Denver Law Review

Volume 30 | Issue 10 Article 3

January 1953

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PRE-TRIAL PROCEDURE— SHOULD IT BE ABOLISHED IN COLORADO?

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Prior to the adoption by our Supreme Court of the Colorado Rules of Civil Procedure (adopted January 6, 1941, effective April 6, 1941, see Volume 107, Colorado Reports following page 442 and Rule 1 C (b)) much use of Rule 16 (pre-trial procedures; formulating issues) was predicted.

However, Percy Morris, Esquire, in his address No. 5 Appendix D, page 463, stated:

> This rule prescribes an innovation in our practice which, *if put into effect by the judges and wisely administered by them,* will prove to be one of the most beneficial changes in procedure made by the rules. (Italics mine).

Much has been written and spoken by eminent and distinguished individuals about the benefits to be derived from its effectual use. The late Judge J. Foster Symes of our Federal District Court, who was an ardent advocate and skilful user of the procedure set up in the rule, made the most apt statement of its objective and its benefits when he said in his article in *Dicta* of May 1950 at page 463:

> It (Pre-trial Procedure) *will not succeed unless the court is sympathetic with the new procedure,* insists upon its use and insists further, that the bar take it seriously.
> . . .

And at page 164:

> Its obvious advantage is the saving of time for litigants, counsel, and the court by a frank discussion of the law and facts in chambers after a case is at issue and before trial. Each side is compelled to disclose witnesses, what they will testify to, the legal theory upon which they will proceed, and the legal points that will be raised in the trial of the case which can be settled before trial. These matters are discussed, and if the court wishes, it can decide questions of law before the case goes to trial, if a trial is necessary. In this way all elements of surprise are taken out of the case, and the issues are simplified so that they are thoroughly understood by the court and jury. It prevents a law suit from being a contest between counsel rather than between parties. Many lawyers object to this as they are fond of keeping their facts a secret, springing a question of law, etc., at the trial and taking the other side by surprise.

> Furthermore, when lawyers and litigants learn of the other side's case by the use of pre-trial procedure, they are not quite so sure of the strength of their own position and are willing to talk compromise and settlement. My experience has been that many clients do not make a full disclosure of the case to their counsel and only tell him the facts favorable to their contentions. They, as well as their counsel, are often surprised to learn at pre-trial of the strength of their opponent's case. This makes them more reasonable and willing to talk compromise when they learn there is a question as to the correctness of their position.

It is not my intention to decry, or reflect adversely, upon this rule as we [1] are firm believers in its usefulness and are strong advocates of the merits of the procedure set up in the rule. Nor do I intend to try and report the attitudes of various lawyers, trial judges, etc. with regard to the way the Rule is handled and practiced. T. Raber Taylor, Esquire, in his splendid article in *Dicta,* May 1950, pages 157-163 has made a report of its use in the various district courts up to that time. I have made no attempt to gather any additional statistics from trial courts nor am I going to indulge in reporting any personal experiences in the trial courts.

I do, however, propose to indicate the fate that has attended the rule as reported by our own Supreme Court decisions. For, after all, the approval or disapproval of this Rule by our court of last resort has determined whether or not the Rule will be vigorously used by trial judges or land in the limbo of discarded judicial junk.

When Mr. Morris made the statement referred to above, it seemed to be his view that the success or failure depended upon the trial judges, because in a later paragraph at page 464 he said:

> Whether the pre-trial procedure is to be put into practice at all is dependent entirely upon the trial court. And the effectiveness of the practice, when put into effect, will depend both upon the manner in which the judge handles the conference and upon the attitude adopted by the attorneys.

This statement of course is a splendid statement, because by the terms of the rule, the trial judge has discretion in putting the rule into effect, but in the final analysis the limits of approval or disapproval of the actions of trial courts and their orders made during the conference are ultimately set by the supreme court. They are the "Judges" who have the ultimate responsibility, and, perhaps their approval was taken for granted.

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[1] Kenneth W. Robinson of the Denver Bar and myself.

According to Volume 107, at the time of the adoption of the Rule, the court was composed of the following individuals:

Benjamin C. Hilliard, Chief Justice
Francis E. Bouck
John C. Young
Norris C. Bakke
William L. Knous
Otto Bock
Haslett P. Burke.

It would appear from the proceedings that the adoption of the rules was unanimous by the court.

The construction to be placed upon the rules is set forth in plain, vigorous and unmistakable terms:

> . . . They shall be liberally construed to secure the just, speedy, and inexpensive determination of every action.

Rule 1 C (a) *Colorado Rules of Civil Procedure.*

In *Berryman v. Berryman,*[2] decided August 21, 1946, the court, speaking through Mr. Justice Stone, in reversing the trial court for sustaining a motion to dismiss a complaint in an action for insufficient facts to state a claim in a case where a husband set forth the usual allegations for divorce, but prayed for a limited divorce (judicial separation), equitable division of property, and "such other and further relief, etc." said at page 284:

> Our new rules of civil procedure, adopted almost in their entirety from the new federal rules, are intended to simplify pleadings and to eliminate delay, . . . 'If wisely administered, the Rules should do much to eliminate the complaints of laymen and of lawyers alike as to the technicalities of the law, the subtleties of practice, and the involvements of procedure. Their object must at all times control—"to secure the just, speedy and inexpensive determination of every action." '

And at page 286 at the end of the opinion:

> Rules of procedure should serve to facilitate, not to impede, the decision of cases on their merits.

This opinion, however, was not unanimous. Mr. Justice Hilliard did not participate. Mr. Justice Bakke and Mr. Justice Burke dissented and the ground for dissent by them is not stated. Inasmuch as they were on the court at the time of the adoption, it is assumed that their dissent was based on the legal question as to whether or not the complaint in fact stated "a cause of action",

[2] 115 Colo. 281, 172 P. (2d) 446.

and thus did not militate against the announced spirit of the rules set forth in the opinion and in the rules themselves.

This decision appeared for a time to be a hopeful augury of the future of the Rules in general, and particular rules from time to time, as they had occasion to be scrutinized by our Supreme Court in connection with cases brought to it for review.

In *McKinley v. Denver and Rio Grande Western Railroad Company*,[3] a damage action, arising out of a shipment of sheep from Presidio, Texas, to Mosca, Colorado, the defendant's line having been the terminal carrier and in which the plaintiff suffered a directed verdict against him for failure to make out a case, the Supreme Court said at page 207:

> When the specific acts of negligence upon which plaintiff relies are declared by him, whether in his complaint or at *pre-trial conference* or in any other manner, it is the general rule that he is restricted thereby. He must maintain this cause, if at all, by proof of the negligence so charged. No reason of surprise or excusable negligence appears to justify an exception here to the general rule. (italics mine).

Although no claim of error was apparently made challenging the pre-trial conference or any part of it in this case, nevertheless, the opinion of our Supreme Court indicated some emphasis on the proceedings at the pre-trial conference.

Nowithstanding these hopeful signs and on January 23, 1950, the outlook changed. On that day *Duffy v. Gross*[4] wes decided. This case was referred to in T. Raber Taylor's article and is well briefed there.

Three years have now passed and *Duffy v. Gross* may well have been either, for all practical purposes, the death knell of pre-trial procedure in Colorado, or at least a postponement for some time to come of its adequate and intended use. The composition of the court was Benjamin C. Hilliard, Chief Justice, William S. Jackson, Mortimer Stone, Frank L. Hays, Wilbur M. Alter, E. V. Holland, and O. Otto Moore. It seems to have been unanimous as no dissent is noted. It can be seen, of course, from this roster that the only Judge remaining on the court among those who adopted the Rules was the then Mr. Chief Justice Hilliard. This was an automobile accident case. The testimony was extensively reviewed by the court. The presence or absence of a stop sign at the collision intersection was a disputed question. The plaintiff having recovered judgment, the defendant sought review, alleging among other errors "that the court erred in its rulings in the pre-trial conference." (This seems to be the first direct challenge

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[3] 119 Colo. 203, 201 P. (2d) 905, January 10, 1949.
[4] 121 Colo. 198, 214 P. (2d) 498.

of its kind in our court.) It appears that during the pre-trial conference, counsel for defendant had requested the court to require plaintiff to "advise the court as to the acts of negligence upon which they (plaintiffs) were proposing to rely." Counsel for the plaintiffs objected, and stated that the request was not proper, that it was a matter of proof and that this is a pre-trial conference *to see what can be admitted;* that they had alleged negligence, and defendants had denied it so that is a question that is at issue. The trial court sustained the plaintiff's objection. During the opening statement by counsel for plaintiffs, for the first time the basis of the negligence asserted appeared, as counsel stated that plaintiffs expected to prove that there was a stop sign at the intersection. The Supreme Court held that the failure of the trial court to direct plaintiffs to state the specific negligence relied upon at the pre-trial conference was *not* prejudicial error. In considering the court's opinion it may well be that the defendants were not prompt and diligent in using other rules available to them to ascertain this vital information. It appears at page 207 and the Supreme Court made note of it that the defendants had not filed any motion for a bill of particulars, nor employed any other means to obtain a definite or particular statement of the items of specific negligence asserted by plaintiff [5] prior to the date set for trial. Be that as it may, however, the following statement by the court on page 209 is quite significant as indicating the view of our Supreme Court:

> Further discussion of the failure of the court to compel plaintiffs to disclose the specific acts of negligence upon which they relied, and which is the real basis of this assignment of error, is not necessary other than to say that the pre-trial conference rule is designed to expedite trials when certain facts may be admitted and the necessity of proof thereof obviated. The proper courtesy of the profession enables this to be done, usually in a few moments at the beginning of a trial, without pre-trial conference. Usually, obvious facts are admitted, but we see nothing in the rule that is compulsory as to the disclosure of the details of the issues to be made by the pleadings. As to whether or not a pre-trial conference is to be called, rests entirely in the discretion of the trial court and that discretion abides throughout the procedure.

Naturally, no one can quarrel with the statement that the calling of the pre-trial conference by the trial judge is discretion-

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[5] The fate of such a motion, at least in Denver, is well known; as to depositions, in Morris v. Redak, 124 Colo. 27, 234 P. (2d) 908, the court said at p. 41 that such motions have been held to be luxurious in character and nontaxable as costs.

ary, because the rule says so specifically. However, it would seem that once the discretion was exercised in favor of holding a pre-trial conference that the trial court should be able to determine fairly the real issues to be tried and thus compel a frank disclosure of the proof, the applicable law and other details as mentioned by Judge Symes in his article so that the conference would produce results in accordance with the spirit of the rules. The statement by counsel for the plaintiff that "this is a pre-trial conference to see what can be admitted" which apparently was endorsed by the trial judge, and ultimately approved by the supreme court is far too narrow and overlooks the other aspects of the rule as stated expressly by its wording, such as, the simplification of issues, amendments, etc. The attitude of the Federal Courts is well stated in *Cherney v. Holmes*:[6]

> The first stated purpose of the pre-trial conference under Rule 16, Federal Rules of Civil Procedure, 28 U.S.C.A., is simplification of the issues; another purpose is to obtain admission of facts and of documents without further proof at the trial. Attorneys at a pre-trial conference owe a duty to the court and opposing counsel to make a full and fair disclosure of their views as to what the real issues at the trial will be. Rule 16 has done much to eliminate sham and surprise in the preparation and trial of cases in the federal courts. As was stated in Brown v. Christman, 75 U.S. App. D. C. 203, 126 F. 2d 625, 631, one of the results of fair disclosures at a pre-trial conference is to take cases from the realm of surprise and maneuvering whereby an unwary counsel might see the just cause of his client lost.

In *American National Insurance Company v. Gregg*,[7] which also came up from Pueblo as the Duffy-Gross case did, from the same trial judge (Honorable J. Arthur Phelps) again the Supreme Court was called upon to determine whether or not Judge Phelps' action at the pre-trial conference in refusing to require a plaintiff to make additional specifications of the claim was right and again the Supreme Court sustained the trial judge. It appears that this was an action to recover from an insurance company on a policy of insurance. The critical question was whether or not the policy was in force at the time of death, and depended upon the effective date of the policy. The date of the application for the insurance was June 27, 1946; the date of the issuance of the policy was August 9, 1946; and the date of delivery, September 10, 1946. The insured was killed in an airplane accident on March 30, 1947. By arrangement made with agent of the insurance company the premium

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[6] (7th Circuit) 185 F. (2d) 718 at 721.
[7] 123 Colo. 476, 231 P. (2d) 467 (1951).

was actually paid for the first six months by the agent. The question to be determined by the trial judge was whether or not the policy was in force because of the grace period of 31 days. If it extended from the date of delivery of the policy it was in force, otherwise not. Although the rules were in force from April 6, 1941, and the trial commenced on February 24, 1948, the trial judge referred to the rules as the "new rules." Although geologically speaking, perhaps the term of seven years is not long; nevertheless, when one considers the amount of litigation which has ensued in the courts of Colorado in such period it would seem that the gloss of being "new" had then and certainly now rubbed off. In Paragraph 4 of Plaintiff's complaint it was averred "That at the time of the death of William Timothy Gregg all premiums due and payable on said policy had been paid by one J. Q. Adams, agent of defendant." Counsel for the company inquired how plaintiff intended to prove these allegations and by whom. The answer to this was that she expected to prove the allegations by herself, one Virgil R. Carter and John Q. Adams, and by the allegations made in the defendant's answer and defendant's motion. The counsel for the defendant insisted that the plaintiffs state the specific allegations in defendants answer and motion that they were relying upon. The trial court ruled that since plaintiff had given the names of the three witnesses plus the defendant's answer and motion she had sufficiently answered.

The Supreme Court said at page 483:

> We cannot think the court erred, and assuredly defendant could not have been misled by the ruling . . . Considering the state of the pleadings, as we think, no mystery attended in the premises. The evidence given by the witnesses mentioned, and particularly that of the agent Adams, made certain that which already was clear.

The second error charged by the defendant related to whether or not the plaintiffs intended to prove the agent had authority to accept other property pledged in payment of the premiums. The Supreme Court held, that considering the record and the fact that the agent had paid the premiums himself, based upon the arrangement with the insured, that this question was not pertinent. This case, of course, neither helps nor hinders in determining the power of the trial court under Rule 16, as the answers given certainly seem sufficient. The opinion was by Judge Hilliard. Mr. Justice Hays and Mr. Justice Moore concurred. Mr. Justice Alter concurred specially. The then Chief Justice, Judge Jackson, Mr. Justice Stone and Mr. Justice Holland dissented. The ground of dissent is not stated, consequently, we may assume that the pronouncement of the writer of the opinion as to the proceedings at the pre-trial conference were accepted, and that the real basis of the dissent was on the legal effect of the opinion as to the effective date of the policy of the insurance.

In *Light v. Rogers*,[8] a case involving damages for breach of contract in connection with the sale of real estate in which the court applied again the parol evidence rule, decided February 18, 1952, the opinion by Mr. Justice Alter, reference was made to the pre-trial proceedings without any discussion as to whether or not the court committed error, and at page 211 of the report:

> When the trial began, a question was propounded to plaintiff on direct examination, to which defendants interposed an objection, whereupon the court ruled:
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> 'As we stated in the pre-trial conference which we have just concluded, and wherein we entered certain stipulations [no order reciting the action taken at the pre-trial conference or the stipulations entered into thereat appear in the record as provided by Rule 16, R.C.P. Colo.], we are running into a matter of law here upon which there might be a serious controversy.'

However, it appeared that this question of law was reversed for the trial, when it could have well been ruled upon at the pre-trial conference and would have been of decisive effect. I realize, of course, that the pre-trial conference should not be a substitute for or held in lieu of the actual trial, but in the interest of attaining the objective stated by the rules it should determine what the "real issues" are to be tried and if proof offered by a party is not "legal" proof rulings should be made accordingly.

In *McCoy v. District Court of Larimer County*,[9] the Supreme Court made original proceedings in the nature of a writ of prohibition absolute against the trial court. This involved the question as to whether or not a party who had made a statement to an investigator shortly after a collision could require his opponent to submit for inspection such statement. The trial court observed that the showing made by the party under Rule 34 was not sufficient, but went on to say:

> 'However, the motion made was and is in connection with pre-trial conference, and one purpose of pre-trial conference is to aid in the disposition of the action, which may well include, among other discovery mechanisms, disclosure so that "civil trials need no longer be carried on in the dark by either party to them."'

While the Supreme Court held that the trial court could not compel such disclosure and placed its decision primarily on the failure of the party seeking inspection to show good cause under Rule 34, nevertheless, it also disapproved the action of the trial court in ordering inspection under Rule 16, saying:

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[8] 125 Colo. 209, 242 P. (2d) 234.
[9] 246 P. (2d) 619, June 23, 1952.

> [2] The district court apparently concluded that the showing made in the instant case was insufficient—under Rule 34, R.C.P. Colo.—to justify an order to produce the documents, but concluded that, since the matter arose in connection with the pre-trial conference the insufficiency of the showing might be disregarded. In this conclusion the trial court erred. Rule 16, R.C.P. Colo., which provides for a pre-trial conference, does not confer upon a trial court authority to compel the production of any documents or force the making of any admissions. Duffy v. Gross, 121 Colo. 198, 214 P. 2d 498. The only section of said rule in which documents are specifically mentioned, is to the effect that the court may order the attorneys for the parties to appear before it for a conference to consider 'the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof.' If in any case a litigant is entitled to the production of documents he must bring himself within the provisions of Rule 34, R.C.P. Colo.

It is noteworthy that *Duffy v. Gross* is cited as authority and the court again emphasizes that Rule 16 does not confer upon the trial court authority to compel or force the making of any admission or the disclosure of a position. It would appear that the channel in which pre-trial conferences may be charted is very narrow indeed.

In *Marsh v. Warren,*[10] an action for reformation of deeds, the Supreme Court in reviewing the pre-trial order of the court below, agreed with counsel for the defendant that the pre-trial order did not bear the construction placed upon it by counsel for the plaintiffs.

Although the rules were adopted effective April 6, 1941, and thus have been in effect for over twelve years, it possibly would not be quite fair to take the whole period from April 6, 1941, to date as a basis for the comparisons set forth hereinafter. Due to the very nature of the drastic changes made by the rules, the fact that many actions and proceedings were already on file in which pleadings and issues were drafted and arrived at under the code of civil procedure, it is fair to assume that a substantial period of time elapsed before the full impact of the rules was felt. The fact that many lawyers opposed the adoption of the rules is well known; others had a tongue in cheek attitude. Indeed, since their adoption there have been rumblings and rumors from the court itself that the rules narrowly escaped rescission. It may, therefore, be interesting to note that commencing with Volume 112 of the Colorado Reports, (January, April and September terms 1944, published in 1945) and ending with the last Volume No. 125 (Septem-

[10] 248 P. (2d) 825, September 22, 1952.

ber 1951, January and April terms 1952) published in 1953, practically a ten-year period, the court has decided 1,218 cases including those disposed of without written opinion. Of these, 164 involve criminal law and 41 industrial commission cases. Estimating another ten per cent for cases in which no pre-trial conference was necessary or could be had, such as proceedings in the nature of special writs, etc., it is probably not unreasonable to conclude that there were approximately 900 civil cases in which pre-trial would have been profitable and may, or may not have been held, depending, of course, on the rule in the District. It is somewhat startling to note that our court has decided two cases in which the pre-trial proceedings were directly challenged (but approved) and in two others have made a reference to it. While I made no attempt to determine the number of cases decided by our court since the publication of Volume 125 we do have two additional decisions, one in which the pre-trial procedure was directly questioned and disapproved and the other in which there was a reference to it.

On the other hand Rule 15, relating to amendments and supplemental pleadings have been the subject of consideration at least 27 times, according to Shepherd's Citator for Colorado.

It appears to me as a justifiable conclusion that if no power is to be confided to the trial court under Rule 16 to compel a full, frank and fair disclosure of the position of each party to the end that the issues be simplified, and

> to secure the just, speedy, and inexpensive determination of every action (Rule 1 C (a))

that the rule ought to be rescinded, because as it now stands under the decisions of our court, it is just another date on the calendar.

LAYMAN'S LANGUAGE

We learn from an ad on page 108 of the New Yorker magazine for September 19, 1953 that for one dollar it is possible to buy a book on divorce and marriage laws which "Helps you understand advice of your attorney." Not so amusing are the number of people who vainly request the Denver Lawyer Referral Service to refer them to an attorney who can explain advice which they have already received from another attorney. Even more serious are the charges of professional misconduct which reach the Grievance Committee of the Bar Association because an attorney failed to advise a client of delays which might arise in his litigation, or that a money judgment is not the same as money in a bank or that payment of an attorney's fee does not insure success in court.