

1989

Janet Higham vs. 350 Main Street Association, dba
The Black Pearl, a non-profit corporation, Four
Forty Nine, dba The Club, a non-profit corporation,
and Jerome Patrick Scholtz, an individual:
Appellant's Brief

Utah Court of Appeals

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BRIEF

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~~890290~~ IN THE SUPREME COURT OF THE STATE OF UTAH

JANET HIGHAM,

Plaintiff,

vs.

350 MAIN STREET ASSOCIATION,
dba THE BLACK PEARL, a non-
profit corporation, FOUR
FORTY-NINE, dba THE CLUB, a
non-profit corporation, and
JEROME PATRICK SCHOLTZ, an
individual,

Defendants.

PROGRESSIVE INSURANCE COMPANY,

Respondent.

90.

Supreme Court No. 870499

District Court No. 7676

Judge Homer Wilkinson

Priority No. 14(b)

APPELLANT'S BRIEF

Appeal from the Judgment of the
Third District Court for Summit County
Honorable Homer Wilkinson

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APR 4 1993

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

JANET HIGHAM,	:	
	:	
Plaintiff,	:	
	:	Supreme Court No. 870499
vs.	:	
	:	
350 MAIN STREET ASSOCIATION,	:	
dba THE BLACK PEARL, a non-	:	District Court No. 7676
profit corporation, FOUR	:	
FORTY-NINE, dba THE CLUB, a	:	Judge Homer Wilkinson
non-profit corporation, and	:	
JEROME PATRICK SCHOLTZ, an	:	Priority No. 14(b)
individual,	:	
	:	
Defendants.	:	
	:	
PROGRESSIVE INSURANCE COMPANY,	:	
	:	
Respondent.	:	

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Plaintiff,	:	
	:	Supreme Court No. 870499
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FORTY-NINE, dba THE CLUB, a	:	Judge Homer Wilkinson
non-profit corporation, and	:	
JEROME PATRICK SCHOLTZ, an	:	Priority No. 14(b)
individual,	:	
	:	
Defendants.	:	
	:	
PROGRESSIVE INSURANCE COMPANY,	:	
	:	
Respondent.	:	

LIST OF PARTIES

The only party on appeal who was a party to the proceeding in the Court whose order is sought to be reviewed is Janet Higham, plaintiff/appellant. Progressive Insurance Company, the automobile insurer of the plaintiff/appellant, is respondent in this proceeding because the Third District Court's order

released to the insurer funds to which both Janet Higham and Progressive Insurance Company claim a right.

STATEMENT OF JURISDICTION AND
NATURE OF PROCEEDINGS BELOW

Jurisdiction of the Supreme Court vests by virtue of Section 78-2-2, Utah Code Ann. The proceedings below involved the settlement of appellant's claims against two of the defendants and the entry of default judgment against a third in the underlying suit. The settlements were of claims based on the Utah Dramshop Act and the judgment was based on the negligence of an uninsured motorist. Appellant's automobile insurer asserted rights to a portion of the settlement funds. The portion, representing the amounts the insurer paid appellant for personal injury protection, uninsured motorist coverage, and collision coverage, was deposited with the Court in which the underlying suit lay. The insurer filed a Motion to Intervene and a Motion for Release of Funds. The Court, after receiving memoranda and hearing argument regarding the right of the insurer to intervene and the rights of the appellant or her insurer to the amount deposited with it, denied the insurer's motion to intervene but granted its motion for release of funds.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues presented for review are:

1. Whether an automobile insurer which pays uninsured motorist, personal injury protection, and collision coverage benefits for injuries and damages its insured incurs as a result

of a collision with an uninsured motorist has rights of subrogation or reimbursement to funds its insured receives from litigating claims against the uninsured motorist or whether no such rights exist under the Utah No-Fault Insurance Act;

2. Whether, under the Utah No-Fault Insurance Act or the provisions of the specific contract of insurance between appellant and respondent, an insurer has rights of subrogation or reimbursement to funds its insured receives from settlement of claims litigated against tort-feasors other than uninsured motorists; and

3. Whether equitable principles militate against subrogation if an insured's recovery from tort-feasors has not made her whole.

STATEMENT OF AUTHORITY DEEMED
TO BE DETERMINATIVE

Statutes believed to be determinative of the respective issues raised are Section 31A-22-302, Section 31A-22-305(3), Section 31A-22-307, and Section 31A-22-309, Utah Code Ann. The statutes are set forth verbatim in the addendum hereto.

STATEMENT OF THE CASE

The case, in its status before this Court, is an appeal from the order of the Third Judicial District Court granting release to respondent of \$35,082.00 of the funds appellant secured through a settlement of dramshop claims against private clubs. The clubs served alcohol to an uninsured motorist, whose truck subsequently collided with appellant's vehicle and caused her

severe physical injury. The case presents questions of law under the Utah No-Fault Insurance Act and questions involving equitable principles. The respondent was not a party to the action below, but filed a motion to intervene and a motion for release of the portion of appellant's settlement funds which was equal to payments the insurer made to appellant under her automobile insurance policy. The court granted the insurer's motion for release of funds but, at the same time, denied its motion to intervene. The insurer had filed its motions after the appellant's settlement with the dramshop defendants and after entry of judgment against the uninsured motorist defendant.

STATEMENT OF FACTS

1. The appellant, Janet Higham, was severely injured (R. 74-80) in an automobile accident involving an inebriated, uninsured motorist, Jerome Patrick Scholtz (referred to hereafter as "Scholtz"), in Park City, Utah, on March 3, 1983. (R. 54, 151, 784, 836.)

2. Appellant's automobile insurer, Progressive Insurance Company (referred to hereafter as "Progressive"), paid appellant \$11,163.00 in personal injury protection benefits, \$20,000.00 for uninsured motorist coverage, and \$3,919.00 of collision coverage under her policy. (R. 872, 783.) Progressive sought appellant's signature on a release and trust agreement covering the \$20,000.00 sum, but appellant did not agree to or sign the agreement. (R. 862, 873.)

3. Prior to the accident in which appellant was injured, Scholtz had been drinking alcoholic beverages at two Park City private clubs, the Black Pearl and The Club. (R. 1-8.)

4. In December, 1983, the appellant filed suit against Scholtz, The Black Pearl, and The Club. (R. 1-8.)

5. Progressive was aware of appellant's suit and her allegations against all of the defendants from its inception. (R. 872, 873.)

6. At various times during discovery and settlement negotiations, appellant's attorneys communicated to Progressive the fact that appellant did not believe her insurer had any rights under its policy or in law to be subrogated to any recovery she might achieve. (R. 886-889, 917, 919.)

7. Without moving to intervene, Progressive filed a Notice of Subrogation Interest in the amount of \$35,082.00 on May 29, 1985. (R. 957, 958.)

8. Appellant reached an agreement to settle her claims against The Club on March 18, 1986, (R. 453) and, in January of 1987, agreed to a settlement of her claims against The Black Pearl. (R. 692.)

9. On January 26, 1987, counsel for appellant and counsel for Progressive stipulated to the deposit of the amount to which Progressive claimed a right, \$35,082.00, with the Court for the purpose of achieving final resolution of the appellant's suit against the clubs and to allow the Court to rule on Progressive's claim. (R. 711, 712.)

10. After approval of her settlements with The Club and The Black Pearl, the appellant received a trial setting for suit against Scholtz. It was set for March 17, 1987. Scholtz failed to appear. The appellant presented evidence of her damages and received a verdict and \$139,716.76 judgment against Scholtz. (R. 715.)

11. Counsel for Progressive was present in Court at the trial of appellant's claims against Scholtz and attempted to object to appellant's evidence of damages. The trial court refused to consider his objections, ruling that Progressive had no standing in the matter. (R. 715.)

12. On July 8, 1987, appellant moved for judgment that she was entitled to the deposited funds. (R. 783-784.)

13. Progressive moved to intervene in appellant's suit and filed a Motion for Release of Funds, claiming entitlement to the \$35,082.00, on July 23, 1987. (R. 866-870.)

14. Appellant filed memoranda in opposition to Progressive's motions on July 29, 1987. (R. 897-962.)

15. The Court held a hearing on the claims to the funds and Progressive's motion to intervene on August 3, 1987, and on November 5, 1987, ruled that appellant's motion for summary judgment be denied, Progressive's motion for leave to intervene be denied, and Progressive's motion for release of funds be granted. (R. 972.)

SUMMARY OF ARGUMENTS

The following is a succinct condensation of the arguments actually made in the body of this brief:

Argument, Point I: The Court below erred in releasing the deposited funds to Progressive because a no-fault insurer has no right of subrogation or right to reimbursement against its own insured under the Utah No-Fault Insurance Act. Progressive's rights, if any, to recoup uninsured motorist benefits paid to appellant are against the uninsured motorist tort-feasor, not the insured. The insurer has no subrogation right or right of reimbursement for personal injury protection benefits or collision coverage because the coverage is secured by premium paid by the insured and the insurer would receive double recovery through the exercise of such a right.

Argument, Point II: The Court below erred in releasing the funds in question to Progressive because neither the law nor the provisions of the specific contract between insured and insurer give the insurer the right to subrogation or to reimbursement of monies an insured motorist receives from tort-feasors other than an uninsured motorist tort-feasor.

Argument, Point III: The Court below erred in releasing the funds in question to Progressive because it is not equitable to allow an insurer to recover monies paid under its contract from an insured whose recovery through litigation has not made her whole.

POINT I

UNDER UTAH LAW, AN AUTOMOBILE LIABILITY INSURANCE CARRIER DOES NOT HAVE RIGHTS OF SUBROGATION OR REIMBURSEMENT FOR UNINSURED MOTORIST COVERAGE, PERSONAL INJURY PROTECTION, OR COLLISION COVERAGE BENEFITS PAID TO ITS OWN INSURED FOR DAMAGES INCURRED BY THE INSURED IN ACCIDENTS CAUSED BY UNINSURED MOTORISTS.

The components required in motor vehicle insurance policies in Utah are now set forth in the motor vehicle insurance chapter of the Insurance Code, Section 31A-22-302, Utah Code Ann., which provides:

(1) Every policy of insurance or combination of policies purchased to satisfy the owner's or operator's security requirement of Section 41-12a-301 shall include:

(a) motor vehicle liability coverage under Sections 31A-22-303 and 31A-22-302; and

(b) uninsured motorist coverage under Section 31A-22-305, unless affirmatively waived under Subsection 31A-22-305(4).

(2) Every policy of insurance or combination of policies, purchased to satisfy the owner's or operator's security requirement of Section 41-12a-301, except for motorcycles, trailers, and semitrailers, shall also include personal injury protection under Sections 31A-22-306 through 31A-22-309.

(3) First party medical coverages may be offered or included in policies issued to motorcycle, trailer, and semitrailer owners or operators. These owners and operators are not covered by personal injury protection coverages in connection with injuries incurred while operating any of these vehicles.

A. Uninsured Motorist Coverage

The uninsured motorist coverage required by Section 31A-22-302(1)(b) is described in Section 31A-22-305(3):

(3) Uninsured motorist coverage under Subsection 31A-22-302(1)(b) provides coverage for covered persons who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, disease, or death, in limits which at least equal the minimum bodily injury limits for motor vehicle liability policies under Section 31A-22-304.

The essence of Sections 31A-22-302(1)(b) and 31A-22-305(3) was codified in Section 41-12-21.1 prior to the legislature's 1986 amendment (and renumbering) of the Insurance Code. In Lima v. Chambers, 657 P.2d 279 (Utah 1982), this Court stated,

Utah Code Ann., 1953, Section 41-12-21.1 requires that automobile liability insurance policies include coverage for accidents with uninsured motorists:

[N]o 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 use of a motor vehicle, shall be delivered . . . unless coverage is provided in such policy . . . 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 of bodily injury, sickness or disease, including death, resulting therefrom. [Emphasis added.]

657 P.2d at 280. In Lima, the question considered was whether an automobile liability insurance carrier providing uninsured motorist coverage might intervene as of right as a party defendant in a tort action between its insured and an uninsured motorist

tort-feasor. Id. Lima had been injured in a collision with Chambers, filed a negligence action against him, and pursued discovery in her action. Following Chambers' attorney's withdrawal from the case, Lima's attorney prepared an affidavit for Chambers' signature which acknowledged the facts that Chambers was an uninsured motorist and had caused the collision in which Lima was injured. Lima obtained summary judgment on the issue of Chambers' liability and her uninsured motorist carrier moved to intervene in the action for the purpose of litigating the remaining issue of Lima's damages. The trial court denied the carrier's motion. This Court reversed, holding that the carrier should be allowed to intervene under Rule 24(a), Utah Rules of Civil Procedure,

[b]ecause Section 41-12-21.1 requires insurers to assume financial responsibility for judgments obtained by their insureds against uninsured motorist tortfeasors (within certain limits), and because of the insurer's contractual obligation which embodies that statutory requirement, the insurer "is or may be bound" by the tort judgment within the meaning of Rule 24.

657 P.2d at 284 (citations omitted.)

In reaching its holding, the Court described the insurance carrier as "contractually liable for a judgment against an uninsured motorist" (657 P.2d at 280). Directly below its citation of the statutory requirement that automobile liability insurance policies include coverage for accidents with uninsured motorists, the Court stated:

Thus, if an insured is injured by an uninsured motorist, the insured may recover damages from

his own insurance company upon showing that he is "legally entitled" to recover those damages from the uninsured tortfeasor. This showing of legal entitlement typically entails a lawsuit against the uninsured tortfeasor to litigate the issues of liability and damages. A judgment favorable to the insured fixes the insurer's contractual duty to satisfy that judgment, within the policy limits. The insurer is then left to pursue its subrogation remedy against the uninsured tortfeasor.

657 P.2d at 281 (emphasis added.)

Lima's case differed factually from appellant's in two ways. First, Lima's carrier apparently did not pay her the uninsured motorist limits of her policy before she established her legal entitlement to recover damages, while Progressive paid the policy limits to appellant upon receipt of her claim for them. Second, Lima's carrier attempted to intervene in her lawsuit while it was pending, while Progressive did not seek to intervene in appellant's lawsuit until settlements occurred and a judgment was rendered. But Lima is dispositive of the issue whether an automobile liability insurance carrier providing uninsured motorist coverage has a subrogation remedy against its insured when the insured receives a judgment against an uninsured motorist. The insurance carrier is contractually liable to the insured, up to the limits of the uninsured motorist coverage, for the insured's judgment. The carrier must pursue the subrogation remedy against the uninsured tort-feasor.

Thamert v. Continental Cas. Co., 621 P.2d 702 (Utah 1980), is to the same effect as Lima v. Chambers, supra. Thamert was injured in a collision with an uninsured motorist. At the

time of the collision, he was in the course of his employment and therefore received workers' compensation benefits from his employer's workers' compensation carrier. The workers' compensation carrier was also the employer's casualty carrier and the casualty policy included uninsured motorist coverage. Thamert had his own automobile policy which contained uninsured motorist coverage. Following judgment by default against the uninsured motorist, Thamert filed an action in which he sought the uninsured motorist benefits from his employer's casualty carrier and from his own automobile carrier. The trial court granted summary judgment to both insurance carriers and Thamert appealed. Both carriers defended their judgments on the ground, inter alia, that any recovery under their uninsured motorist coverage must be reduced by amounts paid or payable as workers' compensation. The Court held that the insurers should not be permitted to offset Thamert's workers' compensation benefits, but remanded for determination of problems of fact, the problem of whether either insurance was excess, and the question whether its decision resulted in overexposure to either insurer. In its decision, the Court spoke of the intent behind the uninsured motorist statute as follows:

We are of the opinion that it was the intent of the legislature in adopting Section 41-14-21.1 that an insured, who availed himself of uninsured motorist coverage would have protection in not less than \$15,000 per person and \$30,000 per occurrence. Any attempt to reduce the amounts specified would be contrary to the statute.

621 P.2d at 704 (emphasis added.) This language is critical in light of the fact that both of the insurance policies under consideration contained provisions which reduced the policy limits by any amount the insured should receive under workers' compensation laws. Of this fact, the Court stated,

In considering the respective positions of the parties we start from the premise that if we are governed by the clear provisions of the policies here involved, the plaintiff cannot recover. However, the plaintiff contends that an insurer cannot by contract, reduce the mandatory uninsured motorist coverage required

A majority of the courts . . . have adopted the view that permitting offsets by contract would allow insurers to escape all or a part of the liability the legislature mandated they should provide.

Id. (emphasis added.)

The reasoning, and holdings, in Lima and Thamert reveal that the purpose and intent of the legislature in enacting Sections 31A-22-302 and 31A-22-305(3) were to allow a responsible motorist to insure herself against just such a contingency as occurred in this case. The appellant chose to carry uninsured motorist coverage and paid premiums for the coverage. Progressive, choosing to write automobile insurance in Utah in exchange for perceived profit, accepted her premiums and extended the coverage in the amount and kind set forth by law. When appellant was severely injured by a motorist who did not take the responsibility of carrying insurance, she was entitled to the full uninsured motorist coverage of her own policy upon establishing that she was legally entitled to recover damages from the

uninsured motorist. Respondent had a right to intervene in appellant's action against the uninsured motorist to protect its policy limits or contest its insured's entitlement. Progressive also has, now, a right to pursue a subrogation remedy against the uninsured tort-feasor. Progressive has no right, however, to subrogation against its own insured and no right to receive back from her that which it was its contractual duty to pay. The trial court erred in releasing \$20,000.00 of appellant's settlement to the respondent.

B. Personal Injury Protection

Section 31A-22-302(2) states that every policy of insurance purchased to satisfy an automobile owner's proof of security under the law "shall also include personal injury protection." Personal injury protection coverages and benefits are set forth in Section 31A-22-307 and include the reasonable value of all expenses for medical, surgical, x-ray, hospital and nursing services.

After appellant's accident with Scholtz, Progressive paid \$11,163.00 in personal injury protection (PIP) benefits to her under the terms of her policy. Appellant's medical expenses as a result of the accident were \$70,716.76 (R. 774) as of June of 1987 and, given the nature of her injuries and disability, they have continued to accrue. (R. 722-770.)

This Court discussed PIP benefits under Utah's "no-fault" auto insurance law in Allstate Ins. Co. v. Ivie, 606 P.2d 1197 (Utah 1980):

The true "no-fault" insurance is a type of compensation system which couples the payment of benefits on a no-fault basis with the partial elimination of fault-based tort actions for both economic losses and pain and suffering. This system generally continues to permit fault-based claims for pain and suffering in the more serious cases and for economic losses above no-fault benefits. A system which has no tort exemption at all is not a "no-fault" insurance. The Utah no-fault statute is a compulsory, partial tort exemption law coupling no-fault insurance benefits, Section 6, with a partial elimination of tort claims for bodily injury.

. . .

Under this statutory plan, first party PIP benefits up to the amounts provided in Section 6 are paid to an injured person without regard to fault. Furthermore, the injured party is precluded from maintaining an action to recovery general damages (all damages other than those awarded for economic losses), except where the threshold requirements of Section 9(1) are met. Under Section 9(2), there are two consequences to the owner of a motor vehicle who fails to have the security required by Section 5; first, he has no immunity from tort liability; second, he is personally liable for the benefits provided under Section 6. The only logical inference is that if a party has the security required under Section 5, the no-fault insurance act confers two privileges: first, he is granted partial tort immunity; second, he is not personally liable for the benefits provided under Section 6. He does, however, remain liable for customary tort claims, viz., general damages and economic losses not compensated by the benefits paid under Section 6, where the threshold provisions of Section 9(1) are met.

606 P.2d at 119, 1200 (emphasis added.) Under the statutory scheme, an insured tort-feasor is not liable for PIP benefits his victim receives from her insurer. The victim cannot include the PIP benefits as damages in an action against the insured tort-

feasor. In case of settlement between the tort-feasor's insurer and the victim, the amount of PIP benefits the victim received from her own insurer are not included. The tort-feasor's insurer, then, is subject to the victim's insurer's claim of subrogation. The Ivie Court explained,

Under the Utah No-Fault Insurance Act, the tort-feasor who has the required security, is not personally liable to the injured person for payment of Section 6 benefits, Section 9(2); therefore, the tort-feasor has no personal legal obligation to reimburse the injured party's insurer. On the other hand, the tort-feasor's liability insurer, in fulfilling its duty to respond to the claims of the injured party to the limits of its policy, stands in the shoes of its insured and pays on the basis of its insured's personal liability to the tort victim; this personal liability does not include PIP payments. Thus, the tort victim's recovery from the liability insurer cannot be reduced by the PIP payments. If the victim's recovery be reduced by the amount of the PIP payments by granting his no-fault insurer a right of subrogation, it is the no-fault insurer who receives double recovery. This is so because the insurer receives a premium for the benefits, and then receives full reimbursement, while the liability insurance available to recompense the victim is depleted by payments for which the liability insurer is not responsible to the victim.

. . .

However, [the PIP insurer] is not precluded from claiming reimbursement from [the tort-feasor's insurer] in an arbitration proceeding.

606 P.2d at 1202, 1203 (emphasis added.)

At the time of the Ivie decision and the time of appellant's accident, Section 31-41-11, Utah Code Ann., was in effect. It read,

(1) Every insurer authorized to write the insurance required by this act shall agree as a condition to being allowed to continue to write insurance in the State of Utah;

(a) That where its insured is or would be 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.

Section 31-41-11 is now embodied in Section 31A-22-309(6), Utah Code Ann., which reads:

(6) Every policy providing personal injury protection coverage shall provide:

(a) that where the insured under the policy is or would be held legally liable for the personal injuries sustained by any person to whom benefits required under personal injury protection have been paid by another insurer, including the Workers' Compensation Fund of Utah, the insurer of the person who would be held legally liable shall reimburse the other insurer for the payment, but not in excess of the amount of damages recoverable; and

(b) that the issue of liability for that reimbursement and its amount shall be decided by mandatory, binding arbitration between the insurers.

The content of the statutes is the same. Of Section 31-41-11, the Ivie Court wrote,

Section 11 in the Utah No-Fault Insurance Act cannot be interpreted as conferring on the no-fault insurer a right of subrogation to the funds received by its insured for personal injuries. Section 11 grants the no-fault insurer a limited, equitable right to seek reimbursement in arbitration proceeding against the liability insurer. Section 11 cannot be deemed as conferring subrogation rights on the no-fault insurer, vis-a-vis its insured as to his recovery in a settlement or legal action.

606 P.2d at 1202 (emphasis added.) In the context of Ivie, where the tort-feasor is insured and his insurance provides the proceeds of settlement with the victim, the victim's insurer must seek reimbursement for PIP benefits from the tort-feasor's insurer. Where, as here, the tort-feasor is not insured, but remains personally liable for the benefits paid by the victim's insurer as well as for the claims not compensated by such benefits, the victim's insurer must seek reimbursement from the tort-feasor himself.

The appellant has settled claims against tort-feasors other than the uninsured motorist. This fact does not alter the the No-Fault Insurance Act so as to make it confer on insurers subrogation rights against their own insureds for PIP benefits. Progressive may not have the limited equitable right to seek reimbursement in an arbitration proceeding against the motorist tortfeasor's insurer, but to reduce appellant's recovery would cause the result the court rejected in Ivie: Progressive would receive both its premium for the benefits and full

reimbursement, while the recovery available to the victim would be depleted by payments for which the uninsured motorist remains responsible. The trial court erred in releasing to respondent the \$11,163.00 of appellant's settlement.

C. Collision Coverage

Collision coverage, like uninsured motorist coverage, is secured and paid for by the responsible driver to protect her against the possibility of collision with an irresponsible uninsured motorist. Respondent has no right to receive back from appellant that for which she paid unless she has received a double-recovery. As noted above, and will be explained more fully below, appellant has not received double-recovery in this case. The trial court erred in releasing to respondent the \$3,919.00 of appellant's settlement.

POINT II

AN INSURER HAS NO RIGHT TO RECOVER FROM SETTLEMENT FUNDS COVERAGE PROVIDED AN INSURED WHEN ITS POLICY IS UNCLEAR AND THE SETTLEMENT FROM WHICH IT SEEKS RECOMPENSE HAS NO RELATION TO THE COVERAGE PROVIDED BY THE POLICY.

A. Uninsured Motorist Coverage

Progressive's policy states,

Coverage I -- Uninsured Motorists Coverage
We will pay damages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle up to the limit of liability as defined in this part. The bodily injury must be caused by accident and arise out of the ownership, maintenance or driving of the uninsured motor vehicle. Determination whether an insured person is legally entitled

to recover damages or the amount of damages shall be made by agreement between the insured person and us. If no agreement is reached, the decision will be made by arbitration. Such arbitration must be demanded within one year after the date of the accident. If suit is brought to determine legal liability or damages without our written consent, we are not bound by any resulting judgment.

Progressive Companies' Combination Car Policy Agreement (R. 520-526), Part IV, p. 4 (R. 524) (emphasis added.) The damages Progressive paid appellant under this policy are those which she is "legally entitled to recover" from Scholtz, the "owner or operator of an uninsured motor vehicle." The funds the trial court released to Progressive were monies appellant received from the defendant private clubs in settlement of statutory liability imposed on the clubs by the Utah Dramshop Act.

On page 5 of respondent's policy (R. 525), the following exclusion to coverage appears:

Exclusions

This coverage does not apply to bodily injury sustained by a person

. . .

2. If that person or the legal representative of that person makes a settlement without our written consent.

Page 5 also contains the following "Trust Agreement":

Trust Agreement

If we pay for a loss under this coverage:

1. We are entitled to recover from you an amount equal to such payment if there is a legal settlement made on your behalf against the person or organization legally responsible for the bodily injury.
2. You must hold in trust for us all rights to recover money which you

- have against the person or organization legally responsible for bodily injury.
3. You must do everything proper to secure our rights and do nothing to prejudice these rights.
 4. If we ask you in writing, you will take necessary or appropriate action, through a representative designated by us, to recover payment as damages from the responsible person or organization; if there is a recovery, then we shall be reimbursed out of the recovery for expenses, costs and attorney's fees incurred in connection with this recovery.
 5. You must execute and deliver to us any legal instruments or papers necessary to secure the rights and obligations of you and us as established here.

The provisions on page 5 are both parts of Part IV, Uninsured Motorists. On page 6 of the policy (R. 526), under Part V-General Provisions, there is the following paragraph:

5. Our Recovery Rights (Subrogation)
In the event of any payment under this policy, we are entitled to all the rights of recovery of the person to whom payment was made against another. That person must sign and deliver to us any legal papers relating to that recovery, do whatever else is necessary to help us exercise those rights and do nothing after loss to prejudice our rights.
When a person has been paid damages by us under this policy and also recovers from another, the amount recovered from the other shall be held by that person in trust for us and reimbursed to us to that extent of our payment.

The question is, do the exclusions and rights stated in these various parts of the policy mean that Progressive has a right to

deduct from appellant's settlement with the clubs payments it made to appellant under her car policy agreement?

In the case of the uninsured motorist benefits, respondent's policy states, in Coverage 1 quoted above, that the payment be for bodily injury "caused by accident and arising out of the ownership, maintenance or driving of the uninsured motor vehicle." The policy must be interpreted in a manner which imputes to the various exclusions and the trust and right paragraphs the definitions of the specific coverages for which an insured receives benefits. The subrogation set forth in the General Provisions is in language too broad for an automobile insurance policy if it is not tied to the specific coverages set forth in the coverage sections of the policy.

When a problem arises as to the meaning of an insurance policy, the courts apply the fundamental principle that when there is any question regarding the language of the policy, the language should be construed against the party who drafted it. Hoffman v. Life Ins. Co. of North America, 669 P.2d 410, 417 (Utah 1983); Handley v. Mutual Life Insurance Co., 106 Utah 184, 192, 147 P.2d 319, 322 (1944). Progressive's policy does not make it clear whether its intent is to tie its caveats, as well as its benefits, to the specific coverages within it. Seal v. Tayco, Inc., 400 P.2d 503 (Utah 1965), addressed the problem of differing language in separate portions of contract as follows:

In addressing this problem, certain principles should be kept in mind. The first is that in case of uncertainty as to the meaning of the contract, it should be construed most strictly

against its framer A particularized application of this well-recognized doctrine is that it seems manifestly unfair to permit one who formulates a contract to so fashion it as to mislead the other party by setting forth a clearly apparent promise or representation in order to induce acceptance, and then designedly "burying" elsewhere in the document, in fine print, provisions which purport to limit or take away the promise, and/or preclude recovery for failure to fulfill it.

Supplemental to and in accord with the foregoing is the principle that it is improper to excerpt from context and give independent meaning to the provision It must be considered in connection with the whole contract

400 P.2d at 505.

It is not clear whether Progressive meant the subrogation provisions of its policy to apply to any and all recoveries its insured might achieve due to the tortious conduct of others. Arguably, such a construction is far too broad. But, since the policy is not clear, it must be construed against Progressive because Progressive drafted it.

Even if the policy were clear, and the subrogation provisions consistent with the other provisions in the policy, Progressive would not have subrogation rights against its own insured. In Thamert v. Continental Cas. Co., supra, p. 12, the Court construed similar, but clear, contract provisions as incapable of reducing the mandatory uninsured motorist coverage required by the Utah No-Fault Statute. 621 P.2d at 704. The Thamert court would not permit an "offset by contract." To permit a release of funds appellant received from tort-feasors other than

Scholtz, based on liability which did not arise out of "ownership, maintenance or driving of the uninsured motor vehicle," would be to defeat the purpose for which appellant insured herself and the purpose of the No-Fault Insurance provision. It would allow the type of reduction Thamert itself would not permit.

B. PIP Benefits and Collision Coverage

The reasoning which militates against Progressive's claims regarding uninsured motorist benefits also applies to PIP benefits. The PIP benefits were paid, without regard to fault, for injury inflicted by the uninsured motorist, Scholtz, under a policy of which appellant availed herself as a responsible motorist. Settlement amounts paid to appellant by the clubs for statutorily imposed dram shop liability do not reflect any benefits appellant insured herself to receive. Even if Progressive's policy were not unclear as to whether the insured's recovery of damages from one other than a motorist is to be included in the subrogation and trust clauses, the law as stated in Allstate v. Ivie, supra, denies an insurer subrogation rights vis-a-vis its insured as to recovery in a settlement or legal action.

Like uninsured motorist and PIP benefits, collision coverage is a matter of contract. Progressive's contract is unclear as to reimbursement from recovery received from one other than a motorist tort-feasor. As with PIP benefits, double-recovery of collision coverage is not contemplated under the law,

nor would appellant seek it. Her recovery from the clubs, however, was not a complete recovery and cannot be construed as double-recovery. Progressive's coverage, for which appellant contracted and paid, should not become an instrument by which the recovery she achieved is depleted.

POINT III

EQUITABLE PRINCIPLES APPLY TO SUBROGATION, AND SUBROGATION IS NOT PERMITTED IF IT WILL WORK INJUSTICE TO OTHERS, WHICH WOULD BE THE CASE IF AN INSURER WERE ALLOWED TO RECOVER ANY PORTION OF AN INSURED'S RECOVERY FROM A TORT-FEASOR BEFORE THE INSURED WERE MADE WHOLE.

Progressive claims a right of subrogation against the appellant because her settlements with the clubs entailed release agreements covering "all claims" she had against the clubs. This argument is identical to the argument made by the insurer in Transamerica Insurance Company v. Barnes, 505 P.2d 783 (Utah 1972). The Court's response in Transamerica was:

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 tortfeasor. The purpose of subrogation, as a creation of equity, is to effect an adjustment between parties so as to secure ultimately the payment or discharge of a debt by a person who in good conscience ought to pay for it.

. . .

[Transamerica] to establish a superior equity and thus to be entitled to prevail must present proof which establishes that the damages covered by defendant's settlement were the same or cover those for which the [insured] has already received indemnity from [Transamerica]; otherwise, the receipt of payment from the tort-feasor does not entitle

[Transamerica] to the return of the payments made by it.

505 P.2d at 786, 787. In this case, respondent cannot present proof to establish that the damages covered by appellant's settlements were the same or cover those for which respondent paid. The facts reveal that the appellant has not been made whole by the settlements. Settlements are compromises parties make in the interest of time, effort, and economics. Necessarily, no settlement ever makes a plaintiff entirely whole. In this case, the fact that appellant received a judgment against Scholtz underlines the reality respondent seeks to obscure: the appellant has not been made whole nor is it likely that she will be, as Scholtz is an unemployed laborer who has no assets.

Transamerica presents further justification for rejecting Progressive's asserted right to a portion of the appellant's recovery. Transamerica waited until the insured had litigated and negotiated his case to settlement, then sued its insured. The Court stated,

Furthermore, if [Transamerica] had an opportunity to assert its subrogation rights to the tort-feasors and neglected to give notice or enforce its demands, the trial court may determine under such circumstances that [Transamerica's] rights in equity are equal or inferior to [the insured's], i.e., equity will not relieve one who could have relieved himself.

505 P.2d at 787. Progressive waited until appellant litigated and negotiated to settlement her case against the clubs before attempting to intervene to enforce its demands. Equity will not relieve it in this case.

CONCLUSION

Under the law, equitable principles, and the facts of this case as set forth above, respondent had no right to the release of funds granted it by the trial court. Appellant respectfully requests from this Court a reversal of the order below releasing funds to Progressive and a holding that the funds be distributed to appellant as rightfully included in her compromise settlement with the two private club defendants.

DATED this 4TH day of April, 1988.

BLACK & MOORE

/s/

WENDY B. MOSELEY

/s/

JOSEPH E. TESCH

CERTIFICATE OF MAILING

I hereby certify that four (4) true and correct copies of the above and foregoing Appellant's Brief were mailed, with first-class postage thereon fully prepaid, on the 4th day of April, 1988, to each of the following:

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ADDENDUM NO. 1

Section 31A-22-302, U.C.A.

(4) "Occupying" means being in or on a motor vehicle as a passenger or operator, or being engaged in the immediate acts of entering, boarding, or alighting from a motor vehicle.

(5) "Operator" has the same meaning as under Subsection 41-12a-103(7).

(6) "Owner" has the same meaning as under Subsection 41-12a-103(8).

(7) "Pedestrian" means any natural person not occupying a motor vehicle.

History: C. 1953, 31A-22-301, enacted by L. 1985, ch. 242, § 27; 1986, ch. 204, § 155; 1987, ch. 91, § 49.

Amendment Notes. — The 1987 amendment, in Subsection (1), substituted

"41-12a-103(4)" for "41-12a-104", in Subsection (5), substituted "41-12a-103(7)" for "41-12a-104", and in Subsection (6), substituted "41-12a-103(8)" for "41-12a-104"

31A-22-302. Required components of motor vehicle insurance policies — Exceptions.

(1) Every policy of insurance or combination of policies purchased to satisfy the owner's or operator's security requirement of § 41-12a-301 shall include:

(a) motor vehicle liability coverage under §§ 31A-22-303 and 31A-22-304; and

(b) uninsured motorist coverage under § 31A-22-305, unless affirmatively waived under Subsection 31A-22-305(4).

(2) Every policy of insurance or combination of policies, purchased to satisfy the owner's or operator's security requirement of § 41-12a-301, except for motorcycles, trailers, and semitrailers, shall also include personal injury protection under §§ 31A-22-306 through 31A-22-309.

(3) First party medical coverages may be offered or included in policies issued to motorcycle, trailer, and semitrailer owners or operators. These owners and operators are not covered by personal injury protection coverages in connection with injuries incurred while operating any of these vehicles.

History: C. 1953, 31A-22-302, enacted by L. 1985, ch. 242, § 27; 1987, ch. 183, § 1.

Amendment Notes. — The 1987 amendment, in Subsection (2), inserted "trailers, and semitrailers", designated the second and third sentences in former Subsection (2) as Subsec-

tion (3), and, in Subsection (3), in the first sentence inserted "trailer, and semitrailer" and in the second sentence substituted "These" for "Motorcycle" and "any of these vehicles" for "a motorcycle"

NOTES TO DECISIONS

Liability of county.

Liability of county, as self-insurer of own vehicles operated by permissive users, under for-

mer law See *Foster v Salt Lake County*, 712 P 2d 224 (Utah 1985)

COLLATERAL REFERENCES

A.L.R. — Injury or death caused by assault as within coverage of no-fault motor vehicle insurance, 44 A.L.R.4th 1010

ADDENDUM NO. 2

Section 31A-22-305(3)

31A-22-303. Motor vehicle liability coverage.

COLLATERAL REFERENCES

A.L.R. — Liability insurance: when is vehicle in "dead storage," 48 A.L.R.4th 591. Automobile liability insurance policy flight from police exclusion: validity and effect, 49 A.L.R.4th 325.

31A-22-304. Motor vehicle liability policy minimum limits.

NOTES TO DECISIONS

Liability of county. Liability of county, as self-insurer of own vehicles operated by permissive users, under former law. See *Foster v. Salt Lake County*, 712 P.2d 224 (Utah 1985).

COLLATERAL REFERENCES

A.L.R. — Consortium claim of spouse, parent or child of accident victim as within extended "per accident" rather than "per person" coverage of automobile liability policy, 46 A.L.R.4th 735.

31A-22-305. Uninsured motorist coverage.

- (1) As used in this section, "covered persons" includes:
 - (a) the named insured;
 - (b) persons related to the named insured by blood, marriage, adoption, or guardianship, who are residents of the named insured's household, including those who usually make their home in the same household but temporarily live elsewhere;
 - (c) any person occupying a motor vehicle referred to in the policy or owned by a self-insurer; and
 - (d) any person who is entitled to recover damages against the owner or operator of the uninsured motor vehicle because of bodily injury to or death of persons under Subsection (1)(a), (b), or (c).
- (2) As used in this section, "uninsured motor vehicle" includes:
 - (a) a vehicle, the operation, maintenance, or use of which is not covered under a liability policy at the time of an injury-causing occurrence; or if the vehicle is covered, but with lower limits than required by § 31A-22-304, then the motor vehicle is uninsured to the extent of the deficiency;
 - (b) an unidentified motor vehicle which left the scene of an accident proximately caused by its operator; or
 - (c) an insured motor vehicle if before or after the accident the liability insurer of the motor vehicle is declared insolvent by a court of competent jurisdiction, but the motor vehicle is uninsured only to the extent that the claim against the insolvent insurer is not paid by a guaranty association or fund.
- (3) Uninsured motorist coverage under Subsection 31A-22-302(1)(b) provides coverage for covered persons who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, disease, or death, in limits which at least equal the minimum bodily injury limits for motor vehicle liability policies under § 31A-22-304.

ADDENDUM NO. 3

Section 31A-22-307

by insured while occupying "owned" vehicle establishing compensation for claims not
not insured by policy, 30 A.L.R.4th 172. paid because of insurer's insolvency, 30
Validity, construction, and effect of statute A.L.R.4th 1110.

31A-22-306. Personal injury protection.

Personal injury protection under Subsection 31A-22-302(2) provides the coverages and benefits described under § 31A-22-307 to persons described under § 31A-22-308, but is subject to the limitations, exclusions, and conditions set forth in § 31A-22-309.

History: C. 1953, 31A-22-306, enacted by L. 1985, ch. 242, § 27; L. 1986, ch. 204, § 158.

Amendment Notes. — The 1986 amend-

ment, effective July 1, 1986, substituted "31A-22-302(2)" for "31A-22-302(3)" and "in" for "under."

COLLATERAL REFERENCES

Am. Jur. 2d. — 44 Am. Jur. 2d Insurance § 1689.

C.J.S. — 44 C.J.S. Insurance § 64.

A.L.R. — Combining or "stacking" of "no

fault" or personal injury protection (PIP) coverages in automobile liability policy or policies, 29 A.L.R.4th 12.

Key Numbers. — Insurance ⇨ 11.1.

31A-22-307. Personal injury protection coverages and benefits.

(1) Personal injury protection coverages and benefits include:

(a) the reasonable value of all expenses for necessary medical, surgical, X-ray, dental, rehabilitation (which includes prosthetic devices), ambulance, hospital, and nursing services, not to exceed a total of \$3,000 per person;

(b) (i) the lesser of \$250 per week or 85% of any loss of gross income and loss of earning capacity per person from inability to work, for a maximum of 52 consecutive weeks after the loss, except that this benefit need not be paid for the first three days of disability, unless the disability continues for longer than two consecutive weeks after the date of injury; and

(ii) a special damage allowance not exceeding \$20 per day for a maximum of 365 days, for services actually rendered or expenses reasonably incurred for services that, but for the injury, the injured person would have performed for his household, except that this benefit need not be paid for the first three days after the date of injury unless the person's inability to perform these services continues for more than two consecutive weeks;

(c) funeral, burial, or cremation benefits not to exceed a total of \$1,500 per person; and

(d) compensation on account of death of a person payable to his heirs, in the total of \$3,000

(2) To determine the reasonable value of the medical expenses provided for in Subsection (1) and under Subsection 31A-22-309(1)(e), the commissioner shall, at least once each odd-numbered year, conduct a relative value study of services and accommodations for the diagnosis, care, recovery, or rehabilitation of an injured person in the most populous county in the state to assign a unit value and median charge to each type of service and accommodation. In conducting the study, the department shall consult with appropriate public and private medical and health agencies. Upon completion of the study, the department shall prepare and publish a relative value study which sets forth the unit value and median charge assigned to each type of service and accommodation. The value of any service or accommodation is determined by applying the unit value and median charge assigned to the service or accommodation under the relative value study. If a service or accommodation is not assigned a unit value or median charge under the relative value study, the value of the service or accommodation shall equal the reasonable cost of the same or similar service or accommodation in the most populous county of this state. This subsection does not preclude the department from adopting a schedule already established or a schedule prepared by persons outside the department, if it meets the requirements of this subsection. In disputed cases, a court on its own motion or on the motion of either party may designate an impartial medical panel of not more than three licensed physicians to examine the claimant and testify on the issue of the reasonable value of the claimant's medical expenses.

(3) Medical expenses as provided for in Subsection (1)(a) and in Subsection 31A-22-309(1)(e) include expenses for any nonmedical remedial care and treatment rendered in accordance with a recognized religious method of healing.

(4) At appropriately reduced premium rates, insurers may offer deductibles in amounts not exceeding \$500 per accident with respect to the insurance coverages required under this section. However, the deductible is applicable only to claims of the named insured and persons living in his household.

(5) This section does not prohibit the issuance of policies of insurance providing coverages greater than the minimum coverage required under this chapter nor does it require the segregation of those minimum coverages from other coverages in the same policy.

History: C. 1953, 31A-22-307, enacted by L. 1985, ch. 242, § 27; L. 1986, ch. 204, § 159.

Amendment Notes. — The 1986 amend-

ment, effective July 1, 1986, inserted "prosthetic devices" in Subsection (1)(a), and made minor stylistic changes throughout the section.

ADDENDUM NO. 4

Section 31A-22-309

iting application of these provisions to accidents "in this state," insurance commissioner's regulation making no-fault insurance coverage applicable to incidents occur-

ring outside the state was in error. IML Freight, Inc. v. Ottosen, 538 P.2d 296 (Utah 1975).

31A-22-309. Limitations, exclusions, and conditions to personal injury protection.

(1) No person who has direct benefit coverage under a policy which includes personal injury protection may maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident, except where the person has sustained one or more of the following:

- (a) death;
- (b) dismemberment;
- (c) permanent disability;
- (d) permanent disfigurement; or
- (e) medical expenses to a person in excess of \$3,000.

(2) (a) Any insurer issuing personal injury protection coverage under this part may only exclude from this coverage benefits:

(i) for any injury sustained by the injured while occupying another motor vehicle owned by the insured and not insured under the policy;

(ii) for any injury sustained by any person while operating the insured motor vehicle without the express or implied consent of the insured or while not in lawful possession of the insured motor vehicle; or

(iii) to any injured person, if the person's conduct contributed to his injury:

- (A) by intentionally causing injury to himself; or
- (B) while committing a felony.

(b) The provisions of this subsection do not limit the exclusions which may be contained in other types of coverage.

(3) The benefits payable to any injured person under § 31A-22-307 are reduced by:

(a) any benefits which that person receives or is entitled to receive as a result of an accident covered in this code under any workers' compensation or similar statutory plan; and

(b) any amounts which that person receives or is entitled to receive from the United States or any of its agencies because he is on active duty in the military service.

(4) When a person injured is also an insured party under any other policy, including those policies complying with this part, primary coverage is given by the policy insuring the motor vehicle in use during the accident.

(5) Payment of the benefits provided for in § 31A-22-307 shall be made on a monthly basis as expenses are incurred. Benefits for any period are overdue if they are not paid within 30 days after the insurer receives reasonable proof of the fact and amount of expenses incurred during the period. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after that proof is received by the insurer. Any part or all of the remainder of the claim that is later supported by reasonable proof is also overdue if not paid within 30 days after the proof is received by the insurer. If the insurer fails to pay the expenses when due, these expenses shall bear interest at the rate of 1½% per month after the due date. The person entitled to the benefits may bring an action in contract to recover the expenses plus the applicable interest. If the insurer is required by the action to pay any overdue benefits and interest, the insurer is also required to pay a reasonable attorney's fee to the claimant.

(6) Every policy providing personal injury protection coverage shall provide:

(a) that where the insured under the policy is or would be held legally liable for the personal injuries sustained by any person to whom benefits required under personal injury protection have been paid by another insurer, including the Workers' Compensation Fund of Utah, the insurer of the person who would be held legally liable shall reimburse the other insurer for the payment, but not in excess of the amount of damages recoverable; and

(b) that the issue of liability for that reimbursement and its amount shall be decided by mandatory, binding arbitration between the insurers.

History: C. 1953, 31A-22-309, enacted by L. 1985, ch. 242, § 27; L. 1986, ch. 204, § 160.

Amendment Notes. — The 1986 amendment, effective July 1, 1986, in the introductory language of Subsection (1), substituted "person has sustained" for "accident caused"; in Subsection (1)(b) deleted "or fracture" at the end; substituted "\$3,000" for "\$1,000" in Subsection (1)(e); in Subsection (2), redesignated the subsections, rewrote the introductory language in Subsection (2)(a), and added Subsection (2)(b); in Subsection (6)(a), substituted "Workers' Compensation Fund of Utah, the insurer of the person who would be held legally liable shall" for "State Insurance Fund, it will"; and made minor stylistic changes throughout the section.

Meaning of "this code". — See note under same catchline following § 31A-22-102.