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IN THE SUPREME COURT
of the
STATE OF UTAH

BARBARA LYON,
Plaintiff and Respondent,
vs.
HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Defendant and Appellant,
and
YOSEMITE INSURANCE COMPANY,
Defendant.

Case No. [illegible] 12068

BRIEF OF PLAINTIFF, RESPONDENT AND CROSS-APPELLANT

Appeal from a Judgment of the Third District Court
In and for Salt Lake County, Utah
The Honorable Gordon R. Hall, Judge

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FILED
JUL 15 1970
Clerk, Supreme Court, Utah

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November 10, 1970

L. M. Cummings
Clerk of the Supreme Court
State Capitol Building
Salt Lake City, Utah 84114

Re: Barbara Lyon v Hartford Accident and Indemnity Co., et al
Case No. 12068

Dear Mr. Cummings:

Please add the following citations to the Respondent's brief on file for argument this date:

POINT I

Moore v. Hartford Fire Insurance Co., 155 SE2d 128 (1967)
American Mutual Ins. Co. v. Romero, 10th Cir. Ct, 428 F.2d 870 (1970)

POINT II

In re Hutchison v. Hartford Insurance Co., NY S.Ct.App. (not in advance sheets up to 314 NY2d, Vol. 3), summarized in CCH Automobile Law Reports #136, Aug. 28, 1970, page 3.

Respectfully submitted

cc Harold G. Christensen
cc Burningham & Dee

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IN THE SUPREME COURT
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BARBARA LYON,
Plaintiff and Respondent,
vs.
HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Defendant and Appellant,
and
YOSEMITE INSURANCE COMPANY,
Defendant.

Case No. 12068

BRIEF OF PLAINTIFF, RESPONDENT AND CROSS-APPELLANT

NATURE OF THE CASE

This is an action to recover against respondent's insurance company for her damages incurred by an uninsured motorist. It is also a case of first impression in this Court and in some respects in the United States.

DISPOSITION IN THE LOWER COURT

Respondent was granted a summary judgment against appellant and defendant Yosemite, who did not

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appeal, by The Honorable Gordon R. Hall in the District Court of Salt Lake County, Utah. Appellant appeals from the granting of a portion of the motion for summary judgment and respondent cross-appeals from the denial of certain portions of said motion for summary judgment.

RELIEF SOUGHT ON APPEAL

Respondent seeks to sustain the judgment of the lower court insofar as the same was granted in her favor and seeks a reversal of the lower court denying judgment on the points raised on cross-appeal.

STATEMENT OF FACTS

Respondent, Barbara Lyon, was injured while a guest passenger in an automobile driven by one Bernie Martinez on February 4, 1969. A civil action was brought against Scott Gould Nickel, an uninsured motorist driver of one vehicle, and Robert G. Butcher, an insured motorist driver of a second vehicle, claiming that each was jointly and severally liable to respondent for the serious injuries she had suffered as a result of said collision. Judgment was entered on a jury verdict against both defendants on August 7, 1969, in the sum of $70,083 75. See Vol. II of the Transcript on Appeal containing the file of Civil No. 184994 which is the civil action in which the judgment was rendered. See also the exhibit envelope pertaining to that file as documentation for the serious and permanent disfiguring injuries respondent suffered as a result of Nickel's and Butcher's

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negligence. Prior to the trial date in the first civil action, Butcher, through his insurance company, made an offer of judgment for his policy limits (R. 222), which was not accepted, and expired in accordance with the Utah Rules of Civil Procedure, as a result of the trial (R. 255). The sum of $8,000.00 plus the cost bill of $51.90 was paid to respondent, and the sum of $2,000.00, being the balance of Allstate's liability, was paid to the Clerk of Salt Lake County (R. 260), as a result of the filing of a complaint in intervention for said sum by appellant on August 1, 1969, (R. 224), the $2,000.00 having been paid by appellant under its Medical Payments Provision of respondent's own family automobile insurance policy (R. 1). Hartford also had written a single limits Uninsured Motorist clause insuring Miss Lyon against this type loss, the principle amount of which was $20,000.00. Yosemite Insurance Company became involved in the instant civil action because it was the insuring company for the vehicle in which respondent was a guest passenger at the time she received her injuries. Part of the coverage written on the automobile in which Miss Lyon was riding included an Uninsured Motorists clause with minimum policy limits of $10/20,000.

After obtaining the above jury verdict, respondent brought a direct civil action against Hartford and Yosemite for recovery of the sum of her damages as assessed by the jury for which she had not been paid. After Judge Hall granted to respondent a summary judgment (R. 125) from which this appeal arises, Yosemite paid the

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amount of the judgment assessed by the lower court against it and respondent accepted same as a partial compromise settlement of her claim (R. 138). Hartford appealed and Barbara Lyon cross-appealed.

Part of the record on appeal in this case includes pleadings, a deposition and arguments of law on certain requests for admissions of fact from the Plaintiff to the insurance company defendants as to whether or not a defense asserted by them that Nickel had a valid policy of public liability insurance in force at the time of the accident was a true fact. That issue was resolved against the insurance companies has not been raised on appeal, and is, therefore, not now material to this case.

POINTS ON APPEAL AND CROSS-APPEAL

POINT I

THE LEGISLATURE HAVING ENACTED AN UNINSURED MOTORIST LAW IN THIS STATE IN 1967, THE FORMER RULE OF LAW OF THIS COURT IN RUSSELL VS. POULSEN (1966), IS NOT APPLICABLE, AND RESPONDENT IS ENTITLED TO ALL AVAILABLE UNINSURED MOTORIST COVERAGE UP TO THE AMOUNT OF HER ACTUAL GENERAL AND SPECIAL DAMAGES WHICH, IN THIS CASE, INCLUDES THE $20,000.00 SINGLE LIMITS POLICY WRITTEN BY APPELLANT.

§41-12-21.1 Utah Code Annotated was enacted by the 1967 Legislature. It requires sale of uninsured motorist coverage with automobile insurance unless expressly rejected by the insured in writing. The policy in question contains the following terminology:

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> "Protection against uninsured motorists: The company will pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured highway vehicle because of bodily injury sustained by the insured caused by accident and arising out of the ownership maintenance or use of such uninsured highway vehicle. . ." (R. 42)

Hartford still includes as further terminology in its policy a duty to arbitrate and to obtain its consent to sue for a determination of liability and damages, which clauses have heretofore been held invalid almost universally.

When Hartford purports to agree to pay "all sums which the insured . . . shall be legally entitled to recover . . .," respondent submits that this is exactly what she is asking for and has demanded that Hartford pay under the Uninsured Motorists clause of its policy, specifically, $20,000.00. Referring the Court to *Russell v. Poulsen,* 18 Utah 2d 157, 417 P. 2d 658 (1966), upon which appellant relies, we submit that the intent of the Legislature in enacting the above statute now changes and overrides that decision. We further submit that what may then have been the majority case rule as followed by this Court in 1966 is now the minority rule in interpreting in uninsured motorist cases the "other insurance" provisions relied upon by appellant. They are now being invalidated whether the form be "prorata," "excess insurance," or "excess-escape." We further believe that

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the statement in 28 A.L.R. 3d at 559 is the current trend of the law:

> "The following cases hold or recognize that an 'other insurance' provision, whether in the form of a 'pro rata,' 'excess insurance,' 'excess-escape,' or other similar clause, as it has variously appeared in the cases cited, is invalid, when contained in a policy providing protection against injuries caused by uninsured motorists, to deny, within its general limits, recovery of proper damages, on the ground that this type of provision limits the protection afforded the insured in a manner contrary to *the policy behind statutes requiring insurers to provide uninsured motorist coverage, and not limiting the total recovery allowable by one suffering damages from an unin insured motorist.*" (See cases cited, emphasis added.)

Discussing *Sellers v. United States Fidelity & Guarranty Company,* (1966 Fla.), 185 So. 2d 869, the annotator above makes the following observation:

> "There appeared to be no latitude in the statute, the court said, for an insurer to limit its liability through such 'other insurance' clauses, and if the statute was to be meaningful and controlling in respect to the nature and extent of the coverage, the sources of recovery, and the subrogation of the insurer, all inconsistent clauses in the policy must be judicially rejected, although insured would not be permitted to 'pyramid' recoveries." (double recovery) 28 A.L.R. 3d p. 560.

Arizona, in *Geyer v. Reserve Insurance Company* (1968), 447 P. 2d 556, 561 was called upon to interpret

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its almost identically verbatim Uninsured Motorist statute enacted in 1965. In this case the Arizona court eliminated any belief that previous decisions might support the validity of "other insurance" clauses and joined the current trend of cases relied upon by respondent which accumulate all available policies to aid in full and complete compensation of an injured person. Referring to other Arizona decisions, the court stated in deciding for the insured in a fact situation similar to *Russell v. Poulsen,* whose claim exceeded another company's limits:

> "They (previous cases) indicate to us that Arizona will nowhere but in the forefront of jurisdictions in making available to automobile accident victims the fullest extent of insurance coverage . . . nothing in the nature of a constrained construction is required to hold that the minimum limits of our uninsured motorist legislation are a part of every policy issued containing such coverage, and the prescribed limits cannot be reduced by offsetting policy provisions.
>
> * * *
>
> "The apparent intent of the Legislature was to provide for uninsured motorists coverage in the stated minimum amount, unless the coverage was rejected.
>
> * * *
>
> "We add, for emphasis, that all that has been said herein is applicable only to the extent of the total legal damages of the claimant. Nothing we have stated in this opinion is to be construed as permitting or tending to permit 'double recovery' or windfall to the insured under separate coverages in excess of her actual legal damages."

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IN WIDDIS, 62 *NORTHWESTERN UNIVERSITY LAW REVIEW* (*Number* 4), page 497, at page 520, the author states:

> "The policy creates an exclusion according to which 'the insurance does not apply . . . so as to inure directly or indirectly to the benefit of any workman's compensation or disability carrier . . .' In addition, the policy provides that any amount payable under the terms of this insurance 'shall be reduced by . . . the amount paid and the present value of all amounts payable . . . under any workman's compensation law, disability benefits law or any singular law,' and that the 'company shall not be obligated to pay under this insurance that part of the damages which the insured may be entitled to recover . . . which represents expenses for medical services paid or payable under the medical payments coverage of the policy.' Adherence to such provisions is certainly justifiable where the available benefits exceed the damages sustained by the insured. But where the actual damages sustained are in excess of the damages indemnified by either a workman's compensation plan or the medical coverage of the insured's policy, the uninsured motorist endorsement would still limit the policy's protection making it unavailable to supplement payments from these other sources. *Allowing the insured to recover up to the limits of his policy, so long as he is not being compensated twice, would be consistent with the principle of indemnity,* that the individual should not be allowed to acheive a net gain through the receipt of insurance proceeds from several sources. Several insurance companies, however, have taken advantage of a literal construction of these clauses

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to reduce their liability below the limits of the endorsement where the claimant received workman's compensation benefits, even though he was not fully indemnified. In these instances, the companies persuaded the courts that the endorsement's language is 'clear and unambiguous: and that therefore the court had no right to make a new contract for the parties. However, other courts have invalidated this clause, finding such clauses repugnant to the state's public policy as manifested in the mandatory uninsured motorist endorsement legislation. In those cases the insurer's obligation was held to be fixed and irreduceable regardless of what other sources of indemnification might be available to the insured-claimant. Rather than totally disregarding such clauses, the better rule would be to interpret the policy's terms so that the insured would be entitled to recover until he is fully indemnified, but would not secure a multiple recovery through receipt of proceeds from the uninsured motorist endorsement. It would be more desirable to alter the language of the standard endorsement to provide expressly for such coverage than to initiate a state-by-state litigation process to determine which state will accept the present limitation of the standard policy." (Emphasis added).

Further illustration of this trend is found in the case of *Southeast Furniture Company and The State Insurance Fund v. Dean L. Barrett and The Industrial Commission of Utah* (1970) ...... Utah 2d ......, (1970) 465 P.2d 346, wherein the Utah Justices unequivocally rejected an argument that Uninsured Motorist contract benefits could be used to eliminate or reduce amounts due under workmen's compensation benefits.

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Reference has been made by appellant to *Martin v. Christensen,* 22 Utah 2d 415, 454 P.2d 294 (1969). The facts of that case are unique in that one insurance company had issued two separate policies of insurance on automobiles in the same household. Presumably there was evidence of reduced premium because of the duplication of coverage and the policy provisions against accumulation of same.

Appellant fails to note to the court the entire text of *APPLEMAN, INSURANCE LAW AND PRACTICE, Volume* 8, *p.* 400. The entire text is as follows:

> "It has been held that where the owner of an automobile or truck has a policy with an omnibus clause, and the additional insured also has a non-ownership policy which provides that it shall only constitute excess coverage over and above any other valid, collectible insurance, the owner's insurer has the primary liability. In such case, the liability of the excess insurer does not arise until the limits of the collectible insurance under the primary policy have been exceeded. It should be noted that under this rule, the courts give no application to the other insurance clause in the primary policy, which provides that if the additional insured has other valid and collectible insurance, he shall not be covered by the primary policy that is because the insurance under the excess coverage policy is not regarded as other collectible insurance, as it is not available to the insured until the primary policy has been exhausted. . ."

We do not take issue with the brief excerpt appellant

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has cited to the court in *National Indemnity Company v. Lead Supplies, Inc.*, 195 F. Supp. 249, 255 (1960), being a correct statement of ordinary contract law: however, insurance policies are not so literally construed as noted from a further excerpt from that opinion:

> "Different factors and principles are involved in those situations. Policies containing only 'pro rata' clauses are in harmony and consonant with each other in that each asserts, if multiple overlapping coverage exists, the same mathematical computation for resolving the concurrent insurance problem. And if multiple 'excess' clauses conflict or, as in the much-quoted case of Oregon Automobile Ins. Co. v. United States Fidelity & Guar. Co., 9 Cir., 1952, 195 F. 2d 958, supra, where an 'excess' clause conflicted with an 'escape' clause, each insurer purported to disclaim responsibility if other coverage was available. If such policies are to be construed and applied according to their terms, an intolerable situation would be created. 'Escape' and 'excess' provisions are indeed mutually repugnant to each other for a resolution of the problem thereunder depends upon which policy is read first. As the court in Reetz v. Werch, supra, has observed, 'any attempt to give effect to both clauses puts one on a perpetual mental merry-go-round.' 98 N.W. 2d at page 926."

Respondent submits that this Court should sustain the conclusion of trial court as supported by the authorities cited which indicate that the legislative intent in enacting a mandatory Uninsured Motorist Law was to af-

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ford compensation to persons such as Miss Lyon up to the amount of her actual damages.

POINT II

SINCE RESPONDENT'S DAMAGES EXCEED ALL AVAILABLE PUBLIC LIABILITY AND UNINSURED MOTORISTS INSURANCE, HARTFORD HAS NO RIGHT OF SETOFF AGAINST THEIR UNINSURED MOTORIST COVERAGE NOR A SUBROGATION RIGHT FOR THE $2,000.00 PAID BY THEM TO RESPONDENT.

41-12-21.1 Utah Code Annotated as amended by the Chapter Laws of 1967, reads as follows:

> Motor vehicle liability policy — Uninsured motorist coverage required. — Commencing on July 1, 1967, no automobile liability insurance policy insuring against loss resulting from liability imposed by law for bodily injury or death or property damage suffered by any person arising out of the ownership, maintenance or uses of a motor vehicle, shall be delivered, issued for delivery, or renewed in this state, with respect to any motor vehicle registered or principally garaged in this state, unless coverage is provided in such policy or a supplement to it, in limits for bodily injury or death set forth in section 41-12-5, under provisions filed with and approved by the state insurance commission for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. *The named insured shall have the right to reject such cover-*

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> *age, and unless the named insured requests such coverage in writing, such coverage need not be provided in a renewal policy or a supplement to it where named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer.* (Emphasis added).

In support of respondent's motion for summary judgment seeking to recover the $2,000.00 Medical Payments Coverage paid by Hartford to Miss Lyon under her own family automobile policy, which sum was paid to the Clerk of Salt Lake County because of the contest as to who was entitled to same, an affidavit was procured from Mr. John T. Paradise, an examiner in the Utah State Insurance Department (R. 77). In substance, that affidavit stated that Mr. Paradise was familiar with the premium rate filings of all companies writing casualty and property insurance policies in the State of Utah and that Uninsured Motorists and Medical Payment Coverage are classified as casualty insurance. Further, the affidavit stated: "Defendants above-named, and all similar standard casualty insuring companies licensed in Utah, have on file in the department in which I am employed a fixed premium rate for Uninsured Motorists Coverage . . ."

> "Defendants above-named, and the above referred to standard casualty insuring companies, do not reduce their premiums on Uninsured Motorists Coverage if the policy holder purchases Medical Payment Coverage."

Hartford's policy purports to reduce its liability to

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Miss Lyon, one of its named insureds, by the following statement in its policy:

> "The Company shall not be obligated to pay under Coverage D — Uninsured Motorists that part of the damages which the insured may be entitled to recover from the owner or operator of an uninsured highway vehicle which represents expenses for medical services paid or payable under Coverage B — Medical Expense." (R. 44).

In substance, what Hartford is trying to do is collect a full, non-flexible, Uninsured Motorist premium notwithstanding the presence or absence of a contract for Medical Payments Coverage. This would constitute a windfall to Hartford and is obviously against public policy. See *Sims v. National Casualty Company,* (Fla. 1965), 171 So. 2d 399; also 24 A.L.R. 3d 1353 for cases discussing such a clause as being invalid as constituting an attempt to reduce uninsured motorist liability below statutory minimums.

Here this case differs from *State Farm Mutual Insurance Company v. Farmers Insurance Exchange,* 22 Utah 183, 450 P.2d 458 (1969), in that Miss Lyon's damages exceed all available public liability insurance:

Allstate (Butcher's company) $10,000.00, Yosemite (Martinez's under the omnibus clause, making his insurance applicable to Miss Lyon as a guest passenger) $10,000.00, Hartford (Miss Lyon's own insuring company under a single limit policy) $20,000.00.

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Public policy dictates that as between an insured and an insurer, if one is to receive a windfall it should be the insured (although in view of the damages, there is no windfall here) who has paid the fixed arbitrary premium to insure against a certain loss. *Notman, A Decennial Study of the Uninsured Motorist Endorsement,* NOTRE DAME LAWYER (October 1967) at page 16, see also *Stephen v. Allied Mutual Insurance Company* (Nebraska 1968), 156 N.W. 2d 133, wherein the court was construing an identical statute as became law in that state in 1967, is set out at the beginning of this point. The Nebraska court stated after discussing its fact situation involving a judgment in excess of Uninsured Motorists Coverage and Medical Payments Coverage, (page 136):

> "A provision, drawn by the insurer to comply with the statutory requirement of uninsured motorist coverage, must be construed in light of the purpose and policy of the statute. Such a provision, drawn in pursuance of a statutorily declared public policy, is enacted for the benefit of injured persons traveling on the public highways. Its purpose is to give the same protection to the person injured by an uninsured motorist as he would have had if he had been injured in an accident caused by an automobile covered by a standard liability policy. Such provisions are to be liberally construed to accomplish such purpose." (Citing cases).

* * *

and at page 139:

> "The argument as to the effect of this provision, as distinguished from its basic nature, be-

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comes dielectically complex. If the provision does not limit coverage, as the insurer contends, we fail to see its purpose. Surely its object is not to give additional coverage to the insured. Conversely, if its purpose is to alter or change the company liability for the separately charged premium for medical payments, it would have to be struck down as an alteration of the separately contracted for contractual risk assumed by the insurer under the terms of the medical payment coverage.

* * *

"The general rule is that an insurer may not limit its liability under uninsured motorist coverage by setoffs or limitations through 'other insurance,' excess insurance, or medical payment reduction clauses, and this is true even when the setoff for the reduction is claimed with respect to a separate, independent policy of insurance (workmen's compensation) or other insured motorist coverage. And this is true because the insured is entitled to recover the same amount he would have recovered if the offending motorist had maintained liability insurance." (Citing cases).

Respondent and cross-appellant submit that if this Court believes its holding in *State Farm Mutual v. Farmers* is not against public policy, the rule of this jurisdiction should be confined to the fact situation of that case and should not apply when damages exceed all available insurance coverage.

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POINT III

IF THE COURT CONCLUDES HARTFORD HAS A SUBROGATION RIGHT FOR THE $2,000.00 MEDICAL PAYMENTS MADE BY IT, THE JUDGMENT OF THE LOWER COURT GRANTING RESPONDENT AN ATTORNEYS' FEE AWARD FOR RECOVERING SAID SUM ON BEHALF OF HARTFORD IS CORRECT AND SHOULD BE SUSTAINED

Appellant does not consider the record as a whole in this case when, at page 10 of its brief, it is claimed that Hartford didn't accept the benefit of the efforts of plaintiff's counsel. By the time this case was tried in August of 1969, a summary judgment for liability had already been entered in May, 1969 (R. 210). An offer of judgment was made on behalf of Butcher on June 19, 1969, for the limit of his policy plus taxable costs (R. 222) and, only thereafter, on July 21 did appellant file a motion and complaint in intervention (R. 222 et sequitar). There is no other evidence that Allstate was willing to pay its $10,000.00 policy limits until forced to trial, and, obviously, after not wanting to be caught in a position of bad faith bargaining by their own insured, Robert G. Butcher.

Under basic quantum meruit principles, if Hartford seriously believes that it is entitled to reduce its liability under its Uninsured Motorist Coverage, as heretofore discussed in Point II, it seems unconscionable that they should be permitted to idly accept the benefits, without cost, of its insured's prosecution of a civil action to establish liability, amount of damages, recoupment of some

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of the damages, and then demand the benefits of same by asserting its claimed subrogation right. In *State Farm vs. Farmers,* supra, it is admitted this Court upheld the subrogation right for medical payments made. Presumably evidence must have been adduced, in addition to mere contract interpretation, of some reduced premium factor in return for such provision, or underwriting considerations were taken into account by the insuring company in order to support the conclusion that such a clause was not against public policy. We submit if an insurance company is attempting to contract itself into a windfall by reducing its exposure as Hartford did here and still charges a full premium for an item of coverage without regard to the reduced exposure, this is against public policy. The windfall, if there is one, should be that of the insured, not the insurer, and such clause should be voided or, in the alternative, an insured should equitably be entitled to collect attorneys' fees for the recoupment.

Reference has been to the case of *Black vs. Black,* 17 Utah 2d, 369, 412 P. 2d 454, for the proposition that attorneys' fees cannot be taxed to assess same. That case differs from the instant award by Judge Hall which is sustained by the following excerpts from 45 A.L.R. 2d at 1186 and 1187:

> "It appears to be well settled that where the natural and proximate consequence of a tortious act of defendant has been to involve plaintiff in litigation with a third person, reasonable compensation for attorneys' fees incurred by plaintiff

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in such action may be recovered as damages against the author of the tortious act. All the cases support either expressly or by necessary implication this general principle:

* * *

"This is also the rule of the Restatement[8], where it is stated that 'a person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney fees and other expenditures thereby suffered or incurred.'

[8]Restatement, Torts §914."

Even though this is an action in contract to recover under an insurance policy, plaintiff's action against appellant also lays in tort for intentional negligent breach of said contract, and, therefore, the award of attorneys' fees would be proper if the Court rules against respondent on Point II.

POINT IV

THIS BEING AN ACTION ON A CONTRACT BETWEEN AN INSURED AND AN INSURER, RESPONDENT SHOULD BE ENTITLED TO LEGAL INTEREST OF SIX PER CENT PER ANNUM FROM THE DATE OF HER LOSS, FEBRUARY 4, 1969, — THE DATE SHE WAS INJURED, UNTIL AUGUST 7, 1969, WHEN JUDGMENT WAS ENTERED IN THE FIRST CIVIL ACTION.

The only case the writer has been able to locate on this point of cross-appeal is that of *Standard Accident*

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Insurance Company vs. Gavin, (Florida 1966), 184 So. 2d, 229, 24 A.L.R. 3d 1359. In that case the Florida court stated:

> "The Court further finds, over the objection of the defendant that the plaintiff is entitled to interest on the said sum of $20,000.00 from the date of death of her husband. Although the damages sustained by the plaintiff arose by reason of a tort commited by an uninsured motorist, plaintiff's action against the defendant is an action on her contract of insurance with the defendant and is not an action sounding in tort. Accordingly, interest is due on the amount of damages which plaintiff is entitled to recover under her contract with defendant from the date said damages were sustained and became due and payable."

From an examination of the exhibit file of the original civil action, Civil No. 184994 (Vol. II of the transcript on this appeal), a review of the photographic documentation received by the court in that civil action of Miss Lyon's injuries, notice of the nature and extent of which was served upon appellant before the August 1969 trial, (R. 208-9 and Exhibit P-7 in the instant appeal) should beyond all doubt have placed appellant on notice of its legal obligation to pay and, therefore, interest should be owed Miss Lyon under her contract.

POINT V

RESPONDENT HAS A CAUSE OF ACTION AGAINST APPELLANT BECAUSE OF ITS FAILURE TO BARGAIN

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WITH HER IN AN ATTEMPT TO SETTLE HER INJURY CLAIM WITHIN OR FOR THE AMOUNT OF APPELLANT'S COVERAGE EXPOSURE WITHOUT THE NECCESSITY OF A LAWSUIT, APPELLANT HAVING AT ALL TIMES BEEN ON ACTUAL NOTICE OF THE NATURE AND EXTENT OF RESPONDENT'S PERSONAL INJURIES, HER PERMANENT DISFIGUREMENT AND THE SEVERITY OF SAME.

Exhibits P-3 through P-14 in this case were received into evidence by the trial court in support of the documentation of notice to appellant of all stages of these proceedings. An examination of the certificates of mailing by respondent's counsel of copies of pleadings at all stages of the proceedings is contained in Volume II of the transcript in this appeal, which is the pleading file in the original civil action. Hartford is in no position to assert lack of notice of the nature and extent of Miss Lyon's permanent facial injuries. In fact, the motion for an immediate trial after a summary judgment for liability had been granted, (R. 198 and 206), advised them that special damages were approaching $10,000.00.

No case law has been located in the United States for or against the proposition that an insurance company has a duty to bargain with its insured to settle an uninsured motorist claim. In *UNIVERSITY OF SAN FRANCISCO LAW REVIEW, Volume III, page* 46, is a discussion of the problem and potential liability of an insuring company under a fact situation similar to Barbara Lyon's. The author's observations are as follows:

"UNINSURED MOTORIST INSURERS'

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LIAILITY FOR LEGAL EXPENSES THE INSURED INCURS IN ARBITRATING HIS CLAIM. Assume that an insured carries $15,000.00 in uninsured motorist coverage. Assume further that an uninsured motorist injures the insured so severly that if the case against the motorist were litegated in a personal injury action, the insured would recover a $50,000 judgment. At this point, the insured would probably consult an attorney. A competent attorney will recognize that the insured's claim worth exceeds the policy's limits. The insured and the attorney are likely to enter into the following retainer agreement: (1) for a fee of $200.00, the attorney promises to furnish the insurer with all the necessary documents and information to collect the $15,000.00 face amount of the policy; and (2) the attorney promises that if the insurer refuses to pay the face amount of the policy he will prosecute the insured's claim on a contingent basis for 33⅓% of the award. Since the claim is an uninsured motorist claim, the claim against the insurer will be arbitrated. On these facts, the arbitration award would be for $15,000.00 But since the insured had to pay his attorney $5,000.00 rather than $200.00, the insurer's refusal to settle cost the insured $4,800.00. Can the insured hold the insurer liable for the $4,800.00?

"The answer to this question depends upon the courts' willingness to analogize to the *Crisci* fact situation." (*Crisci v. Security Insurance Company*, 426 P. 2d 173) (1967).

"It can be argued that the analogy to the *Crisci* fact situation is seriously defective. Superficially, there is a clear distinction between the two situations. In the *Crisci* fact situation, the insur-

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> er's refusal to settle results in an excess judgment. It is true that where the uninsured motorist insurer refuses to settle the insured does not suffer an excess judgment. On the other hand, the uninsured motorist insurer's refusal to settle causes the insured a definite financial loss. The only difference between the two situations is the way in which the insurer causes the insured a financial loss. In the *Crisci* fact situation, the loss occurs by way of legal expenses. In both cases, the insurer's refusal to settle causes the insured a financial loss. If the uninsured motorist insurer's refusal to settle is wrongful, it seems that the insurer should be held liable for the insured's legal expenses. It is the opinion of this author that if the case arises, a California court would analogize to the *Crisci* case and hold the insurer liable for the $4,800.00."

It is obvious that Miss Lyon has been damaged and should be compensated for same because of the refusal of Hartford to even bargain with her. The file and all of the evidence adduced up to the summary judgment proceedings from which this appeal arises does not diclose one scintilla of evidence that Hartford at any time has been willing to bargain or settle their obligation to Miss Lyon.

See R. 179, et sequitur, for stipulations on notice to appellant and its agents and the failure to take any action to determine its liability to Miss Lyon.

The court's attention is directed to *Andeen v. Country Mutual Insurance Company*, 217 N.E. 2d 814. In that

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case the insurance company had written a $30,000.00 Uninsured Motorists Policy. They permitted a default judgment to be entered against the uninsured motorist defendant in the sum of $60,000.00. The Supreme Court, in a direct action suit against the insurance company, held them liable for the total amount of the default judgment. See also *Potomac Insurance Company v. Wilkins Company,* 376 F. 2d 425, Tenth Circuit (1967), supporting the trend of authorities obligating insurance companies to bargain and represent their insureds' interests.

CONCLUSION

Respondent and cross-appellant respectfully submits that she having purchased a policy of Uninsured Motorist Coverage with appellant in the sum $20,000.00, and her damages having been assessed by a jury and exceeding liability and uninsured motorist insurance limits, the judgment of The Honorable Gordon R. Hall awarding her further compensation should be sustained. Likewise, since a separate policy of medical payments insurance was written and there is no possible double compensation from insurance companies, it is against public policy to permit reduction in liability because of offsetting insurance clauses in the same policy, especially when the only evidence is no reduced premium factor was afforded her. Should this court affirm the rationale of *State Farm v. Farmers* as controlling, Hartford should not be permitted to accept insurance premiums without assuming an obligation to their insured and her attorney for recoupment

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of the subrogated amount. This being an action based upon a contract, legal interest of six per cent (6%) per annum should be owed from the date of the loss. Appellant having willfully and intentionally breached its contractual duty of compensation to Miss Lyon for damages obviously due her in excess of Hartford and other insurance limits, this matter should be remanded for trial to establish the amount of damages sustained by her.

Respectfully submitted,

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