy. When the defendant refused to answer the interrogatory concerning insurance, the trial court sustained the plaintiff's motion to compel the defendant to answer. In interpreting the Oklahoma discovery statutes,[19] the supreme court reversed saying that to be relevant the material need not be admissible but it must lead to the discovery of admissible evidence.[20] The court rejected the argument that discovery might induce a settlement and found that knowl-

14. Notes of Advisory Committee on Rules, 28 U.S.C.A. § 26(b)(2) at 156 (1972).
15. N.H. REV. STAT. ANN. § 498:2-a (Supp. 1972).
16. 312 A.2d at 695.
17. 418 P.2d 963 (Okla. 1966).
18. *Id.* at 965.
19. OKLA. STAT. tit. 12, §§ 548, 549 (1971).
20. Carman v. Fishel, 418 P.2d 963 (Okla. 1966); *accord*, Westerheide v. Shilling, 190 Okla. 305, 123 P.2d 674 (1942).

edge of insurance might cause the plaintiff to hold out for a larger settlement and thus prolong the litigation. It concluded that the argument for relieving congested court calendars could lead to forcing any information out of either side simply to clear the court docket. While there are circumstances in which knowledge of the insurance policy would be relevant, such as to show ownership,[21] the Oklahoma statutes were not intended to allow discovery of insurance in ordinary negligence cases. The supreme court followed a similar view and applied the test of materiality in the case of *Peters v. Webb* where the plaintiff sought discovery of insurance in an action against a doctor for malpractice. The information was found to be irrelevant to the issues and would not lead to obtaining evidence. Discovery was therefore denied.[22]

There are no reported cases in Oklahoma where the issue of discovering the defendant's personal assets other than liability insurance in a personal injury and wrongful death action has been raised. However, where the parties have made the financial situation an issue in the case, it becomes a legitimate subject of inquiry. In *Matchen v. McGahey*,[23] the Oklahoma Supreme Court granted discovery of the plaintiff's income tax returns because she asked for damages for injuries which disabled her and restricted her ability to receive income through employment. The court based its conclusion on title 12, section 548 of the Oklahoma statutes[24] and noted that this "statute § 548, relating to discovery and production of documents, basically follows Rule 34 of Title 28, United States Federal Court Rules of Civil Procedure. . . ."[25] The court found a relationship of the Oklahoma statute to rule 26(b) when it said, "The scope of Rule 34 is within the limits of Rule 26(b) which applies to any matter not privileged which is relevant to the subject matter involved in the pending action. . . ."[26]

On the basis of this decision, it seems clear that where personal assets are an issue in the litigation, Oklahoma follows the liberal dictates of rule 26(b) and applies the test of relevancy. However, when the purpose of discovering insurance liability is only to aid in settlement, it does not meet the test of relevancy and cannot be discovered. The confidentiality of insurance information is assured in various Oklahoma

21. Layton v. Cregan & Mallory Co., 263 Mich. 30, 248 N.W. 539 (1933).
22. Peters v. Webb, 316 P.2d 170 (Okla. 1957).
23. Matchen v. McGahey, 455 P.2d (Okla. 1969).
24. OKLA. STAT. tit. 12, § 548 (1971).
25. 455 P.2d at 56.
26. *Id.*