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GUARANTY NATIONAL
INSURANCE COMPANY,

Respondent,

vs.

BARBARA J. MORRIS,

Appellant.

BRIEF OF APPELLANT

AN APPEAL FROM A JUDGMENT OF THE
JUDICIAL DISTRICT COURT, OF SALT
COUNTY, STATE OF UTAH, THE HONORABLE
G. HAL TAYLOR, PRESIDING.

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FILED

MAR 16 1979

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE

STATE OF UTAH

GUARANTY NATIONAL INSURANCE COMPANY,	)	
Respondent,	)	
vs.	)	CASE NO. 16207
BARBARA J. MORRIS,	)	
Appellant.	)	

BRIEF OF APPELLANT

AN APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, OF SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE G. HAL TAYLOR, PRESIDING.

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IN THE SUPREME COURT OF THE

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GUARANTY NATIONAL INSURANCE COMPANY,	)	
Respondent,	)	
vs.	)	Case No. 16207
BARBARA J. MORRIS,	)	
Appellant.	)	

BRIEF OF APPELLANT

NATURE OF CASE

This case arose out of a settlement for personal injuries received by defendant/appellant, hereinafter referred to as "defendant", in which plaintiff/respondent, hereinafter referred to as "plaintiff", claimed a right to full reimbursement for no-fault benefits it paid to defendant by way of Personal Injury Protection payments (hereinafter referred to as P.I.P.), without any responsibility for a proportionate share of the attorneys' fees and costs incurred by defendant in securing that settlement.

DISPOSITION IN THE LOWER COURT

The lower court granted plaintiff's Motion

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for Summary Judgment (R. 12-13) and denied defendant's corresponding Motion for Summary Judgment (R. 16-17) on the basis that plaintiff had ". . . no obligation to the defendant . . . for attorneys' fees or costs with respect to the subrogated interests asserted by (plaintiff) . . for the no-fault payment and benefits paid to . . . (defendant)." (R. 84).

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the order granting Summary Judgment to plaintiff and an entry of Summary Judgment in defendant's favor.

STATEMENT OF FACTS

This matter was submitted to the lower court upon a Stipulation of Facts and Exhibits (R. 52-81) which properly reflect the facts material to a determination of this matter. Summarizing those items, defendant was injured in an auto accident on December 16, 1975, by an individual insured by State Farm Insurance Company (hereinafter referred to as "State Farm").

Following that accident, plaintiff paid defendant $2,787.61 in no-fault insurance benefits and notified State Farm of its claim for reimbursement of those benefits on June 24, 1976 (R. 74). On November

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9, 1976, plaintiff was advised by State Farm that defendant had obtained the services of an attorney and that its subrogation demand could not be considered until defendant's liability claim had been resolved (R. 75). On February 22, 1977, State Farm advised plaintiff of the name of defendant's attorney and that negotiations were still pending (R. 76). On December 22, 1977, defendant executed a release and settled with State Farm for $14,000.00 prior to filing suit, which release specifically provided that, in return for the amount paid, the defendant "releases and forever discharges" State Farm's insureds, "none of whom admit any liability to the undersigned but all expressly deny any liability" (R. 77).

Pursuant to plaintiff's asserted subrogation rights as provided in the insurance contract (R. 73, 75 and 80-P.I.P. Endorsement, Section 1. Conditions, paragraphs (d) and (e)), two checks were issued by State Farm in connection with the settlement: one payable to defendant and her attorney in the sum of $11,212.39; and one payable to plaintiff and defendant's attorney in the sum of $2,787.61 (R. 77). On January 6, 1978, defendant's attorney advised plaintiff of the settlement and that the no-fault payments, to be paid out of the $14,000.00 settlement, pursuant to

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plaintiff's subrogation claim, would be subject to a regular 1/3 contingency fee of $928.27 as its proportionate share of the attorneys' fees, which fee was based upon the contingency fee agreement executed between defendant and her attorneys. (R. 78-79).

Plaintiff denied responsibility for any attorneys' fees or costs relative to the amounts recovered in its behalf (R. 80-81) and brought this action for a declaration that it was not responsible for such fees and for a release of any claim by defendant to those funds (R. 1-3). Defendant answered and by way of Counterclaim, asserted her rights to have plaintiff bear its proportionate share of the attorney's fees and costs of $928.27 (R. 9-10). Motions for Summary Judgment based upon these facts, were filed by both parties and, after a hearing thereon without a transcript, the Honorable G. Hal Taylor, Judge, entered an Order granting plaintiff's Motion for Summary Judgment and denying defendant's corresponding Motion. It is from that Order that defendant appeals.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF HAD NO OBLIGATION TO DEFENDANT FOR ATTORNEYS'

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FEES OR COSTS WITH RESPECT TO THE SUBROGATED INTERESTS ASSERTED.

As pointed out in the Statement of Facts, prior to any settlement, plaintiff was aware that a claim was being made by defendant against State Farm's insured and that its subrogation claim would not be considered until that claim had been determined. Yet, plaintiff took no action whatsoever to aid in the prosecution of defendant's claim or even to prosecute its own claim, choosing, instead, to await the outcome of defendant's efforts. Nor did plaintiff, at any time, suggest to defendant, or her attorneys, that they should not make any claim for the $2,787.61 for which plaintiff sought reimbursement. Only after the necessary expenditure of work, labor, and effort by defendant and her attorneys to secure the recovery did plaintiff make demand for the full amount of its subrogation claim, without any off-set for the attorneys' fees or other expenses incurred in securing those monies. Plaintiff now claims that no such fees are provided for in the Utah Automobile No-Fault Insurance Act, §31-41-1, et seq., Utah Code Anno. (1953), and, therefore, may not be allowed. That Section provides:

> (1) Every insurer authorized to write the insurance required by this act shall agree as a

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condition to being allowed to continue to write insurance in the State of Utah:

> (a) That where its insured is or would be held legally liable for the personal injuries sustained by any person to whom benefits required under this act have been paid by another insurer, including the state insurance fund, it will reimburse such other insurer for the payment of such benefits, but not in excess of the amount of damages so recoverable, and
>
> (b) That the issue of liability for such reimbursement and the amount of same shall be decided by mandatory, binding arbitration between the insurers. Id.

While it is true, as plaintiff contends, that no attorney's fees are provided for in that section, it must also be noted that no "subrogation" is provided for either.

That section contemplates only arbitration between insurance companies as does the act itself. The plaintiff, rather than taking his chances pursuant to the artibration provisions referred to, chose instead to proceed under its contractual subrogation rights (R. 76, 78, 79, 80, 81) by asserting a lien upon any recovery secured by the defendant. By doing this the provisions of the Utah Automobile No-Fault Insurance Act, Supra., then become inapplicable and basic equitable principles of subrogation should be looked to as controlling.

The right of subrogation is an equitable

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principle, designed to prevent a plaintiff from recovering twice, once from the company insuring her and once from the company insuring the tort-feasor, thereby preventing an unjust enrichment of the insured. Needless to say, the plaintiff now argues that it is entitled to money for which it made no effort to obtain recovery and for which it paid none of the expenses of recovery. To allow the defendant to recover its total expenditures without bearing its fair share of the expenses of recovery would truly constitute unjust enrichment and is most certainly contrary to the principles of equity.

This proposition has continuously been admitted by fair-minded insurance companies. In the case of Transamerica Insurance Co. vs. Barnes, 29 Utah 2d 101, 505 P.2d 783 (1972), (a case whose facts and issues are quite similar to this case), the insurer-plaintiff openly admitted that it owed the defendant-insured for the costs of recovery.

> Plaintiff claims that it is entitled to reimbursement to the extent of $1,000.00 less a reasonable attorney's fee and its proportionate share of the costs from the fund recovered by defendant from the tort-feasors. Id. at 785.

Plaintiff believes that this is the only reasonable and honest solution to the question of distribution of

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settlement proceeds between an insured and a subrogated insurer.

The law in this area is clearly set forth in 44 Am.Jur.2d, §1845 and §1846:

> The general rule is that the insured may retain out of the fund recovered from the wrongdoer, after the payment of the policy, the costs and reasonable expenses incurred in the litigation, for it would be unjust to require him to incur expenses for the recovery of money for the benefit of the insurer, without being allowed to reimburse himself. Id.

This same general rule is expressed in an annotation "Attorney's Fee - Recovery From Insurer", 2 ALR.3d 1441. The annotation states that:

> In the cases which hold that the subrogated property insurer is obligated to pay a fee to the insured's attorney, who recovered damages from a third party, the courts generally rely on general equitable principles, and, in some cases, point out that the insurer did not participate in the action against the third party. Id. at 1443.

With respect to the minority position, where the right to a fee is denied, the same annotation states:

> A very few cases which hold or indicate that an insured's attorney was not entitled to a fee out of that part of the recovery from the tort-feasor belonging to the insurance carrier, have been found. These decisions rest on asserted principles of equity, or on the fact that the property insurer participated and assisted in the recovery, or at least

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attempted to do so. 2 ALR.3d 1145-1146.

Plaintiff's lack of assistance and participation in the recovery is admitted and, therefore, plaintiff does not fall within the confines of the minority rule. On the contrary, under the equitable considerations of the majority rule, plaintiff must bear a pro-rata share of the attorneys' fees and expenses incurred by defendant in recovering the monies at issue.

In State Farm Mutual Automobile Insurance Co. v. Elkins, 451 SW.2d 528 (1970), the trial court allowed the insured to deduct a pro-rata share of the attorney's fees and expenses from the portion of the judgment which accrued to the insurer's benefit under its subrogation rights. In affirming the trial court's decision, the appellate court stated:

> The principle that the insurer can recover payments made to the insured, after insured recovers from the tort-feasor is based upon equity and that the insurance is a contract of indemnity. Hayward v. State Farm Mutual Automobile Ins. Co., 212 Minn. 500, 4 NW.2d 316, 140 ALR 1236 (1942); Manley v. Montgomery Bus Co., 82 Pa.Super. 530 (1924); Home Ins. Co. v. Slater, 28 Del.Co.R. (Pa.) 546 (1939); Cedarholm v. State Farm Mutual Insurance Companies, 81 Idaho 136, 338 P.2d 93 (1959); National Union Fire Ins. Co. v. Grimes, 278 Minn. 45, 153 NW.2d 152 (1967).
>
> In the above cited cases, where the insurer has recovered against the insured,

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> the pro-rata cost and expenses incurred by insured in obtaining the money are borne by the insurer. Camden Fire Ins. Ass'n v. Missouri K & T. Ry. Co. of Texas, supra; Hayward v. State Farm Mutual Automobile Insurance Companies, supra. The proceeds owed to the insurer who did not assist in their collection, must bear the cost and expense of their collection. (Emphasis added). 451 S.W.2d at 531-32.

See also St. Paul Fire & Marine Ins. Co. v. W.P. Rose Supply Co., 19 N.C.App. 302, 198 SE.2d 482 (1973), State Farm Mutual Automobile Ins. Co. v. Clinton, 518 P.2d 645 (Ore. 1974).

A similar result was reached in Cedarholm v. State Farm Mutual Insurance Companies, 81 Idaho 136, 338 P.2d 93 (1959). A husband and wife, injured in an automobile accident, brought an action against the tort-feasor after being partially reimbursed by their insurer. A settlement was reached, and (similar to the present factual situation), two checks were delivered by the defendant to the plaintiff. The plaintiffs then brought a declaratory judgment action seeking to have the draft made out to the respondent-insurer turned over to them. The respondent-insurer claimed the full amount under its subrogation rights. The Idaho Supreme Court ruled that:

> Recovery by the respondent under its right of subrogation, however, is subject to reduction by the amount appellants expended for collection.

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> The general rule is that the insured may retain out of the fund recovered from the wrongdoer, after the payment of the policy, the costs and reasonable expenses incurred in the litigation, for it would be unjust to require him to incur expenses for the recovery of money for the benefit of the insurer, without being allowed to reimburse himself. * * *. 338 P.2d at 96.

It is clear that the courts throughout the nation have held that an insured is entitled to recover from his insurer a pro-rata share of his attorney's fees and expenses incurred in an action against the tort-feasor where the insurer was subrogated to a portion of the amount recovered. (See also Iowa National Mutual Insurance Company v. Huntley, 328 P.2d 569 (Wyo. 1958); Commercial Standard Insurance Company of Ft. Worth Texas v. Combs, 460 SW.2d 770 (Ark., 1970); Krause v. State Farm Mutual Automobile Ins. Co., 184 Neb. 588, 169 NW.2d 601 (Neb., 1969); and Carter v. Wooley, 521 P.2d 793 (Okla., 1974)).

This court has dealt with the relationship of subrogation rights and equity in the case of Transamerica Insurance Co. v. Barnes, supra. In that case, this court established the guidelines that should apply to this case:

> Equitable principles apply to subrogation, and the insured is entitled to be made whole before the insurer may recover any portion of the recovery from the tort-feasor. If the

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> one responsible has paid the full extent of the loss, the insurer should not claim both sums, and the insurer may then assert its claims to subrogation. Subrogation is not a matter of right, but may be invoked only in those circumstances where justice demands its applications, and the rights of the one seeking subrogation have a greater equity than the one who opposes him. Subrogation is not permitted where it will work any injustice to others. To entitle one to subrogation, the equities of one's case must be strong, as equity will, in general, relieve only those who could not have relieved themselves. Id. at 786.

Thus, while the plaintiff may be entitled to recover the P.I.P. payments paid to defendant under a subrogation theory, it must, equitably, bear its proportionate share of the expenses incurred by defendant in recovering those payments from the tort-feasor's insurance company.

Plaintiff's claim that it was required to arbitrate under the facts of this case completely misconceives the basic purpose of the No-Fault Act, supra. It is clear that its arbitration provisions were meant only to apply to a simple matter in which all expenses incurred by the insured in an accident do not exceed $500.00 and have been paid by the insurer, and the only reconciliation to be reached was between the two insurance companies. (A settlement which in no way affects the rights of the insured). The same provisions are clearly inadequate to handle the equitable

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considerations which arise when the insurer is only required to pay a small portion of the total damages incurred by the insured, and the insured then is forced to take action, by way of suit or otherwise, to recover from the tort-feasor his total damages and concommitantly to protect her own rights as well as the subrogation rights of the insurer. When this happens, the principles of subrogation become operative and the arbitration provisions of the No-Fault Act, supra., become inoperative.

In either event, plaintiff's rights are protected. If plaintiff's expenditures on behalf of the insured are the only damages sustained by the insured, plaintiff may then arbitrate with the tort-feasor's insurance company to recover the amount it expended. If the insured has sustained damage in addition to the amounts expended by plaintiff, then plaintiff may recover those amounts under the subrogation rights specifically reserved by plaintiff in the P.I.P. insurance policy (R. 73). The presence of a subrogation clause in plaintiff's own P.I.P. policy is clearly indicative of the fact that even plaintiff anticipated subrogation situations would occur in connection with the payment of P.I.P. benefits.

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By relying on the No-Fault Act's requirement of mandatory arbitration, plaintiff is simply trying to take back the entire amount which was paid to its insured under a paid for contract of insurance without having to share in the labor, efforts, expenses, and risks incurred in collecting such amounts.

A direct parallel can be drawn between the present case, its applicable statutory guidelines, and an analogous area of the law concerning workmen's compensation. Under the Utah Workmen's Compensation laws, §31-1-1, et seq., Utah Code Anno. (1953), the extent to which the employee-claimant can recover, and the context within which he can bring suit to recover from the third party-tort-feasor involved is all a matter of statutory regulation. Yet in this area, given a situation wherein the employee-claimant brings suit to recover his damages from the negligent third party, the Utah statutes expressly provide that a reasonable attorney's fee shall be awarded for the efforts of the employee-claimant's attorney. See §35-1-62(2), Utah Code Anno. (1953).

In interpreting the Workman's Compensation Statute, supra., this court has stated that the reasonable expenses of the action, including contingent

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attorney's fees, should be paid and charged proportionately against the parties (the injured employee and the insurer) as their interests appear.

This equitable doctrine was first ennunciated by the Utah Supreme Court in a well-reasoned opinion in the case of Worthen v. Shurtleff and Andrews, Inc., 16 U.2d 80, 426 P.2d 223 (1967), and has been repeatedly cited in the workmen's compensation area as the controlling law.

The Worthen doctrine, supra., was followed in a later workmen's compensation case, Lanier v. Pyne, 29 U.2d 249, 508 P.2d 38 (1973). In Lanier, the insurance company attempted the same agrument that defendant is now making and contended that it had not hired the plaintiff's attorneys and should not be required to bear a proportionate share of the attorney's fees and costs incurred. The court responded as follows:

> However, by indulging in a process of rationalization, and by following a procedure presently to be stated, Liberty Mutual (insurer of the injured employee) contends that notwithstanding the amendment, it is still not obliged to bear any portion of plaintiff's attorney's fees. This contention is based on the following propositions: that by reason of its right of subrogation, it properly intervened in the action; that inasmuch as it would be required to pay attorney's fees, it should be privileged to choose its own attorneys; that it notified the plaintiff and his attorneys that it did not desire their representation; and that its

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> own attorneys would protect its interests. Liberty Mutual does not disagree with the cases above referred to, but asserts that this one is different because in none of them does it appear that the plaintiff was put on notice, as he was here, that the insurance carrier had hired its own counsel and would protect its own interest. It thus raises what it asserts to be the sole issue in this case: that when it has thus hired its own counsel and given such notice, it is not required to participate in proportional payment of the costs and attorney's fees incurred by the plaintiff.
>
> Considerations of reason and policy impel the conclusion that the plaintiff, the one who has suffered the injury and damage, should have basic ownership and control of his cause of action. It is most natural to suppose that he will try to obtain the maximum possible recovery. Id. at 39-40. (Emphasis Added.)

The plaintiff respectfully asserts that the equitable considerations in these two areas of the law are identical with regard to the rights of an insured to recover for his total losses and the rights of the insurer to be subrogated to this recovery to the extent of any amounts paid to the insured by his insurer. It is clear that the insurer in both situations should rightfully bear a portion of the expenses incurred by the injured parties in recovering a fund from which both parties will share.

The defendant acknowledges plaintiff's rights to be subrogated to the recovery by her to the extent of the payments for special damages made by her insurer

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to her. It is equally clear under the general rules of law and equity and the majority of decisions hold that the plaintiff herein is liable for a pro-rata share of the expenses incurred, including attorney's fees, in recovering the amounts to which it is entitled.

POINT II.

THE TRIAL COURT ERRED IN DETERMINING THAT, IF SECTION 31-41-11 UTAH CODE ANNO. (1953), AS AMENDED, PRECLUDES DEFENDANT'S RECOVERY OF A PROPORTIONATE SHARE OF ATTORNEYS' FEES AND COSTS IN THIS MATTER, SUCH PROVISION WOULD NOT VIOLATE ARTICLE I, SEC. 11, CONSTITUTION OF UTAH.

The plaintiff has completely misconceived the basis of the defendant's causes of action and the language and effect of the Utah No-Fault Act, supra. The plaintiff claims that the No-Fault Act prohibits a suit to recover its interest and specifically limits it to binding arbitration.

Such an interpretation of the Act would render it unconstitutional on the grounds that it would violate an injured party's constitutional rights of due process of law and equal protection under the laws, under both the state and federal Constitutions. Particularly applicable is the due process provision of

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Article I, Sec. 11; of the Constitution of Utah:

> Sec. 11. All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by him-self or counsel, any civil cause to which he is a party.

Under the interpretation of the No-Fault Act asserted by the plaintiff, the only damages for which the defendant could bring an action would be those in excess of any amounts already paid to her by her insurer. Apparently, plaintiff would then assert that it alone has the right to seek reimbursement for the damages it has paid, through the binding, compulsory arbitration called for under the Act.

This entire characterization of the process of adjudication proposed by the plaintiff is directly contrary to the requirement in Utah law, as well as in a majority of jurisdictions, that a single cause of action may not be split. The general rule on splitting causes of action is discussed in 140 ALR 1245 and 1 Am.Jur.2d 651. In Cedarloff v. Whited, 110 Utah 45, 169 P.2d 777 (1946), this court dealt with the splitting of a cause of action and stated:

> . . . even though the insurance company is subrogated to a part of the claim of the

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> plaintiff, against the defendant, that does not create another cause of action and there can only be one suit to recover on that cause of action. 169 P.2d at 780.

See also Johanson v. Cudahy Packing Co., 107 Utah 114, 152 P.2d 98 (1944), and Rayner v. Hi-Line Transport, Inc., 15 U.2d 427, 394 P.2d 383 (1964).

The defendant is entitled to bring an action for the full damages incurred, including those for which it received partial payment from her insurer. The defendant would then naturally anticipate that her insurer would receive payment, under its subrogation rights, for the amount it had paid to her less its proportionate share of the expenses incurred in bringing the action. This would insure that neither party would be unjustly enriched at the expense of the other. To require her to commence an action in any other manner would violate her constitutional rights to a full and total adjudication of her claim.

There is still another line of reasoning under which the plaintiff'a assertions violate the defendant's constitutional rights. If an injured party were precluded from presenting evidence of medical, hospital and other expenses simply because she had been reimbursed for her expenditures, such a law would violate her rights because it would deny her "remedy by

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due course of law" and would deprive her of her property without due process of law. If a plaintiff were precluded from introducing evidence of doctor's bills, hospital and drug expenses, and other insurable losses, she would effectively be precluded from presenting the most effective evidence of her damage and would most likely receive less than that to which she was rightfully entitled.

Defendant, therefore, respectfully asserts that certain provisons of the Utah No-Fault Act supra., and specifically those under Section 31-41-11, supra., relative to the mandatory, binding arbitration between the insurers, is unconstitutional in its effect upon the defendant, if it is to be interpreted as claimed by the plaintiff. Application of those provisions, as interpreted by the plaintiff would violate the defendant's constitutional rights in that they would deny her "remedy by due course of law" and would deprive her of her property without due process of law.

CONCLUSION

Defendant is entitled to have plaintiff bear its fair share of the attorney's fees and costs expended in connection with securing a recovery of defendant's damages and the amounts expended by plaintiff in

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defendant's behalf.

At no time until plaintiff's monies had been recovered by the defendant did plaintiff claim that it should not pay a proportionate share of those costs.

Because subrogation principles are applicable to this case, as admitted by plaintiff in its conduct and in its insurance policy, plaintiff cannot now attempt to escape its responsibility to bear its proportionate share of the burden by relying on the provisions of a statute which is not applicable to the facts of this case.

Defendant is entitled to summary judgment in her favor.

DATED this 15th day of March, 1979.

Respectfully submitted,

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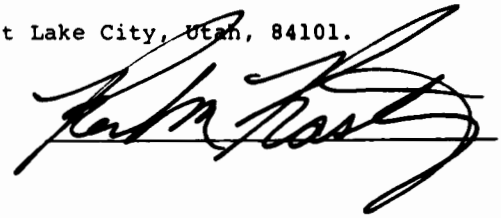
CERTIFICATE OF HAND DELIVERY

I hereby certify that on this 15th day of March, 1979 I hand delivered 2 true and correct copy of the foregoing Brief of Appellant to Timothy R. Hanson, Esq., at 702 Kearns Building, Salt Lake City, Utah, 84101.



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