

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 Reply Brief

Utah Court of Appeals

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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.

QC
Supreme Court No. 870499

District Court No. 7676

Judge Homer Wilkinson

Priority No. 14(b)

APPELLANT'S REPLY BRIEF

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

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JUL 1 1988

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.	:	
	:	
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	:	
Respondent.	:	

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	:	
Defendants.	:	
	:	
PROGRESSIVE INSURANCE COMPANY,	:	
	:	
Respondent.	:	

Argument
INTRODUCTION

The Brief of Respondent in this matter set forth the argument that the appellant has breached the provisions of the policy under which she received payment from the respondent. The argument constitutes new matter to which this brief presents appellant's reply.

The Brief of the Respondent also presents cases in support of respondent's position from which, respondent claims, the present case is not distinguishable. The cases respondent cites, however, are clearly and easily distinguishable from the present case and this reply will succinctly state the distinction.

For the Court's convenience, each case cited herein is reproduced in the Addendum hereto.

POINT I. UNDER THE MOTOR VEHICLE INSURANCE CHAPTER OF THE UTAH INSURANCE CODE AND UNDER THE SPECIFIC PROVISIONS OF THE INSURANCE POLICY IN ISSUE, THE RESPONDENT HAS NO SUBROGATION RIGHTS WHICH THE APPELLANT COULD HAVE PREJUDICED.

The respondent (referred to hereafter as "Progressive") maintains that it is entitled to return of the funds it paid appellant under its automobile policy because the appellant "prejudiced Progressive's subrogation rights against the parties legally responsible for her injuries" and "such conduct constitutes a breach of the insurance contract." (Progressive's brief, p. 10.) Appellant's prejudicial action is said to be her "release of the only defendants with any ability to pay." (Id., p. 11). The general provision of the policy appellant purportedly breached is paragraph(s) 5 of Part V of the policy, which reads as follows:

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.

(Emphasis added.) Read literally, the emphasized language of paragraph(s) 5 constitutes an assignment of a cause of action for personal injury, which is not countenanced by the law. See State Farm Mut. Ins. Co. v. Farmers Insurance Exch., 450 P.2d 458 at 459; 450 P.2d at 460 (Justice Callister concurring.) Of course, the second paragraph above limits Progressive's rights to reimbursement to the extent of its payment and thus defines rights of subrogation (id.), which rights are what Progressive claims. The issue is whether, in this case, Progressive has any rights of subrogation which its insured could prejudice.

In light of the fact that the Utah Insurance Code and specific provisions regarding uninsured motorist and no-fault coverage are controlling, the language of Progressive's policy does not constitute the last words on the matters in issue. Progressive cannot write a policy that is more restrictive than the statutes allow, nor one which deviates from the statutes' provisions, and expect it to be enforced. Indeed, paragraph 11 of Part V - General Provisions of Progressive's policy conforms its terms to the state's statutes.

A. Uninsured Motorists Coverage

Progressive relies on Shepherd v. State Farm Mut. Auto Ins. Co., 607 F.Supp. 75 (D.C. Miss. 1985), as illustrative. The

insured in Shepherd released her claims for injury in an automobile accident in return for \$10,000 in settlement and then brought suit against her own insurer for uninsured motorist coverage over the amount of her settlement, which settlement she claimed did not compensate her for her damages. The insurer sought summary judgment on the grounds that Shepherd's execution of a covenant not to sue the motorist responsible for her injuries violated provisions of its contract's uninsured motorist provisions and abrogated its subrogation rights against the negligent motorist. Pertinent to the Shepherd Court's decision that Shepherd had abrogated her insurer's rights are the facts that:

1.) the insurer's uninsured motorist provisions, as quoted by the Court, stated:

This insurance does not apply: (a) to bodily injury to an insured . . . with respect to which such insured . . . shall, without written consent of the company, make any settlement with any person or organization who may be legally liable therefore

607 F.Supp. at 76;

2.) the negligent motorist was insured and Shepherd's settlement with him was for the limits of his policy; and,

3.) Shepherd was decided under the laws of Mississippi, which guarantee an insurer's subrogation rights in the following provision of the Mississippi uninsured motorist statutes:

An insurer paying a claim under the endorsement provisions required by section 83-11-101 shall be

subrogated to the rights of the insured to whom such claim was paid against the person causing such injury, death, or damage to the extent that payment was made, including the assets of the involvent insurer.

607 F.Supp. at 76, footnote 2.

The above facts are pertinent to the Shepherd Court's decision because they reveal that Shepherd is not illustrative of Progressive's argument in the following ways:

1.) There is no provision in Progressive's policy equivalent to the provision quoted from Shepherd's insurer's policy.

2.) Appellant's settlements and release of claims were not with the uninsured, or, as in Shepherd, underinsured, motorist, but with other parties, and Progressive's policy clearly states in its uninsured motorist provisions:

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

Progressive's policy, Part IV, Uninsured Motorists, Coverage 1, p. 4.

3.) Utah's uninsured motorist statutes do not guarantee an insurer's subrogation rights, as Mississippi's do.

The above-listed third reason Shepherd is not illustrative of this case is the same reason the other cases Progressive cites do not support the notion that Progressive has a right to subrogation under its uninsured motorist provisions when its

insured's recovery is obtained from a tortfeasor other than the uninsured motorist. The cases Progressive cites were all decided in the courts of Illinois: Ackermann v. Prudential Property & Cas. Inc., 83 Ill.App.3d 590, 404 N.E.2d 534 (1980); Glidden v. Farmers Automobile Insurance Ass'n, 57 Ill.2d 330, 312 N.E.2d 247 (1974); Remsen v. Midway Liquors, Inc., 30 Ill.App.2d 132, 174 N.E.2d 7 (1961).) The Illinois Insurance Code, like Mississippi's, guarantees an insurer's subrogation right for payments made under uninsured motorist coverage provisions. Section 143(a), Ill. Rev. Stat., 1975, ch. 73, par. 755a(3), states:

In the event of payment to any person under the coverage required by this Section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement of [sic] judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury or death for which such payment is made, including the proceeds recoverable from the assets of the insolvent [sic] insurer.

Ackermann v. Prudential Property & Cas. Inc., supra, at 536. Provisions equivalent to those in the Illinois and Mississippi Insurance Codes are absent from Utah's Insurance Code. Progressive does cite one case from a jurisdiction which, like Utah, does not provide for subrogation in its insurance code. Progressive states that the case, Farmers Ins. Exchange v. Christenson, 683 P.2d 1319 (Mont. 1984), upholds "the right of an insurer which had paid under the uninsured motorist coverage to

subrogation where recovery is obtained from a tortfeasor other than the uninsured motorist." (Progressive's brief, p. 14.) The Christensen case, however, was one in which the insured had obtained no recovery from any tortfeasor, and the essence of its holding supports the fact that Progressive's remedy is against the uninsured motorist. The facts, as set forth by the Court, were as follows:

On June 6, 1981, defendant Mark A. Christenson apparently caused an accident by improperly operating a motor vehicle. Kristine N. Hinckley, a passenger in the vehicle, sustained injuries as a result of the accident. Both Christenson and Hinckley were minors at the time of the accident. Christenson had no insurance on the vehicle when the accident occurred.

Farmers Insurance Exchange (Farmers) insured Hinckley and paid \$7,000 on her claim arising out of the injuries she sustained in the accident. Farmers paid this under an uninsured motorist provision in the Hinckley insurance policy. As required in the policy, the Hinckleys assigned their personal injury action to Farmers as part of a subrogation clause.

On February 10, 1982, Farmers filed an action against Christenson and his parents for \$7,000 paid on the personal injury claim. The Christensons received proper service of the complaint and summons. The Christensons failed to answer or take any action to defend against this action. On April 1, 1982, Farmers filed a motion for default judgment and on July 29, 1982, the court granted said motion.

On January 11, 1983, the Christensons filed a motion to vacate the default judgment and stay the execution. They asserted the judgment was void because Farmers was an improper party in the action. The Hinckleys lacked the ability to assign their personal injury action via the subrogation clause to Farmers. Following a

hearing on their case, the court found that the subrogation occurred properly and that the default judgment was entered properly.

683 P.2d at 1320-1321. The case did not involve a dispute between the insurer and its insured, as here. The dispute was between the insurer and the "third party" insured motorist. In its brief, Progressive accurately quotes the sentence in the case which begins, "We hold," but the holding in Farmers Ins. Exchange v. Christenson, in its entirety, is as follows:

We hold that an uninsured motorist carrier can make payment to an insured, and when the insured settles his claim or obtains a judgment against a third party, the carrier can subrogate and collect back the amount paid to the insured. Further, the uninsured motorist carrier can be required that the action be instituted in the name of the insured against the uninsured motorist in order to effectuate the subrogation interest of the uninsured motorist carrier. But said action must not impair, diminish or jeopardize insured's ability to recover any damages in excess of the subrogation amount. If a subrogation occurs, then the uninsured motorist carrier must, in good faith, seek for the insured any other damages (general, special or punitive) that he may not have received in his payment from the carrier.

683 P.2d at 1322 (emphasis added.) The Christenson Court, in reasoning towards its holding, also stated:

Respondent argues that public policy requires subrogation in this case. If this Court precluded subrogation of claims against uninsured motorists, then the uninsured motorist would probably benefit. Once the insured plaintiff receives the insurance compensation for the accident, it is less likely he will pursue litigation against the uninsured motorist. Therefore, subrogation enhances the chances that the uninsured motorist will pay for his wrongdoing, and

promote the policy requiring motorists to carry insurance.

As noted above, the controlling issue here is one of public policy.

683 P.2d 1321-1322 (emphasis added.) Christenson does not give Progressive the support Progressive's brief maintains it does. The case, when read in context, says nothing about subrogation of uninsured motorist claims in the absence of statutory provision for them, nor does it deal with recovery from third parties who are not uninsured motorists.

B. "No-Fault" or Personal Injury Protection Coverage

"No-fault" automobile insurance coverage is, as its name suggests, paid to an insured regardless of fault. No-fault benefits are, as progressive notes (Progressive's Brief, p. 16) personal injury protection (PIP) benefits. The insured pays her premium for no-fault coverage to insure coverage of medical expenses which accrue following an automobile accident. Neither Utah's Insurance Code nor the policy in issue in this case grant the insurer a subrogation right as to no-fault benefits paid. The Act grants a no-fault/PIP insurer a right to reimbursement from the insurer of a motorist tortfeasor for payments made by the victim's insurer which the tortfeasor's insurance paid. It does not mention, let alone provide for, the no-fault/PIP insurer's subrogation as to parties whose insurance covers liability for acts unrelated to the operation, ownership, or maintenance of motor vehicles. It expressly states the "reductions" which shall be made from coverage:

**Limitations, exclusions, and
conditions to personal injury**

(1) No person who has direct benefit coverage under a 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 also overdue if to 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 1 1/2% 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.

§ 31A-22-309, Utah Code Ann. (emphasis added.) The provisions found in paragraph 6 of Section 31A-22-309 are helpful to the analysis of Progressive's claims. They limit reimbursement, and set forth the parameters of the section, to policies providing personal injury protection. The defendants with whom appellant settled in this case were not insured by policies "providing personal injury protection coverage," as they were both private clubs, not motorists. Personal injury protection coverage is required under Utah law only in automobile insurance policies.

At the time of appellant's accident and Progressive's PIP payment to her, the above section was codified as § 31-41-7, Utah Code Ann., and read as follows:

31-41-7. Personal injuries covered-Primary coverage-Reduction of benefits.

(1) The coverages described in section 31-41-6 shall be applicable to:

(a) Personal injuries sustained by the insured when injured in an accident in this state involving any motor vehicle.

(b) Personal injuries arising out of automobile accidents occurring in this state sustained by any other

natural person while occupying the described motor vehicle with the consent of the insured or while a pedestrian if injured in a accident involving the described motor vehicle.

(2) When a person injured is also an insured party under any other policy, including those complying with this act, primary coverage shall be afforded by the policy insuring the motor vehicle out of the use of which the accident arose.

(3) The benefits payable to any injured person under section 31-41-6 shall be reduced by:

(a) Any benefits which that person receives or is entitled to receive as a result of an accident covered in this act under any workmen's compensation plan or any 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 of his or her being on active duty in the military services.

(Emphasis added.) Section 31-41-7 contained the same provisions for reduction of PIP benefits as § 31A-22-309 and no provision whatsoever for reimbursement between insurers.

Progressive's policy, Part 11 - Expenses for Medical Services to Insureds, contains no subrogation clause, stating, in its entirety:

PART II - EXPENSES FOR MEDICAL
SERVICES TO INSUREDS

Coverage C - Medical Payments Coverage

We will pay reasonable expenses incurred within one year from the date of accident for necessary medical and funeral services because

of bodily injury sustained by an insured person.

Additional Definition Used in this Part Only

As used in this Part "insured person" or "insured persons" mean:

1. Any person while occupying your insured car while the car is being driven by you, a relative or another person if that person drives your insured car with your expressed permission.

Exclusions

This coverage does not apply for bodily injury to any person:

1. sustained while occupying your insured car when used to carry persons for a fee. This exclusion does not apply to shared-expense car pools whose members are on the way to or from the same place of employment.
2. sustained while occupying any vehicle while located for use as a residence or premises.
3. sustained while occupying a motorized vehicle with less than four wheels.
4. sustained while occupying or through being struck by any vehicle, other than your insured car, which is owned by or furnished or available for regular use by you or a relative.
5. sustained while occupying a vehicle other than a private passenger car while the vehicle is being used in the business or occupation of an insured person.
6. occurring during the course of employment if benefits are payable

or must be provided under a Workers' Compensation Law or similar law.

7. caused by war (declared or undeclared), civil war, insurrection, rebellion, revolution, nuclear reaction, radiation or radioactive contamination, or any consequence of any of these.
8. caused by the insured person's commission or attempt to commit a felony, or by the insured person being involved in an illegal occupation.
9. sustained while your insured car is being operated by a person:
 - a. under the minimum age to obtain a license to operate a private passenger car in the state in which the car is licensed.
 - b. under fourteen years of age.
10. sustained while your insured car is driven in or preparing for any prearranged or organized race, speed contest or performance contest.

Limits of Liability

Regardless of the number of vehicles described in the Declarations, insured persons, claims or policies, or vehicles involved in the accident, we will pay no more than the Limit of Liability shown for this coverage in the Declarations for one or more persons injured in any one accident.

Any amount paid or payable for medical expenses under the Liability or Uninsured Motorists Coverages of this policy shall be deducted from the amounts payable under this Part.

Other Insurance

If there is other auto medical payments insurance on a loss covered by this Part, we will pay our proportionate share as our Limit of Liability bears to the total of all applicable auto medical payments limits.

We will not be liable under this policy for any medical expense paid or payable under the provisions of any:

1. premises insurance providing coverage for medical expenses.
2. individual, blanket, or group accident, disability or hospitalization.
3. medical, surgical, hospital or funeral services, benefit or reimbursement plan, or
4. workers' compensation or disability benefits law or any similar law.

The medical expenses for which no-fault/PIP benefits have been paid cannot be included as an element of damages in a suit against tortfeasors because the victim has recouped them from his own insurer. Appellant's medical expenses amounted to over \$42,000.00 when she initiated her suit against the uninsured defendant, Scholtz, and the dramshops. Her medical expenses exceeded the figure she claimed in her complaint, because Progressive had paid benefits which covered some of them. Her expenses now far exceed the amount sought in her complaint. As of June, 1987, they were \$70,716.76. Further surgery as a result of the accident is still anticipated. (Because the District Court's notation on the record indicates that the record has not been presented to the Court, appellant includes as Appendix A hereto her answers to interrogatories in which she delineates her

injuries. The medical records which establish the injuries she delineates are inches thick, and, therefore, are not reproduced for the Court at this point. They are in the record, should the Court desire to peruse them, and appellant refers to them at this point only to clarify the severity and non-subjectivity of appellant's injuries.)

C. Collision Coverage

As with the uninsured motorist and no-fault provisions of Utah's Insurance Code, the provisions regarding collision coverage are silent as to any rights of subrogation. They do not provide, either, for reimbursement or for any reduction in benefits because of workers' compensation or military benefits.

POINT II. THE RELATIONSHIP BETWEEN INSURER AND INSURED IN CONNECTION WITH AN UNINSURED MOTORIST IS ONE IN WHICH THE INSURER AND INSURED ARE, FOR ALL PRACTICAL PURPOSES, ADVERSARIES AND ONE IN WHICH THE DUTY AND RIGHT TO PROTECT ITS INTERESTS FALLS ON THE INSURER; THE INSURED CANNOT BE SAID TO HAVE "PREJUDICED" THE INSURER'S RIGHTS BY PURSUING HER OWN.

The appellant has not prejudiced any of Progressive's rights. As shown above, Progressive has no right to be subrogated to the proceeds appellant received from parties other than the uninsured motorist tortfeasor. Progressive has not cited one case in which such subrogation was allowed absent a statute specifically authorizing subrogation in general and/or subrogation as to parties other than the uninsured tortfeasor. Progressive's right

in a situation such as this case raises remains intact: it has the right to pursue subrogation against the uninsured tortfeasor.

The trust agreement included in Progressive's policy, under the uninsured motorist coverage provision, includes the following paragraph:

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.

Part IV - Uninsured Motorists, Trust Agreement, paragraph 4, p. 5. Although Progressive's agent states in his affidavit that appellant's counsel Joseph E. Tesch requested Progressive's permission to represent its rights in appellant's lawsuit, and Progressive's brief state that it was appellant's counsel Robert D. Moore who made such a request, there is no documentation of such request and the facts suggest none was made. In any event, Progressive did not ask "in writing," as provided in its policy, or take any steps to protect its own interests in the case until appellant had pursued it for over two years. If any prejudice to Progressive's rights has occurred, the prejudice is of Progressive's own making.

In Lyon v. Hartford Accident and Indemnity Company, 480 P.2d 739 (Utah 1971) (overruled on other grounds, Beck v. Farmers Ins. Exchange, 701 P.2d 795 (Utah 1985), at 798 footnote 1.), the Court discussed the relationship between an insurer and the insured for whom it provides uninsured motorist coverage in the context of

plaintiff's contention that she should be awarded damages for her insurer's failure to bargain with or settle her claims against it after she had obtained judgment against an uninsured motorist who caused her injuries. The Court addressed the contention as follows:

Finally, plaintiff contends that the trial court should have awarded her damages for Hartford's failure to bargain with her or settle her claim. She concedes that there is no case in point but asserts that this court should analogize her situation to that where a liability insurer refuses in bad faith to settle a claim with third parties within the policy limits and a judgment in excess of the policy limits is rendered against the insured. She reasons that by Hartford's failure to bargain, she was compelled to incur legal expenses for which she is entitled to be compensated.

Plaintiff's analogy is untenable because of the distinction in the relationship between a liability insurer and its insured and that between the insurer and its insured in connection with an uninsured motorist. In the former situation, the insurer must act in good faith and be as zealous in protecting the interests of the insured as it would be in regard to its own. In the latter situation, the insured and the insurer are, in effect and practically speaking, adversaries.

480 P.2d at 745 (emphasis added.) Given the adversarial relationship between insurer and insured in this situation, the insured has no more duty to protect the insured's interests than the insurer has to protect the insured's. Hartford points out that the insurer's obligation to perform does not arise until there is a legal determination of the liability of the uninsured motorist. Id. Progressive's policy states:

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.

Part IV - Uninsured Motorists, Coverage 1, p. 4. As in Hartford, Progressive's obligation to appellant did not arise until there was a determination that she was legally entitled to recover damages from the uninsured motorist. Further, under the terms of its own policy, Progressive attempts to retain control over the determination.

Because of the adversarial nature of the insurer-insured-uninsured motorist triangle, the insurer is allowed to intervene in its insured's action against the uninsured motorist. Lima v. Chambers, 657 P.2d 279 (Utah 1982). Intervention allows the insurer to protect its rights by raising the issues of the uninsured's liability, the damages flowing therefrom, whether its insured will be made whole, and the attendant issues Progressive now seeks to raise in this appeal. Progressive did not intervene.

Subrogation, if not specifically spelled out in statutory provisions is an equitable concept. Progressive, as its own agent's affidavit establishes, knew of appellant's lawsuit well in

advance of settlement negotiations. Yet Progressive chose not to participate in any aspect of the case. Progressive could have been involved in the settlement negotiations if it had been a proper party to the case. In equity, Progressive cannot be allowed to rely on the sole efforts of the appellant to effectuate a recovery and appear at the conclusion of her efforts to demand a claimed subrogation. Even where subrogation and full reimbursement regardless of the extent of the insured's recovery are mandated by statute, as they are in workers' compensation insurance cases, the insurer is required to contribute to the effort entailed in the recovery by paying its share of the costs thereof, including attorney's fees. Section 35-1-62 of the Workers' Compensation Act of Utah sets forth the right of an injured worker to an action for damages against a third person who caused his injuries. The action is in addition to the benefits the workers' employer's compensation insurer pays the worker. In case of recovery from the third person, the worker must reimburse its employer's insurer in full for all benefits received, but the insurer must bear the reasonable expenses of the worker's action. Section 35-1-62 states:

If any recovery is obtained against such third person it shall be disbursed as follows:

(1) The reasonable expense of the action, including attorneys' fees, shall be paid and charged proportionately against the parties as their interests may appear. Any such fee chargeable to the employer or carrier is to be a credit upon any fee payable by the injured employee or, in the case of death, by the dependents, for any recovery had against the third party.

(2) The person liable for compensation payments shall be reimbursed in full for all payments made less the proportionate share of costs and attorneys' fees provided for in subsection (1).

(3) The balance shall be paid to the injured employee or his heirs in case of death, to be applied to reduce or satisfy in full any obligation thereafter accruing against the person liable for compensation.

(emphasis added.) Section 35-1-62 abrogates the common law feature of equitable subrogation which requires that the insured must be made whole before the insurer's right of subrogation arises. Lyon v. Hartford Accident and Indemnity Company, supra, spoke of this equitable feature as follows:

Since subrogation is an offspring of equity, equitable principles apply, even when the subrogation is based on contract, except as modified by specific provisions in the contract. In the absence of express terms to the contrary, the insured is entitled to be made whole before the insurer may recover any portion of the recovery from the tort-feasor. If the one responsible has paid the full extent of the loss, the insured should not claim both sums, and the insurer may then assert its claim to subrogation.

480 P.2d at 744, 745. Even as § 35-1-62 precludes any question as to the wholeness of the victim's recovery, it nevertheless requires the insurer to share the costs of the recovery, thus emphasizing the unfairness inherent in allowing an insurer to do nothing to effectuate recovery and subsequently assert a right of full subrogation.

Equity refutes Progressive's right of subrogation in this case. Appellant has set forth in her brief the facts which prove

her recovery from the private club defendants has not made her whole and she will not repeat them here. Nevertheless, if subrogation is allowed Progressive, equity demands that appellant receive reasonable remuneration for the efforts and costs, including attorney's fees, the expenditure of which resulted in the settlements in this case.

CONCLUSION

Under Utah law, Progressive has no right to the subrogation it seeks. Given that fact and the adversarial relationship between insurer and insured in an uninsured motorist claim context, appellant had no duty to protect Progressive's interests and did not, and in fact could not, breach her insurance policy by prejudicing Progressive's "rights."

DATED this 1 day of ^{July}~~June~~, 1988.

15/
Robert D. Moore

15/
Joseph E. Tesch

CERTIFICATE OF MAILING

I hereby certify that four (4) true and correct copies of the above and foregoing Brief were mailed, with first-class postage thereon fully prepaid, on the 1 day of ~~June~~ *July*, 1988, to each of the following:

David B. Williams
Rodney R. Parker
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145

Robert M. Felton
350 Main Street Association
5 Triad Center, #585
Salt Lake City, Utah 84180

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CSB Tower
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Salt Lake City, Utah 84101

15/

APPENDIX A

ANSWERS TO DEFENDANT 350 MAIN
STREET ASSOCIATION, DBA THE BLACK
PEARL'S FIRST SET OF INTERROGATORIES

Robert D. Moore
Wendy B. Moseley
BLACK & MOORE
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NO. 123456789

FILED

APR 26 1984

Clerk of Summit County

Deputy Clerk

IN THE DISTRICT COURT FOR THE THIRD JUDICIAL DISTRICT,
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

JANET HIGHAM,	:	
	:	
Plaintiff,	:	ANSWERS TO DEFENDANT
	:	350 MAIN STREET ASSOCIATION,
vs.	:	DBA THE BLACK PEARL'S
	:	FIRST SET OF INTERROGATORIES
	:	
350 MAIN STREET ASSOCIATION,	:	Civil No. 7676
dba THE BLACK PEARL, a non-	:	
profit corporation, FOUR	:	
FOURTY NINE dba THE CLUB,	:	
a non-profit corporation,	:	
and JEROME PATRICK SCHULTZ,	:	
an individual,	:	
	:	
Defendants.	:	

The plaintiff's injuries from the accident referred to in her complaint were extensive and the records, charges, expenses and paperwork the care of them generated and continue to generate were equally extensive. Therefore, the plaintiff's answers to these interrogatories are based on facts of which the plaintiff is currently aware. The answers are subject to modification and supplementation as further information is made known to the plaintiff and the documents necessary for discovery

known to the plaintiff and the documents necessary for discovery are examined and analyzed.

INTERROGATORY NO. 1. Please state your full name, date of birth, and present address.

ANSWER: Janet M. Higham, June 22, 1932; P.O. Box 1833, 304 Norfolk, Park City, Utah 84062.

INTERROGATORY NO. 2. State each and every fact upon which you intend to rely to prove the allegations set forth in paragraphs 16, 17, 18, and 19 of count 2 of your complaint.

ANSWER: The facts upon which plaintiff relied in making the allegations set forth in paragraph 16, 17, 18 and 19 of her complaint include but are not limited to the following information:

a. The statement given to Detective Lloyd D. Evans at the time of the accident by John Knox, the passenger in defendant Schultz's vehicle.

b. The statement given to patrolman R.L. Clayton the morning following the accident by Ann K. "Chris" Gorham, coatroom attendant at the Black Pearl on the evening of the accident.

c. The statements given to Patrolman R.L. Clayton the morning following the accident by Stuart T. Brown and James Wheble.

d. the complaint filed by Patrolman R.L. Clayton against defendant Schultz.

e. Statements made by defendant Schultz at the time of his prosecution for driving while intoxicated.

The plaintiff will respond regarding facts on which

she intends to rely after further discovery.

INTERROGATORY NO. 3. Set forth exactly what injuries you claim you received as a result of this accident.

ANSWER: The best record of plaintiff's injuries is contained in her medical records. The effects of the injuries are continuing and the full extent of them is as yet unknown. A summary of her injuries includes the following:

Plaintiff suffered right leg and ankle pain, thoracic spine pain and some abdominal pain following the accident. She suffered a subtalar dislocation on the right with an open fracture of the right patella. She had stellate laceration of the forehead and eyelids. She had a widened mediastinum on chest x-rays following the accident. She had a compression fracture of T6 and fractures of ribs 2-5 on the right. She had an equivocal paritoneal lavage with 80,000 red cells upon arrival at the Holy Cross Hospital. She suffered a right pneumothorax and developed respiratory embarrassment requiring placement of a right sided chest tube. She suffered a massive retroperitoneal hemorrhage, and laceration of the inferior vena cava and portal vein, as well as a crush injury to the pancreas with a pelvic hematoma. She also suffered a partial laceration of the pancreas. Plaintiff had an open fracture dislocation of the right subtalar joint, and an open comminuted fracture of the patella and open comminuted fracture of the right lateral femoral condyle with complete disruption of the patellar mechanism.

INTERROGATORY NO. 4. Have you been hospitalized as a result

of the injuries received in this accident?

ANSWER: Yes, plaintiff has been hospitalized as a result of the injuries received in this accident. Her injuries are continuing in nature and further hospitalization may be anticipated.

INTERROGATORY NO. 5. If so, for each period of hospitalization, state:

- a. The name and address of the hospital;
- b. The inclusive dates of hospitalization;
- c. The purpose for each hospitalization;
- d. The total charge for each such hospitalization.

ANSWER: To date, the plaintiff has been treated or examined in each of the following hospitals for the injuries alleged in her complaint: 1. Holy Cross Hospital, 1045 East 1st South, Salt Lake City, Utah 84102.

Dates of Treatment:

March 2, 1983 through April 3, 1983. The plaintiff was treated for multiple trauma as a result of the auto accident. The total charge for the hospitalization was \$32,646.49.

April 6, 1983, through April 9, 1983. The plaintiff was treated for an obstructed pancreatic fistula caused by the auto accident. The total charge for the hospitalization was \$1,457.55.

April 19, 1983 through April 29, 1983. The plaintiff was treated for persistent failure to heal of the pancreatic fistula caused by the auto accident. The total charge for the

hospitalization was \$7,861.81.

May 23, 1983, through May 31, 1983. The plaintiff was hospitalized for treatment of post traumatic chondromalacia secondary to multiple trauma sustained in the auto accident. The total charge for the hospitalization was \$2,858.13.

January 24, 1984, through January 26, 1984. The plaintiff underwent surgery on her leg which was required because of complications of the injuries she suffered to her right leg in the auto accident. The total charge for the hospitalization was \$984.19.

2. St. Benedict's Hospital, 5475 South 5th East Ogden, Utah.

Dates of Treatment:

July 15, and 16, 1983. The plaintiff was hospitalized for plastic surgery on scars caused by the avulsion injury to her forehead and both upper eyelids which she suffered in the auto accident. The total charge for the hospitalization was \$937.91.

INTERROGATORY NO. 6. State whether you have been treated by any doctors, physical therapists, or anyone practicing the healing arts for injuries received in this accident.

ANSWER: Yes, plaintiff has been and continues to be treated by doctors for injuries received in this accident.

INTERROGATORY NO 7. If so, for each such person, state:

- a. His name, address and specialty;
- b. Each date of examination and treatment;

- c. The type of examination and treatment;
- d. The total charge to date for examination and treatment.

ANSWER: To date, the plaintiff has been treated by the following doctors:

1. Chad Halverson, M.D., Holy Cross Hospital, 145 East 100 South, Salt Lake City, Utah 84112;

Dates of treatment:

March 3, 1983, exploratory laparotomy. The reason for the treatment was that the plaintiff was the victim of multiple trauma due to the accident complained of. The total charge for treatment was \$2,593.00.

March 7, 1983. Treatment for the subclavian area. The reason for the treatment was damage to the area under her clavicle which resulted from the auto accident. The total charge was \$55.00.

March 8, 1983. Treatment of damage to the internal jugular line. The reason for the treatment was damage which resulted from the auto accident. The total charge was \$55.00.

March 8, 1983, to April 1, 1983. The treatment was hyperalimentation required because of plaintiff's inability to ingest sufficient nutrients as a result of the traumas of the auto accident. The total charge for which was \$625.00.

March 24, 1983. Dr. Halverson performed reopening of lap incision required because of the traumas of the auto accident. The total charge was \$100.00.

March 24, 1983. Exploration of drain site to stop hemmorage. The plaintiff was found lying in a pool of blood flowing from her lateral Penrose drain which was placed during the exploratory laparotomy of March 2, 1983, following the auto accident. The total charge for treatment was \$243.00.

April 7, 1983, tube fistulotomy. Plaintiff's pancreatic fistula, caused by the trauma of the auto accident, was obstructed. The total charge for treatment was \$166.00.

April 21, 1983. Pancreaticojejunosomy by Roux-en-y. Plaintiff underwent this treatment because of persistent failure to heal of her pancreatic fistula caused by the auto accident. The total charge was \$1,837.00.

2. Robert A. Place, M.D. (TS-CDS), 1055 East 3900 South, Salt Lake City, Utah, 84117.

Dates of Treatment:

March 3, 1983. Physical examination and consultation with Dr. Halverson. The reason for the treatment was because of the trauma the plaintiff suffered in the accident. Dr. Place did not charge the plaintiff for the treatment.

3. Peter A. Hashisaki, M.D. (ID) 50 North Medical Drive, Salt Lake City, Utah 84132.

Dates of Treatment:

March 21, 1983. Physical examination and consultation for Dr. Halverson. Following the exploratory laparotomy performed by Dr. Halverson, the plaintiff developed a fever. Dr. Hashisaki examined her to discover the cause of the fever. The total charge

for examination was \$303.00.

4. Gary R. Zeluff, M.D. (OOS) 1002 East South Temple,
#303, Salt Lake City, Utah 84102.

Dates of Treatment:

March 3, 1983. Irrigation and debridement, partial patellectomy and open repair of quadriceps mechanism, irrigation debridement and reduction with deltoid repair of right subtalar joint. The reason for the treatment was the multiple trauma with an open fracture dislocation of the right subtalar joint, open comminuted fracture of the right patella and open comminuted fracture right femoral condyle with complete disruption of the patellar mechanism suffered in the auto accident complained of. The total charge for treatment was \$2,000.00.

May 23, 1983. Treatment of post traumatic chondromalacia secondary to multiple trauma sustained in the auto accident. The total charge for treatment was \$1,780.00.

January 1, 1984. Arthroscopy with patella shave and lateral retinacular release. The reason for this treatment was post traumatic chondromalacia secondary to the multiple trauma and patellar quad mechanism disruption sustained in the auto accident. The total charge for treatment was \$1,180.00.

5. Larry K. Patton, M.D., 324 Tenth Avenue,
#228, Salt Lake City, Utah 84113.

Dates of Treatment:

March 3, 1983. Closure of forehead wound with local advancement flaps and full thickness skin grafts, closure

of the bilateral upper eyelid lacerations, full thickness skin grafts to the left upper lid. This treatment was given to the plaintiff because of an avulsion injury to the forehead, including both upper eye lids, suffered in the auto accident complained of. Plaintiff will supplement this response with the amount of the total charge for treatment as soon as the record of the charge is found.

6. John E. Keiter, M.D., (PS), 3905 Harrison Boulevard, Ogden, Utah 84403.

Dates of Treatment:

July 15, 1983, plastic surgery on scars caused by the injury to the forehead and both upper eyelids plaintiff suffered in the auto accident complained of. The total charge of treatment was \$1,560.00.

7. Joseph A Schoenhals, M.D., 1002 East South Temple, Salt Lake City, Utah 84102.

Dates of Treatment:

March 3,5,8,9,10,11,14,16,18,19,20,22,23 and 28. Dr. Schoenhals is a pulmonary specialist who inserted a chesttube in the plaintiff to repair the right pneumothorax and followed her with care for pulmonary complaints during her initial hospitalization at Holy Cross in March 1983.

INTERROGATORY NO. 8. State whether you or any of your agents or authorized representatives have obtained medical reports from any of the individuals referred to in the immediately preceding interrogatory.

ANSWER: Neither plaintiff nor her agents or authorized representatives has, to date, obtained medical reports from any of the individuals referred to in the immediately preceding interrogatory other than a letter from Dr. John E. Keiter, M.D., a copy of which is attached as Exhibit #1. Requests for said records have been made and upon request from counsel for defendant after receipt of the records they will be made available for examination and copy.

INTERROGATORY NO. 9. If so, state as follows:

- a. The name and address of the person supplying the report;
- b. The name and address of the person having custody of the report;
- c. The date of the report;
- d. If you will do so without a Request for Production, please attach a copy of such report to your Answers to these interrogatories.

ANSWER: See answer to interrogatory no. 8.

INTERROGATORY NO. 10. List each and every other out-of-pocket expense not heretofore mentioned that you claim as a result of this accident.

ANSWER: The plaintiff incurred expenses including, but not limited to, the costs of transportation to and from hospitals, doctors and other imperative appearances during the period in which she was incapable of driving; dental expenses for problems which arose because of her injuries and because of the special

diet on which she was placed during the period when her pancreatic fistula was draining her body of three to four thousand calories a day; expenses for equipment and supplies she needed to perform her physical therapy; the expenses for canes and special shoes necessary because of her leg injuries. These expenses continue to accrue as the plaintiff continues to suffer the effects of the accident.

INTERROGATORY NO. 11. Were any x-rays taken to aid in the determination of the extent and nature of your injuries or to reveal the progress of your injuries or to reveal the progress of your recovery?

ANSWER: X-rays were taken to aid in the determination of the extent and nature of plaintiff's injuries.

INTERROGATORY NO. 12. If so, for each such procedure, state:

- a. The name and address of the person who took the x-rays;
- b. The time and place the x-rays were taken;
- c. The parts of your body x-rayed.

ANSWER: X-rays taken of which plaintiff at present has record include:

- a. Valley Radiologists, 1002 East South Temple, Suite 102, Salt Lake City, Utah 84102.
- b. X-rays were taken on May 3, 1983, May 4, 1983, and May 5, 1983.
- c. The parts of the body x-rayed were the abdomen, the chest, the femur, the cervical spine, the legs and

the soft tissue of the neck.

INTERROGATORY NO. 13. Were you disabled as a result of the accident?

ANSWER: Plaintiff was disabled as a result of the accident.

INTERROGATORY NO. 14. If so, state:

- a. A description of the disability;
- b. The percentage of disability, if you have received such a rating and if such rating was made, by whom and his address;
- c. Whether the disability is temporary or permanent; and if temporary, when it is expected to terminate.

ANSWER: The plaintiff's disabilities are physical, affecting her internal organs and her right leg. No rating of her disabilities has as yet been made. She was temporarily totally disabled from March 3, 1983, to August 22, 1983. She is as yet disabled to the extent that she cannot resume her position as Nursing Supervisor at McKay Dee Hospital.

INTERROGATORY NO. 15. Do you claim lost wages or income as a result of the injuries you suffered?

ANSWER: Plaintiff claims lost wages as a result of the injuries she suffered.

INTERROGATORY NO. 16. If so, state:

- a. The names and addresses of all employers and the nature of employment since the date of injury;
- b. The rate of pay at each place of employment;
- c. The name and address of your immediate supervisor

at each place of employment;

d. The time lost at each place of employment as a result of the injuries;

e. The total claimed lost income to date.

f. If you will do so without a Motion to Produce, please attach copies of plaintiff's federal income tax returns for the five (5) years immediately preceding the accident.

ANSWER: 1. a. I.H.C. Hospitals Inc., McKay Dee Hospital Center, Ogden, Utah.

b. \$1,198.45 per month

c. The plaintiff has not been able to return to work at the McKay Dee Hospital since the time of the accident.

d. Nursing supervisor. The plaintiff had full responsibility over approximately 1,000 nurses at this hospital. The hospital has approximately 360 beds. The responsibility included staffing of the entire hospital, including such duties as coordinating nursing staff requirements of operating room. etc.

2. a. Granite School District, 340 East 3545 South, Salt Lake City, Utah 84111.

b. \$1,630.00 per month

c. Plaintiff could not work during the months of March, April, May, June, July and August of 1983.

d. The plaintiff is a full-time instructor in areas of health occupation and nurses aids. Her duties are to instruct students. The plaintiff's Federal income tax returns for the five years immediately preceding the accident are attached

as Exhibit #2.

INTERROGATORY NO. 17. Do you claim your future earning capacity has been impaired?

ANSWER: Plaintiff's future earning capacity has been impaired. The full extent of the impairment is at present unknown.

INTERROGATORY NO. 18. If so, state:

- a. The amount claimed for such future loss;
- b. The basis upon which such computation is made.

ANSWER: See answer to Interrogatory No. 17.

INTERROGATORY NO. 19. State whether plaintiff has been hospitalized during his lifetime as a result of any injury or illness, other than that described in plaintiff's Complaint.

ANSWER: The plaintiff has been hospitalized during her lifetime as a result of injury and illness other than that described in her complaint.

INTERROGATORY NO. 20. If so, in each instance, state:

- a. The name and address of the hospital;
- b. The name and address of the doctors who treated plaintiff;
- c. How the injury or illness was incurred;
- d. The nature and extent of the injury or illness;
- e. Any disability which plaintiff sustained as a result of said injuries or illness;
- f. Whether a claim or a lawsuit was filed as a result thereof;
- g. If a claim was filed, the person or firm against

whom the claim was made;

h. If a lawsuit was filed, where said lawsuit was filed, the name and caption of said lawsuit, and the court in which it was filed.

ANSWER: During her lifetime, the plaintiff has been hospitalized as a result of injury or illness in the following hospitals:

1. Magic Valley Memorial Hospital, Twin Falls, Idaho. The plaintiff was hospitalized for three months in 1956 because she had polio. She does not recall the treating physicians. She incurred polio from nursing polio victims in Idaho, where she had gone upon hearing of a need for nurses. Idaho had received an ineffective batch of vaccine that year and consequently many Idahoans contracted polio. The illness was abortive in nature, and plaintiff recovered. The illness did cause some right intercostal narrowing of plaintiff's chest muscles which remained. No claim or lawsuit was filed as a result of this occurrence.

2. Hill Air Force Base Military Hospital. The plaintiff was hospitalized in 1962 for gall bladder surgery. She does not recall the treating physicians. The plaintiff's gall bladder had created gall stones and the gall bladder was infected. The plaintiff underwent major surgery with no complications and no residual effects. No claim or law suit was filed as a result of this surgery.

3. McKay Dee Hospital, 3939 Harrison Boulevard, Ogden, Utah. The plaintiff was hospitalized in 1965 for treatment of an ovarian cyst. The doctor who treated her was Thomas M. Feeny,

3905 Harrison Boulevard, Ogden, Utah 84403. The medical records will reveal what is known of the cause of the ovarian cyst and the nature and extent of the problem. The plaintiff did not sustain any disability as a result of it and no claim or law suit was filed.

INTERROGATORY NO. 21. State whether or not plaintiff has ever filed a claim for medical expenses or compensation as a result of an industrial injury.

ANSWER: Plaintiff has not filed a claim for medical expenses or compensation as a result of an industrial injury.

INTERROGATORY NO. 22. If so, for each instance, state:

- a. the name and address of the employer;
- b. when said injuries were incurred;
- c. the names and addresses of the doctors who treated the plaintiff;
- d. the nature and extent of the injuries.

ANSWER: See answer to interrogatory No. 21.

INTERROGATORY NO. 23. Please state whether plaintiff was suffering from any illness or physical disability immediately prior to the accident described in plaintiff's Complaint.

ANSWER: Plaintiff was not suffering from any illness or physical disability immediately prior to the accident described in her Complaint.

INTERROGATORY NO. 24. If so, state the nature and type of each illness or disability.

ANSWER: See answer to interrogatory no. 23.

INTERROGATORY NO. 25. State whether plaintiff has suffered any injuries, or incurred any illness after the accident referred to in plaintiff's complaint.

ANSWER: Plaintiff has not suffered any injuries or incurred any illness after the accident. Some of the injuries she suffered in the accident have recurrent effects.

INTERROGATORY NO. 26. If so, for each illness or injury, state:

- a. the date it occurred;
- b. where and how it occurred;
- c. the nature and extent of the injury or illness;
- d. the name and address of the doctors and physicians who have treated the plaintiff;
- e. whether any lawsuit was brought against any person by reason of the illness or injury, and if so, the name of the court wherein the lawsuit was brought, the name of the parties, and the name of the case, and whether said lawsuit was tried or settled.

ANSWER: See answer to interrogatory No. 25.

INTERROGATORY NO. 27. Was any personal property damaged as a result of the accident herein?

ANSWER: The plaintiff's 1981 Buick Skylark two door automobile was damaged as a result of the accident.

INTERROGATORY NO. 28. If so, state as follows:

- a. Itemize each piece of property damaged and the damage to that property.
- b. The name and address of all individuals having

made estimates or repairs;

c. Whether each piece of property has been repaired, and if so, the actual amount expended for the repairs;

d. If you will do so without a Request for Production, please attach a copy of each and all repair invoices or estimates of repair to your Answers to these interrogatories.

ANSWER: a. The 1981 Buick Skylark was damaged beyond repair.

b. No estimates or repairs were made on the 1981 Buick Skylark, other than the estimated cost of repair made by the reporting officer at the scene of the accident, which was \$5,000.00.

c. The 1981 Buick Skylark has not been repaired.

d. See answer "c" above.

INTERROGATORY NO 29. State the name and address of each person known to the plaintiff or plaintiff's representatives who knows anything concerning the facts of the incident described in plaintiff's Complaint.

ANSWER: Persons known to plaintiff at present to know facts regarding the accident include the paramedics at the scene of the accident, the doctors and nurses who treated her, the personnel of the life-flight helicopter in which she was flown to Holy Cross's emergency room and the following:

Lise Kelley, 143 Stonewall, Memphis, Tennessee, 38104, phone 901-274-2916.

Patrolman R. L. Clayton, 1825 Faunsdale Drive, Sandy,

Utah.

Detective Lloyd D. Evans, Park City Police Department,
Park City, Utah.

Patrolman L.G. Witt, Park City Police Department, Park
City, Utah.

Robert Kelley, 143 Stonewall, Memphis, Tennessee, 38104,
phone 901-274-2916.

Martin J. Wiesheier, 2661 North Dayton, Chicago, Illinois,
60614, phone 312-248-5152.

Woodie, a guitarist with the Ace Pancakes, a band based
in Denver.

John Knox, 3750 Summit, Casper, Wyoming, phone 307-235-6017.

Mike McCauley, 3650 Jasmine, West Valley City, Utah,
phone 801-966-6385.

H.H. Tony Cate, 300 Norfolk Avenue, Park City, Utah,
649-6253.

James Wheble, 918 Woodside, Park City, Utah

Kristen Gorham, 60 Rossi Hill, Park City, Utah

Stuart Brown, 917 Empire, Park City, Utah.

INTERROGATORY NO. 30. Please state whether any photographs
or diagrams were made of the accident or the accident scene or
anything involved in the accident.

ANSWER: Detective Lloyd D. Evans, Park City Police Department,
photographed the accident scene. Detective Evans has custody
of the photographs. They depict the vehicles involved in the
accident after it occurred and the roadway on which the accident

occurred. Patrolman R.L. Clayton, 1825 Faunsdale Drive, Sandy, Utah, made a diagram of what happened at the time of the accident as part of his Investigating Officer's Report of Traffic Accident. A copy of the diagram is attached hereto as Exhibit #3. Copies of the photographs are being made by Detective Evans and will be provided to defendant when they are placed in plaintiff's possession.

INTERROGATORY NO. 31. If so, for each photograph or diagram, state:

a. The name and address of the persons having taken the photograph or made the diagram;

b. The name and address of the person having custody of such photographs or diagram;

c. What each photograph or diagram depicts;

d. If you will do so without a Motion to Produce, please attach copies of each such photos or diagrams to your Answers to these photos or diagrams to your Answers to these interrogatories.

ANSWER: See answer to interrogatory no. 30.

INTERROGATORY NO. 32. Has plaintiff or any of plaintiff's representatives hired any experts to determine the cause of the accident or to reconstruct the accident?

ANSWER: Neither plaintiff nor any of her representatives has hired any experts to determine the cause of the accident or to reconstruct the accident as of this time but anticipate that the need may arise as a result of discovery which is continuing

and not yet completed. Counsel for the various defendants will be advised in a timely fashion should a determination that an expert will be used at trial be made.

INTERROGATORY NO. 33. If so, state the name and address of each expert, his specialty, and whether written reports have been made to plaintiff or plaintiff's representatives concerning the experts findings or conclusions.

ANSWER: See answer to interrogatory no. 32.

INTERROGATORY NO. 34. With respect to any insurance benefits paid to the plaintiff pursuant to the provisions of the Utah No-Fault Act, set forth the following:

a. The name or names of the insurance carrier making payments.

b. The amount of payment made, in total, and

c. The specific amount of payments made for:

1. medical expenses,

2. lost wages,

3. loss of essential services,

4. any other category of payment.

d. Whether or not the plaintiff intends to place into evidence at the time of trial, expenses incurred by the plaintiff but paid by an insurance carrier under the Utah No-Fault Act.

ANSWER: The plaintiff objects to this Interrogatory. Insurance benefits are not relevant to the subject matter involved in this action and questions regarding them do not seek information

reasonably calculated to lead to the discovery of admissable evidence. However, without waiving the above objection, the name of the insurance carrier making payments to the plaintiff pursuant to the provisions of the Utah No-Fault Act is Progressive Insurance. Plaintiff is unaware of exact amounts paid for medical benefits, if any, but was paid approximately \$7,800 for lost wages (calculated at \$150.00 a week for one year), and between \$952.00 and \$1,600.00 for loss of household services (calculated at \$119.00 to \$200.00 per month for eight months). The plaintiff will place in evidence all legally admissible evidence that will fairly demonstrate her special and general damages.

DATED THIS 24th Day of April, 1984.

BY

Janet Higham
JANET HIGHAM

SUBSCRIBED AND SWORN TO BEFORE ME THIS 24th Day of April, 1984.

My Commission Expires:

Annette Prou
NOTARY PUBLIC

Residing at: Salt Lake City, Utah

0113

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing ANSWERS TO INTERROGATORIES was sent this 24th day of April, 1984, to the following:

Joseph E. Tesch
TESCH & HUFNAEGEL
30 North Main Street, Suite #2
Heber City, Utah 84032

Robert Felton
SPECIALE & FELTON
Suite 220 Coordinated Financial Center
324 South State Street
Salt Lake City, Utah 84111-2303

Dale Lambert
CHRISTENSEN, JENSEN & POWELL
Attorney for 449, dba The Club
900 Kearns Building
Salt Lake City, Utah 84101

Gary B. Ferguson
RICHARDS, BRANDT, MILLER & NELSON
Attorney for Black Pearl
CSB Tower, Suite #700
50 South Main Street
Salt Lake City, Utah 84110

Annette Snelgrove

ADDENDUM 1

State Farm Mut. Ins. Co. v. Farmers Insurance Exchange
450 P.2d 458 (Utah 1969)

fraudulent concealment of the facts by the defendant. That part of the decree is ordered stricken and otherwise the decision of the court below is affirmed. No costs awarded.

CROCKETT, C. J., and CALLISTER and HENRIOD, JJ., concur.

ELLETT, J., concurs in the result.



22 Utah 2d 183

**STATE FARM MUTUAL INSURANCE
COMPANY, Plaintiff and Respondent,**

v.

**FARMERS INSURANCE EXCHANGE, De-
fendant, Third-Party Plain-
tiff and Appellant,**

v.

Carl R. SESSIONS, Third-Party Defendant.

No. 11350.

Supreme Court of Utah.

Feb. 11, 1969.

Action by injured party's insurer, as subrogee, against another insurer on injured party's medical payments claim against tort-feasor. Other insurer brought in another party as third-party defendant. The Third District Court, Salt Lake County, Bryant H. Croft, J., entered summary judgment determining that subrogation provision of policy was valid, and other insurer appealed. The Supreme Court, Henriod, J., held that subrogation provision was not against public policy but was valid and enforceable, and that evidence established that timely notice of subrogation rights had been given.

Affirmed.

1. 19 A.L.R.3d 1055 (1968); Wilson v. Tenn. Farmers Mut. (Tenn.1966), 411 S.W.2d 699; Tenn. Farmers Mut. Insur-

1. Subrogation ⇐1

Subrogation springs from equity concluding that one who has been reimbursed for a specific loss should not be entitled to a second reimbursement.

2. Assignments ⇐24(2)

Insurance ⇐606(1.1, 4)

Subrogation is permitted in insurance field with respect to property damage and to medical costs, but a claim or cause of action for personal injuries arising out of tort is not assignable.

3. Insurance ⇐607

Policy provision for subrogation against tort-feasor as to insured's claim for medical payments was not against public policy but was valid and enforceable.

4. Insurance ⇐607.1(7)

Evidence in action on claim against tort-feasor by injured party's insurer as subrogee of medical payments claim established that timely notice of subrogation rights had been given to protect insurer's subrogation claim.

W. Brent Wilcox of Hanson & Garrett, Salt Lake City, for appellant.

L. L. Summerhays of Strong & Hanni, Salt Lake City, for respondent.

HENRIOD, Justice.

Appeal from a summary judgment holding that a provision in an insurance policy for the subrogation of the insured's claim for medical payments against a tortfeasor is valid and not against public policy. Affirmed with costs to respondent.

[1-4] Subrogation springs from equity concluding that one having been reimbursed for a specific loss should not be entitled to a second reimbursement therefor. This principle has been accepted in the insurance field with respect to property damage, and with respect to medical costs by an impressive weight of authority.¹ On

ance Co. v. Rader (Tenn.1966), 410 S.W. 2d 171; Anderson v. Allstate Ins. Co. (1966), 266 N.C. 309, 145 S.E.2d 845;

the other hand it is generally conceded that a claim or cause of action for personal injuries arising out of tort is not assignable.² Arguments are persuasive for and against any such distinction. Nonetheless, we presently are constrained to affirm the universal rule of non-assignability of personal injury claims, but also the majority rule as to subrogation provisions contained in insurance policies with respect to medical expenses in cases such as that here.

We have been requested to determine but two points: 1) Whether the policy provision is valid and enforceable, and we say it is, and 2) Whether timely notice of subrogation rights was given here in order to protect plaintiff's subrogation claim. The trial court said adequate notice was given and the record supports such conclusion, which we affirm.

CROCKETT, C. J., and ELLETT, J., concur.

CALLISTER, Justice (concurring):

I concur with the conclusion of the majority opinion that the subrogation provision in the insurance policy is valid and enforceable. However, the reasons which support the conclusion merit discussion. The decisions from other jurisdictions which have considered the issue of the validity of a subrogation clause under medical payments coverage have been far from uniform both in reasoning and result. An excellent review of these diverse opinions may be found in *Higgins v. Allied American Mutual Fire Ins. Co.*¹

The cases which have invalidated the subrogation clause have been premised on

the ground that the clause in effect attempted to assign a claim for personal injury, and under the law of the jurisdiction such an assignment was invalid.² One line of cases, which is supported by better reasoning, rejects this concept and holds that the subrogation clause does not constitute an assignment of a claim for personal injury.³ The distinction between an assignment and subrogation is described in 6 C. J.S. Assignments § 2 b(12), as follows:

* * * subrogation presupposes an actual payment and satisfaction of the debtor claim to which the party is subrogated, although the remedy is kept alive in equity for the benefit of the one who made the payment under circumstances entitling him to contribution or indemnity, while assignment necessarily contemplates the continued existence of the debt or claim assigned. Subrogation operates only to secure contribution and indemnity, whereas an assignment transfers the whole claim.⁴

Another aspect which fortifies the validity of the subrogation clause is that the provision for medical payments is in the nature of an indemnity contract, i. e., it indemnifies the insured for medical expenses resulting from the accident, and the amount paid under the contract depends on the amount spent by the insured for the proper care of his injuries.⁵ Subrogation is a normal incident of indemnity insurance. (16 Couch on Insurance 2d, § 61:8, pp. 241-242.)

Finally, there appears to be a valid distinction in the language of the subrogation clause in the instant case and that found in the cases where the courts have held it to

Mich. Med. Serv. v. Sharpe (1954), 339 Mich. 574, 64 N.W.2d 713; *Nat. Un. Fire Ins. Co. v. Grimes* (1967), 278 Minn. 45, 153 N.W.2d 152.

2. 40 A.L.R.2d 502, II (1955).

1. (D.C.C.A., 1968), 237 A.2d 471.

2. *Peller v. Liberty Mutual Fire Ins. Co.*, 220 Cal.App.2d 610, 34 Cal.Rptr. 41 (1963); *Travelers Indemnity Co. v. Chumbley* (Mo.App.), 394 S.W.2d 418, 19 A.L.R.3d 1043 (1965).

3. See the cases cited in footnote 3 of *Higgins v. Allied American Mutual Fire Ins. Co.*, note 1, supra; e. g. *Damhesel v. Hardware Dealers Mutual Fire Ins. Co.*, 60 Ill.App.2d 279, 209 N.E.2d 876 (1965).

4. Also see 16 Couch on Insurance 2d, § 61:92, pp. 289-290; *Kimball & Davis, The Extension of Insurance Subrogation*, 60 Mich.L.Rev. 841, 866-867.

5. *Damhesel v. Hardware Dealers Mutual Fire Ins. Co.*, note 3, supra.

be an assignment of a cause of action for personal injury.⁶ In those cases, the insurance company was subrogated to all the insured's rights of recovery therefor, which the insured may have against any person, and the insured shall execute instruments and papers and do whatever else is necessary to secure such rights. In the instant action, the trial court found that the subrogation provision provided that upon payment of medical bills on behalf of the insured, the company should be subrogated to the extent of such payments to the *proceeds* of any *settlement or judgment* that might result from the *exercise of any rights of recovery* which the *injured person* or anyone receiving such payment *may have against any person or organization* and that such person should execute and deliver instruments and papers and do whatever else is necessary to secure such rights. Such person should do nothing after loss to prejudice such rights.

In *Peller v. Liberty Mutual Fire Ins. Co.*⁷ the court rejected the argument that the right to subrogation was distinguishable from an assignment. The court observed that the distinction was purely verbal in that the legal effect of the policy provisions was the same regardless of what term was attached to the procedure, since the result was to transfer the insured's cause of action against a third party tortfeasor to the insurer. In the instant case, even if the subrogation provision were interpreted as an assignment (which this opinion rejects), it assigns solely the proceeds that may possibly be recovered in an action for personal injuries brought against the tortfeasor. This court has previously held that a court of equity will enforce such an assignment even though the cause of action was not assignable.⁸

* * * Subrogation is an equitable device to compel the ultimate discharge of a debt or obligation by the one who

in good conscience ought to pay or discharge it.⁹

The judgment of the trial court should be affirmed.

TUCKETT, J., concurs in the concurring opinion of CALLISTER, J.



22 Utah 2d 187

Edward Wilson AMMERMAN, by his Guardian Ad Litem, LaVerne Bruce Ammerman, and Eddie Soliz, Plaintiffs and Appellant,

v.

FARMERS INSURANCE EXCHANGE,
Defendant and Respondent.

No. 11068.

Supreme Court of Utah.

Feb. 10, 1969.

Action against insurer to recover amount by which judgment against insured exceeded policy limits. Upon remand 19 Utah 2d 261, 430 P.2d 576, the Third District Court, Salt Lake County, Stewart M. Hanson, J., granted insurer's motion to dismiss and insured appealed. The Supreme Court, Callister, J., held that insured need not pay amount of judgment exceeding policy limits as condition precedent to action against insurer for failure to settle claim within policy limits.

Reversed and remanded.

1. Attorney and Client ⇄21

Attorneys who had represented judgment creditor could represent judgment debtor in action against judgment debtor's insurer.

6. See cases in note 2, *supra*.

7. Note 2, *supra*.

8. In *re Behm's Estate*, 117 Utah 151, 162, 213 P.2d 657 (1950).

9. *National Farmers Union Property & Cas. Co. v. Farmers Insurance Group*, 14 Utah 2d 89, 92, 377 P.2d 786, 788 (1963).

ADDENDUM 2

Shepherd v. State Farm Mut. Auto Ins. Co.,
607 F.Supp. 75 (D.C. Miss. 1985)

Linda SHEPHERD, Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, Defendant.

Civ. A. No. J84-0520(L).

United States District Court,
S.D. Mississippi,
Jackson Division.

Feb. 19, 1985.

Insured brought action against insurer seeking to recover under uninsured motorist provisions of policy. Both parties moved for summary judgment. The District Court, Tom S. Lee, J., held that: (1) by executing covenant not to sue, insured abrogated insurer's subrogation rights, and (2) by executing covenant not to sue in violation of uninsured motorist provisions of policy, insured foreclosed her right to recover from insurer.

Defendant's motion for summary judgment granted.

1. Insurance ⚡606(10)

Insurer's ability to recover from driver of automobile involved in accident with insured or to recover from driver's insurer was dependent entirely upon insured's right; thus, by foreclosing her own right to sue by signing covenant not to sue, insured abrogated insurer's rights.

2. Insurance ⚡603.1

Where agreement not to sue executed by insured constituted "settlement" in violation of uninsured motorist provisions of liability policy, whether agreement was characterized as release or covenant not to sue, insured could not recover from insurer under uninsured motorist provisions of policy.

Joseph E. Roberts, Cothren, & Pittman,
Jackson, Miss., for plaintiff.

Jerome B. Steen & William C. Griffin,
Steen, Reynolds, Dalehite & Currie, Jackson,
Miss., for defendant.

MEMORANDUM OPINION

TOM S. LEE, District Judge.

This cause is before the court on the Motion for Summary Judgment filed by the defendant, State Farm Mutual Automobile Insurance Company (State Farm). After consideration of the memoranda with attachments submitted by the parties, this court is of the opinion that the defendant's motion is well taken and should be granted.

The plaintiff, Linda Shepherd, was injured when the vehicle which she was driving was struck from the rear by a car operated by Mohammad Esmail Amini. She allegedly sustained severe injuries to the head, neck, cervical spine and shoulders and required treatment by an orthopedic surgeon for several months. The automobile driven by Amini was insured by Stonewall Insurance Company (Stonewall). Linda Shepherd was the named insured of an insurance policy issued by State Farm with a policy limit of \$10,000 and her mother, Juanita Atkins, also held a policy issued by State Farm with a policy limit of \$25,000. After the accident, Stonewall paid Shepherd \$10,000.00 on behalf of Amini and, in return, Shepherd executed a covenant not to sue by which she agreed not to sue or "make any claim against Mohammad Esmail Amini, Stonewall Insurance Company, or Dixie Insurance Company...." The agreement further provided that "the execution of this Covenant Not to Sue ... does not in any way prejudice the rights of the undersigned to assert or make a claim against the undersigned's automobile liability insurance carrier, State Farm Mutual Automobile Insurance Company....".

Shepherd alleges that her damages exceed the \$10,000.00 paid to her by Amini's insurer and that she is entitled to recover from State Farm pursuant to the provisions of policies issued to her and her mother and

the Mississippi uninsured motorist statutes.¹

State Farm asserts that it is entitled to summary judgment because Shepherd's execution of the covenant not to sue without the consent of State Farm was in violation of the uninsured motorist provisions of the policy which state in part:

This insurance does not apply: (a) to bodily injury to an insured ... with respect to which such insured ... shall, without written consent of the company, make any settlement with any person or organization who may be legally liable therefor....

The covenant not to sue, according to State Farm, furthermore abrogated its subrogation rights against Amini.²

In *United States Fidelity & Guaranty Company v. Hillman*, 367 So.2d 914 (Miss. 1979), Hillman, the insured, had sustained injuries when a truck, driven by an uninsured motorist, collided with Hillman's automobile. Without the knowledge of U.S.F. & G., Hillman executed a release of the uninsured motorist. The U.S.F. & G. policy stated that the uninsured motorist coverage did not apply "to bodily injury to an Insured with respect to which such insured ... shall, without written consent of [U.S.F. & G.], make any settlement with any person or organization who may be legally liable therefor". The court held that, since Hillman had violated an unambiguous provision of the policy and had, in releasing the uninsured motorist, foreclos-

ed U.S.F. & G.'s subrogation rights guaranteed by Mississippi's uninsured motorist statutes, recovery from U.S.F. & G. must be denied. *Id.* at 922.

[1,2] The plaintiff has attempted to distinguish the release in *Hillman* from the covenant not to sue executed by her. Shepherd contends that the covenant not to sue is personal to her and not prejudicial to the subrogation rights of the defendant. Subrogation, however, "is the substitution of one person in place of another ... so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and to its rights, remedies or securities". *Indiana Lumberman's Mutual Insurance Co. v. Curtis Mathes Mfg. Co.*, 456 So.2d 750, 754 (Miss.1984) (quoting *Lyon v. Colonial United States Mortgage Co.*, 129 Miss. 54, 91 So. 708 (1922)). State Farm's ability to recover from Amini or his insurer is dependent entirely on Shepherd's rights. By foreclosing her own right to sue, Shepherd has also abrogated State Farm's rights. Furthermore, since the covenant not to sue executed by Shepherd constitutes a "settlement" in violation of the policy, the court finds that the legal distinctions between a release and covenant not to sue are immaterial.³

For the reasons stated herein, it is the court's opinion that the defendant's motion for summary judgment should be granted. A separate judgment shall be submitted in accordance with the local rules.

1. Section 83-11-103, Miss.Code Ann., defines an uninsured motor vehicle as, *inter alia*, "An insured motor vehicle, when the liability insurer of such vehicle has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under his uninsured motorist coverage." Although the automobile driven by Amini was covered by an insurance policy, it is an uninsured motor vehicle for purposes of the statutes because Shepherd alleges her damages exceeded the amount of coverage.

2. Miss.Code Ann. § 83-11-107 (1972) provides in part:

An insurer paying a claim under the endorsement or provisions required by section 83-11-101 shall be subrogated to the rights of the insured to whom such claim was paid against

the person causing such injury, death, or damage to the extent that payment was made, including the proceeds recoverable from the assets of the involvent insurer.

3. In *Dancy v. State Farm Mutual Automobile Insurance Co.*, 324 F.Supp. 964 (S.D.Ala.1971), the insured executed a covenant not to sue in favor of a man against whom he had a tort claim, as well as the man's insurance company, and then sought recovery under the uninsured motorist provision of his policy with State Farm. The court, in granting summary judgment for the insurer, found that the covenant not to sue, like a release, breached the policy provision prohibiting settlement without the insurer's consent and interfered with the insurer's subrogation rights. *Id.* at 965.

ADDENDUM 3

Ackermann v. Prudential Property & Cas. Inc.,
83 Ill.App 3d 590, 404 N.E.2d 534 (1980)

1017, 1020, involved a claim of improper examination of witnesses in a probation revocation hearing. The trial judge examined three female witnesses about their employment, education, drinking, drug use habits, receipt of public aid and association with various types of men. In addition the trial judge characterized some of the defendant's witnesses as "hippie-dippies." The conduct of the judge in *Bullard* is strikingly different from that of the trial judge here. There is a total absence of any branding characterization of the defendant in this case or any concern with the life style and association of the defendant as remote from the offense charged as the inquiry into the life styles and associations of the three witnesses was in *Bullard*.

For the reasons stated above, the conviction of defendant of attempt murder is affirmed.

The defendant raises an additional issue regarding his sentencing. On two separate occasions during these proceedings, the trial judge observed that the minimum term of imprisonment for attempt murder was 4 years. At the time of sentencing, Illinois appellate courts had ruled inconsistently on whether the term for attempt murder was a 4-year minimum term. (See *People v. MacRae* (1977), 47 Ill.App.3d 302, 314, 5 Ill.Dec. 362, 370, 361 N.E.2d 685, 693.) But, shortly after the imposition of sentence in this case, the supreme court ruled that the Illinois statutes do not specify a minimum term for attempt murder.

[4] In view of the trial judge's mistaken belief that a minimum sentence of 4 years was required as a matter of law, this matter must be remanded for a new sentencing proceeding. In reaching this conclusion we have considered *People v. Eddington* (1979), 77 Ill.2d 41, 48, 31 Ill.Dec. 808, 811-812, 394 N.E.2d 1185, 1188-89, but we believe that what took place when the defendant was sentenced was more comparable to what happened in *People v. Moore* (1978), 69 Ill.2d 520, 524, 14 Ill.Dec. 470, 472, 372 N.E.2d 666, 668. There is nothing in the record to indicate that had the trial judge not held a mistaken belief about the mini-

mum length of the sentence the defendant still would have received the same sentence. Clearly there is no indication by the trial judge, as there was in *Eddington*, that he did not consider the matter before him a "minimal kind of situation." *Eddington*, 77 Ill.2d at 48, 31 Ill.Dec. at 812, 394 N.E.2d at 1189.

The conviction of the defendant for attempt murder is affirmed, but the sentence imposed upon the defendant is vacated and this matter is remanded for a new sentencing proceeding.

McNAMARA and RIZZI, JJ., concur.



83 Ill.App.3d 590

39 Ill.Dec. 150

Jeffrey ACKERMANN,
Plaintiff-Appellee,

v.

PRUDENTIAL PROPERTY AND CASU-
ALTY INSURANCE COMPANY,
Defendant-Appellant.

No. 79-632.

Appellate Court of Illinois,
First District, Third Division.

April 23, 1980.

Insurer appealed from declaratory judgment rendered in the Circuit Court, Cook County, Arthur L. Dunne, J., holding that its subrogation rights under an uninsured motorist clause extended only to proceeds due from the uninsured motorist. The Appellate Court, McGillicuddy, P. J., held that the insurer was entitled to be subrogated, to the extent of payment made under the uninsured motorist coverage, to any proceeds received by the insured from either the uninsured motorist or any other tort-feasor.

Reversed and remanded.

Insurance ¶601.25

Insurer was entitled to be subrogated, to extent of payment made under uninsured motorist coverage, to any proceeds received by insured from either uninsured motorist or any other tort-feasor. S.H.A. ch. 73, § 755a.

McKenna, Storer, Rowe, White & Farrug, Robert Soderstrom and Richard Clark, Chicago, for defendant-appellant.

Schwartzberg, Barnett & Cohen, Heller & Morris, Chicago, for plaintiff-appellee.

McGILLICUDDY, Presiding Justice:

On October 2, 1976, the plaintiff, Jeffrey Ackermann, was a passenger in an automobile operated by Paul Short which collided with a vehicle driven by William Wallete. At the time of the collision, Wallete was insured by Allstate Insurance Company (Allstate) under an automobile casualty insurance policy which provided for public liability coverage in the amount of \$25,000. Short and the vehicle he was operating were uninsured. The plaintiff was insured by the defendant, Prudential Property and Casualty Insurance Company (Prudential), and his policy included coverage for personal injuries resulting from a collision involving an uninsured vehicle.

The plaintiff pursued his claim for damages against Wallete and sought uninsured motorist benefits from Prudential. Subsequently, Allstate offered the plaintiff \$20,000 in settlement of his claim against Wallete. Prudential asserted its right to subrogation against the settlement offer in accordance with the terms of its policy which provided in pertinent part that:

"Trust Agreement. In the event of payment to any person under this Part: (a) the company shall be entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury because of which such payment is made; (b) such person shall

hold in trust for the benefit of the company all rights of recovery which he shall have against such other person or organization because of the damages which are the subject of claim made under this Part; "

Thereafter, the plaintiff filed a complaint for declaratory judgment which requested that the court declare that he was entitled to recovery under the uninsured motorist provisions of his policy and that Prudential was entitled to subrogation rights only as to any assets of the uninsured motorists but not as to any assets of any other insured co-tortfeasor. In response, Prudential filed a motion to strike the complaint and dismiss the cause of action, asserting that the plaintiff was not entitled to the relief sought as a matter of law. After hearing argument concerning the motion the trial court entered an order declaring that,

"[A]ssuming but not deciding that Plaintiff is an insured under Coverage J—Uninsured Motorist of the insurance policy referred to in the Complaint and is otherwise entitled to make a claim under said coverage, the rights of the Defendant under the paragraph of said coverage entitled 'Trust Agreement', are limited to the pursuit of rights against and to the pursuit of the assets of the allegedly uninsured motorist Paul Short only and may not be pursued against William Wallete, Allstate Insurance Company as Wallete's insurer, or against any other person or organization not defined in said policy as an uninsured motorist."

It is from this order that Prudential appeals.

Prudential contends that the trial court erred in failing to grant its motion to strike and dismiss. It asserts that the language of the trust agreement provision in the policy clearly provides that Prudential is entitled to reimbursement from the proceeds received by the plaintiff from "any person or organization legally responsible for the bodily injury." It contends that there is no distinction in this provision between proceeds received from an insured tortfeasor or an uninsured tortfeasor.

Moreover, Prudential contends that the wording of the trust agreement closely parallels the language of section 143(a) of the Illinois Insurance Code concerning uninsured motorist insurance. This section states:

"In the event of payment to any person under the coverage required by this Section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement of judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury or death for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer."

Ill.Rev.Stat., 1975, ch. 73, par. 755a(3).

This issue was decided by the Supreme Court in *Glidden v. Farmers Automobile Insurance Association* (1974), 57 Ill.2d 330, 312 N.E.2d 247. In that case Glidden's wife, a pedestrian, was struck and killed by an uninsured motorist. In addition to his uninsured motorist claim against the defendant insurance company, Glidden filed suit against a dram shop defendant. The Supreme Court specifically held that the insurer was entitled to be subrogated, to the extent of payment made under the uninsured motorist coverage, to any proceeds received by the plaintiff from both the uninsured motorist and the dram shop defendant.

The plaintiff argues that the recent decision of *Wilhelm v. Universal Underwriters Insurance Co.* (1978), 60 Ill.App.3d 894, 17 Ill.Dec. 872, 377 N.E.2d 62, supports the trial court's order. In *Wilhelm* an insurance policy contained a provision purporting

to allow the insurer to set off from its liability under an uninsured motorist clause any amounts received from any person jointly liable for an accident. The court held that this provision was invalid to the extent it would reduce the uninsured motorist coverage to an amount lower than that required by the Insurance Code.¹ The court noted that the purpose of the coverage requirement is to place the policyholder in substantially the same position he would occupy if the uninsured driver possessed the required minimum liability insurance.

The plaintiff argues that the effect of the subrogation clause in Prudential's policy is identical to the effect of the setoff clause invalidated in *Wilhelm*.² He contends that his damages are in excess of the \$20,000 offered by Allstate. The plaintiff asserts that if Prudential is entitled to subrogation rights against the Allstate settlement, he will be in a worse position than if Short had been insured. If Short had complied with the Financial Responsibility Act (Ill.Rev. Stat., 1975, ch. 95½, par. 7 203) the plaintiff would have been compensated by at least \$10,000 from Short's insurer³ and \$20,000 from Allstate. If Prudential is entitled to subrogation rights against the Allstate settlement, the plaintiff will recover only \$20,000.

The plaintiff cites *Capps v. Klebs* (Ind. App.1978) 382 N.E.2d 947, in which the court found such a result unfair. The court stated.

"If Trinity's [the insurer] interpretation of the subrogation provision were adopted in this case, Trinity would, in effect be allowed to avoid its statutory obligation to provide a minimum of \$30,000 to compensate its insured for losses caused by the uninsured motorist, although the policyholder remains uncom-

such payment, out of the proceeds of any settlement or judgment against any person legally responsible for the injury." 60 Ill App.3d at 899-900, 17 Ill Dec. at 876, 377 N E 2d at 66

1. The Code required every automobile liability policy to contain uninsured motorist coverage in an amount not less than the limits set forth in the Financial Responsibility Act Ill Rev Stat., 1975, ch. 73, par 755a(1)

2. Although the *Wilhelm* court invalidated the setoff clause, it also noted that the Insurance Code provides "that the insurer having paid the claim, is entitled to recover, to the extent of

3. Public Act 81-1202 has increased the minimum amount of insurance required to \$15,000, effective March 1, 1980

compensated for such losses. The statute was designed to diminish this type of uncompensated loss up to the limits of the required policy provision. *Pro tanto* subrogation would effectively nullify the coverage ostensibly provided by the policy. The Capps would be in a worse position than they would have been in had Klebs been insured. . . . To allow subrogation when the Capps have not been fully compensated places them in the same position as if Klebs was uninsured and there was no uninsured motorist statute in effect. Under such circumstances there would be no advantage to paying premiums for uninsured motorist protection in such joint tortfeasor situations. We cannot ascribe such an intent to the legislature. The only purpose of the subrogation provision that is consistent with the statutory framework of minimum coverages required by law is to prevent double recovery."

See also *Security National Insurance Company v. Hand* (1973), 31 Cal.App.3d 227, 107 Cal.Rptr. 439; *Milbank Mutual Insurance Co. v. Kluver* (1974), 302 Minn. 310, 225 N.W.2d 230; *Craig v. Iowa Kemper Mutual Insurance Co.* (Mo.App.1978) 565 S.W.2d 716.

In *Glidden* the Supreme Court decided the issue of subrogation in connection with the uninsured-motorist clauses of insurance policies. Therefore, even though the plaintiff's argument and the authorities he cites are persuasive, under the *Glidden* decision we find that Prudential is entitled to reimbursement from the plaintiff to the extent that it makes payment to him for uninsured motorist coverage, if he recovers from either tortfeasor.

For the foregoing reasons the order of the Circuit Court of Cook County, which denied Prudential's motion to strike and dismiss and held that Prudential could seek reimbursement only from the monies paid by the insured motorist, is reversed. The case is remanded to the Circuit Court for further proceedings consistent with the views expressed herein.

Reversed and remanded.

McNAMARA and SIMON, JJ., concur.

83 Ill.App.3d 594

39 Ill.Dec. 153

Jose FRANCISCO, Plaintiff-Appellant,

v.

**Concepcion FRANCISCO,
Defendant-Appellee.**

No. 79-954.

Appellate Court of Illinois,
First District, Third Division.

April 23, 1980.

Wife filed motion to vacate divorce judgment. The Circuit Court, Cook County, Charles J. Fleck, J., vacated judgment and allowed wife time to answer complaint, and husband appealed. The Appellate Court, First District, Simon, J., held that: (1) husband, by failing to file any report of proceedings, had waived all points which Court could only review if it knew what happened at such proceedings, and Court had to presume that Circuit Court's findings were supported by the evidence; (2) where wife never received notice of complaint for divorce or the divorce judgment and there was an "inference of fraud," judgment was void ab initio for lack of jurisdiction, and such judgment could be challenged by a petition for relief from judgment and could be attacked at any time without regard to two-year limitation and without any showing of diligence or a meritorious defense; and (3) wife's failure to file special and limited appearance did not foreclose her from attacking judgment on ground that it was entered without jurisdiction.

Order affirmed; cause remanded.

1. Divorce ⇐ 183, 184(4)

Husband, by failing to file any report of proceedings in which judgment of divorce was vacated and wife was allowed time to answer complaint for divorce, had waived all points which Appellate Court

ADDENDUM 4

Glidden v. Farmers Automobile Insurance Ass'n,
57 Ill.2d 330, 312 N.E.2d 247 (1974)

57 Ill.2d 330

1. Insurance ⇨531.3

**Robert GLIDDEN, Indiv. and as admr.,
Appellant,**

v.

The FARMERS AUTOMOBILE INSURANCE ASSOCIATION, Appellee.

No. 45990.

Supreme Court of Illinois.

May 29, 1974.

Insured brought declaratory judgment action against his insurer to determine limits of liability under three automobile policies. The Circuit Court, Winnebago County, Albert S. O'Sullivan, J., determined all issues adversely to plaintiff, and plaintiff appealed. The Appellate Court, 11 Ill.App. 3d 81, 296 N.E.2d 84, affirmed in part, reversed in part, and remanded, and plaintiff appealed. The Supreme Court, Davis, J., held that where insured whose wife, while a pedestrian, was struck and killed by an uninsured motorist, had purchased three distinct automobile policies from one insurer, each providing uninsured motorist coverage in amount of \$10,000 per person, and medical payment coverage in amount of \$2,000 per person, "other insurance" clauses, which were ambiguous as to whether they were effective to reduce insured's recovery to what he would have obtained under one policy, were to be construed in favor of insured so as to permit a recovery up to \$30,000 under the three uninsured motorist coverages, and \$6,000 under the three medical payment provisions, but not to exceed total damages sustained. It was further held that setoffs were to apply only where necessary to prevent double exposure for medical payments, that insurer was subrogated to any moneys recovered by insured from uninsured tort-feasor and from an independent dram shop action, and that insured was not entitled to attorney's fees.

Affirmed in part, reversed in part, and remanded.

Provisions in automobile policies that, if there was "other insurance," coverage was "excess insurance" over similar coverage if insured was occupying a nonowned automobile were not applicable in situation where insured was a pedestrian and not occupying an automobile at time she was struck and killed by an uninsured motorist.

2. Insurance ⇨467.51

Public policy expressed by uninsured motorist statute is that insured be provided coverage which would compensate him, in event of injury by an uninsured motorist, to at least same extent as had he been injured by a motorist who was insured in compliance with Financial Responsibility Law. S.H.A. ch. 73, § 755a(1).

3. Insurance ⇨152.2

An insurance policy is not to be interpreted in a factual vacuum.

4. Insurance ⇨146.5(5)

Apparent purpose of "other insurance" clauses is to make certain that one company does not pay a disproportionate amount of the loss which is to be shared with another company; such clauses have no meaningful purpose when applied to coverage issued by one company to one insured.

5. Insurance ⇨146.7(1)

Ambiguities within an insurance policy should be construed in favor of insured.

6. Insurance ⇨531.2, 531.3

Where insured, whose wife, while a pedestrian, was struck and killed by an uninsured motorist, had purchased three distinct automobile policies from one insurer, each providing uninsured motorist coverage in amount of \$10,000 per person, and medical payment coverage in amount of \$2,000 per person, "other insurance" clauses, which were ambiguous as to whether they were effective to reduce insured's recovery to what he would have obtained under one policy, were to be construed in favor of insured.

sured so as to permit a recovery up to \$30,000 under the three uninsured motorist coverages, and \$6,000 under the three medical payment provisions, but not to exceed total damages sustained. S.H.A. ch. 73, § 755a (1).

7. Insurance ⇐532

Where total proven or undisputed damages incurred by insured are greater than combined total of uninsured motorist and medical coverage, crediting provision cannot apply; setoffs are to apply only where necessary to prevent double exposure for medical payments. S.H.A. ch. 73, § 755a (1).

8. Insurance ⇐606(1, 4)

Where plaintiff, whose wife, while a pedestrian, was struck and killed by an uninsured motorist, and plaintiff's insurer was found liable for full amount of uninsured motorist and medical payment coverage under each of three policies issued to plaintiff, insurer was subrogated to any moneys recovered by plaintiff from uninsured tort-feasor and from an independent dram shop action.

9. Costs ⇐172

Insured was not entitled to an award of attorney's fees in declaratory judgment action brought against insurer where insurer was within its rights in refusing to arbitrate issues of liability and damages prior to question of coverage being settled by courts. S.H.A. ch. 73, § 767.

Yalden & Ridings, Rockford (Craig A. Ridings, Rockford, of counsel), for appellant.

Maynard & Brassfield, Rockford (Eugene E. Brassfield, Rockford, of counsel), for appellee.

DAVIS, Justice.

The plaintiff, Robert Glidden, sued in the circuit court of Winnebago County for a

declaratory judgment against the defendant, The Farmers Automobile Insurance Association, his insurer, to construe the limits of coverage under three certain automobile liability insurance policies issued to the plaintiff, covering three separate vehicles. Part IV of each policy offered uninsured-motorist coverage in the amount of \$10,000 per person and \$20,000 per accident, and Part II of each policy provided medical-payment coverage in the amount of \$2,000 per person. The plaintiff's wife, while a pedestrian, was struck and killed by an uninsured motorist.

It is the plaintiff's contention that he is entitled to recover up to \$30,000, *i. e.*, \$10,000 under the uninsured-motorist provisions of each policy, without limitation by reason of the "other insurance" provisions, and also that he is entitled to recover up to \$6,000 under Part II, the medical-payment provision of the three policies. The defendant contends that under the provisions of the three policies the plaintiff is limited to a total recovery of \$10,000 under Part IV of his coverage, and \$2,000 under Part II, the medical-payment provision under the three policies. The defendant further contends that payments made under the medical-payment provisions, Part II, must be set off against the payments to be made under the uninsured-motorist coverage under Part IV.

The defendant also contends that it is entitled to subrogation rights under the provisions of its policies applicable to payments made for uninsured-motorist coverage. Lastly, the plaintiff contends that he is entitled to the recovery of attorney's fees from the defendant.

The trial court determined all issues adversely to the plaintiff. The appellate court (11 Ill.App.3d 81, 296 N.E.2d 84 (1973)) held that the plaintiff is limited to a maximum recovery of \$10,000 under Part IV of the uninsured-motorist provisions of the three policies; that the plaintiff is not so limited with respect to the medical-payment coverage under Part II of the three policies, and that he could re-

cover a total of \$6,000 thereunder; that the monies paid out under the medical-payment provisions of Part II are not automatically to be credited against the uninsured-motorist payments under Part IV; that the defendant is entitled to subrogation from the proceeds of any settlement or judgment resulting from the exercise of rights of recovery of the insured against the person or organization responsible for the injury to the extent of payment made by the insurer to the insured; and that the plaintiff is not entitled to the recovery of fees.

The primary issue of this appeal is whether the plaintiff is limited to a maximum recovery of \$10,000 under Part IV of the three policies providing uninsured-motorist coverage, or a total of \$30,000. The policies contain the usual provisions: that if there is "other insurance" (1) the coverage is "excess insurance" over similar coverage if the insured is occupying an automobile not owned by him, and (2) in all other situations the exposure is limited to the payment only of the *pro rata* portion of the loss represented by the ratio of the limits of uninsured-motorist coverage provided by the particular policy to the total of all such coverage available to the insured, and the total damages are deemed to be no greater than the highest limit in an applicable policy.

Specifically, the policies state:

"Other Insurance: With respect to Bodily Injury to an insured while occupying an automobile not owned by the named insured, the insurance under Part IV shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount by which the limits of liability for this coverage exceeds the applicable limit of liability of such other insurance.

Except as provided in the foregoing paragraph, if the insured has other sim-

ilar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance."

[1] The first limitation, referring to "excess insurance," is not applicable here because the insured (plaintiff's wife) was not occupying an automobile at the time of the accident in question. The question which arises is the effect of the second paragraph of the above "other insurance" provision, in this factual setting.

If the above clause is interpreted literally, it appears that the defendant's contention is correct. Each policy states that if there is other insurance which also provides uninsured-motorist coverage, then the liability of the insurer is limited to its *pro rata* share of such coverage. Here, there are three policies, each providing \$10,000 of such coverage, or a total of \$30,000. The exposure under each policy would thus be one third of the \$10,000 limit, or \$3,333.33.

A majority of courts (see Annot. (1969), 28 A.L.R.3d 551, at 559 et seq.) have rejected such a literal interpretation, primarily under the theory that the result is contrary to the public policy expressed in the "Uninsured Motorist" statute of the particular State. Like the comparable statute in Illinois, those "Uninsured Motorist" statutes generally have provided that no automobile liability insurance policy shall be issued unless it provides uninsured-motorist coverage in the limits expressed in the Financial Responsibility Law (\$10,000 per person, \$20,000 per accident).

These courts have stated that the statutory language of the "Uninsured Motorist" statutes is plain, unambiguous and

mandatory in providing that no insurance "policy * * * shall be renewed or delivered or issued * * * unless coverage is provided therein * * * in limits * * * set forth [in the Financial Responsibility Law]." (See Ill.Rev.Stat. 1969, ch. 73, par. 755a(1).) This line of authority concludes that *each policy* must contain the specified coverage; and that the proration provisions of the uninsured-motorist clauses, being contrary to the policy expressed in the controlling statutory language, must be judicially rejected. *Van Tassel v. Horace Mann Insurance Co.* (1973), 296 Minn. 181, 207 N.W.2d 348; *Blakeslee v. Farm Bureau Mutual Insurance Co.* (1972), 388 Mich. 464, 201 N.W.2d 786; *Protective Fire & Casualty Co. v. Woten* (1970), 186 Neb. 212, 181 N.W.2d 835; *Sellers v. United States Fidelity & Guaranty Co.* (Fla.1966), 185 So.2d 689; *Alliance Mutual Casualty Co. v. Duerson* (Colo.App.1973), 510 P.2d 458.

[2] However, there is a clear division of authority on this question. (See Annot. (1969), 28 A.L.R.3d 551.) We are not compelled to follow the majority view, and under the facts in the following cases, we have rejected the rationale expressed by that view. (*Morelock v. Millers' Mutual Insurance Association* (1971), 49 Ill.2d 234, 274 N.E.2d 1; *Putnam v. New Amsterdam Casualty Co.* (1970), 48 Ill.2d 71, 269 N.E.2d 97.) In both *Morelock* and *Putnam* we held that the public policy expressed by our uninsured-motorist statute is that the insured be provided coverage which would compensate him, in event of injury by an uninsured motorist, to at least the same extent as had he been injured by a motorist who was insured in compliance with the Financial Responsibility Law. In *Morelock*, 49 Ill.2d at page 239, 274 N.E.2d at page 3, we stated that "the 'other insurance' clause does not frustrate the legislative purpose and thereby violate public policy * * *."

[3] There is, however, a distinguishing factor in this case. Here one insurer issued three different policies on three sep-

arate vehicles to one insured. Each policy provided separate uninsured-motorist coverage under Part IV, and medical-payments coverage under Part II, and a separate premium was accepted by the insurer from the insured for those coverages. An insurance policy is not to be interpreted in a factual vacuum; it is issued under given factual circumstances. What at first blush might appear unambiguous in the insurance contract might not be such in the particular factual setting in which the contract was issued. *Jensen v. New Amsterdam Insurance Co.* (1965), 65 Ill.App.2d 407, 415, 213 N.E.2d 141.

[4-6] When an insured purchases three distinct policies from an insurer, each providing the specified coverage, and pays a separate premium for each, does he reasonably contemplate that the "other insurance" clauses therein are effective to reduce his recovery to what he would have obtained under one policy? We think not. The apparent purpose of "other insurance" clauses is to make certain that one company does not pay a disproportionate amount of a loss which is to be shared with another company. There is no purpose in proration unless the "other insurance" is written by another company. The clause has no meaningful purpose when applied to coverage issued by one company to one insured. In this situation its meaning is ambiguous, and the clause should be construed in favor of the insured. *United Services Automobile Association v. Dokter* (1970), 86 Nev. 917, 920, 478 P.2d 583, 585; *Sturdy v. Allied Mutual Insurance Co.* (1969), 203 Kan. 783, 457 P.2d 34; see also *Deterding v. State Farm Mutual Automobile Insurance Co.* (1966), 78 Ill.App.2d 29, 36, 222 N.E.2d 523.

It is true that an insured might end up in a case such as this in a better situation than if the wrongdoer had been insured to the minimum requirements of the Financial Responsibility Law. That, however, is not material as long as he pays for the coverage. The insured is better off because he paid additional premiums. If there is to be a "windfall" in this situa-

tion, it should be to the insured, who paid the several premiums, rather than to the insurer, which collected them. (See Widiss, Perspectives on Uninsured Motorist Coverage, 62 Nw.U.L.Rev. 497, 523 (1967).) We conclude that the plaintiff is entitled to recover up to \$30,000 under the three uninsured-motorist coverages, not to exceed, however, the total damages sustained.

Regarding the medical-payment provisions and the question of whether the plaintiff may recover up to \$6,000 under all three policies, or be limited to the \$2,000 coverage of one policy, the "other insurance" clause under this coverage provides:

"If there is other automobile medical payments insurance against a loss covered by Part II of this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible automobile medical payments insurance; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible automobile medical payments insurance."

The above comments with respect to the uninsured-motorist "other insurance" provision are equally applicable to the medical-payment coverage. The plaintiff also paid three separate premiums for the medical-payment coverage in each policy. It would be unconscionable to permit the single insurer to issue the three coverages to the insured, collect the premiums therefor, and contend the "other insurance" clause bars recovery of more than the limit expressed in one policy. We also note that this "other insurance" clause is only a *pro rata* clause and does not expressly limit the total recovery to the highest limit in any one policy. The plaintiff may recover up to \$6,000 under the three policies, not to exceed, however, the total damages sustained.

[7] As to the question of whether the payments made under the medical-payment provisions of a policy are to be set off against the payments to be made under the uninsured-motorist provisions, the appellate court held that its decision in *Melson v. Illinois National Insurance Co.* (1971), 1 Ill.App.3d 1025, 274 N.E.2d 664, was to be followed. In that case, at page 1028, 274 N.E.2d at page 666, the appellate court stated that "where the total proven or undisputed damages incurred by the insured are greater than the combined total of uninsured motorist and medical coverage, the crediting provision cannot apply." Set-offs are to apply only where necessary to prevent double exposure for medical payments. We agree with that conclusion.

If the crediting provisions were to apply in all situations, including those where the total damages suffered by the insured exceed the combined total uninsured-motorist and medical-payment coverages, the net result would be that the uninsured-motorist coverage under the policy would not assure compensation comparable to that available if the insured had been injured by one insured in compliance with the Financial Responsibility Law. Such an interpretation would run afoul of the minimum coverage required under our decisions in *Morelock v. Millers' Mutual Insurance Association* (1971), 49 Ill.2d 234, 274 N.E.2d 1, and *Putnam v. New Amsterdam Casualty Co.* (1970), 48 Ill.2d 71, 269 N.E.2d 97.

[8] The uninsured-motorist clauses of the policies provide that to the extent the company makes any payments thereunder, it is subrogated to the rights of the insured to any proceeds recovered from one legally responsible for the injury. The appellate court held that the insurer was entitled to such subrogation, and cited *Remsen v. Midway Liquors, Inc.* (1961), 30 Ill.App.2d 132, 174 N.E.2d 7. In the instant case, the plaintiff had pending an independent dramshop action. The trial court held that the defendant company, to the extent of payments made under the uninsured-motor-

1st coverage, was subrogated to any monies recovered by the plaintiff in that action. We believe that the insurer should be subrogated to any monies recovered from the uninsured tortfeasor and under the dram-shop action.

[9] As to the plaintiff's right to attorney's fees, we believe the appellate court correct in holding that the defendant was within its rights in refusing to arbitrate issues of liability and damages prior to the question of coverage being settled by the courts. (Flood v. Country Mutual Insurance Co. (1968), 41 Ill.2d 91, 242 N.E.2d 149.) The questions of coverage in this case were complex. The conduct of the defendant was not vexatious or without reasonable cause (Ill.Rev.Stat.1969, ch. 73, par. 767), and the refusal to allow fees was proper.

The judgments of the trial court and of the appellate court are affirmed in part and reversed in part, and this cause is remanded to the trial court for further proceedings not inconsistent herewith.

Affirmed in part and reversed in part and remanded.



57 Ill.2d 318

**La SALLE NATIONAL BANK, Trustee,
Appellant,**

v.

The COUNTY OF COOK et al., Appellees.

**OAK PARK TRUST AND SAVINGS
BANK, Trustee, Appellant,**

v.

The COUNTY OF COOK et al., Appellees.

Nos. 45988, 46139.

Supreme Court of Illinois.

May 29, 1974.

Suits seeking injunction prohibiting assessment, levy and collection of real es-

tate taxes and declaratory judgment that certain assessment procedures are invalid. The Circuit Court, Cook County, Walter P. Dahl, J., dismissed the suits, and taxpayers appealed. The appeals were consolidated. The Supreme Court, Ryan, J., held that adequate remedy at law existed by means of payment of taxes under protest and that county assessor's assessments were valid.

Affirmed.

1. Declaratory Judgment ⇐41

Injunction ⇐16

Existence of an adequate remedy at law prohibits injunctive relief but existence of another remedy does not preclude declaratory relief.

2. Declaratory Judgment ⇐216

Relief should not be afforded by way of declaratory judgment in case challenging validity of tax assessment if case would not merit relief by way of injunction; same principles prohibiting granting of injunction prohibit granting declaratory relief in such cases. S.H.A. ch. 110, § 57.1.

3. Taxation ⇐2, 494(1)

Taxation of property is a legislative and not a judicial function and courts will not review assessments of property upon which taxes are based unless assessments are fraudulent or constructively fraudulent.

4. Declaratory Judgment ⇐216

Taxation ⇐498, 608(9)

Even though taxpayers alleged in complaint that the failure of Revenue Act to provide them with right of judicial review while providing review to taxpayers outside county violated their rights of due process and equal protection, where complaint in actuality simply complained that property had been assessed at excessively high value, legal remedy by way of payment of real estate taxes under protest followed by objections to application for judgment for delinquent taxes provided adequate remedy at law, so that taxpayers did not have grounds for relief by way of

ADDENDUM 5

Remsen v. Midway Liquors, Inc., 30 Ill.App.2d 132,
174 N.E.2d 7 (1961)

30 Ill.App.2d 132

Delbert E. REMSEN, Administrator of the Estate of George W. Remsen, Deceased, and Elizabeth N. Remsen, Plaintiffs-Appellants,

v.

MIDWAY LIQUORS, INC., a corporation, and Town Hall Tavern, Inc., a corporation, Defendants,

and

Employers Mutual Liability Insurance Company of Wisconsin, Intervenor-Appellee.

Gen. No. 11428.

Appellate Court of Illinois.

Second District, Second Division.

April 19, 1961.

Suit involving the distribution of the settlement proceeds for injuries in loss of support in an action under the Liquor Control Act. An insurer was granted leave to intervene. From a judgment of the Circuit Court, Winnebago County, Albert S. O'Sullivan, J., the plaintiffs appealed. The Appellate Court, Spivey, J., held that a trust agreement was one of subrogation and not a prohibited assignment of an action for injuries to the body and that the trial court properly allocated the attorneys' fees among the various claimants to the proceedings in the Dram Shop action.

Affirmed.

1. Subrogation ⇨1

Subrogation is founded on principles of justice and equity and its operation is governed by equitable principles and rests on the principle that substantial justice should be attained regardless of form.

2. Assignments ⇨31

Subrogation ⇨1

"Subrogation" presupposes an actual payment and satisfaction of the debt or claim to which the party is subrogated, although the remedy is kept alive in equity for the benefit of the one who made the

payment under circumstances entitling him to contribution or indemnity, while "assignment" necessarily contemplates the continued existence of the debt or claim assigned.

See publication Words and Phrases, for other judicial constructions and definitions of "Assignment" and "Subrogation".

3. Assignments ⇨31

"Assignment" has a comprehensive meaning and is a transfer or making over to another of the whole of any property, real or personal in possession, or in action, or of an estate, or right therein.

4. Assignments ⇨24(2)

The release and trust executed by administrator of deceased-insured under family automobile policy and by his injured wife, providing that their claims were transferred to insurer only to extent of insurer's payment and were repayable only in the event of its recovery from anyone liable for injury was agreement of "subrogation" and not forbidden assignment of injury cause. Ill.Rev.Stat.1957, c. 43, §§ 135, 136; S.H.A. ch. 110, § 26.1(1) (c).

See publication Words and Phrases, for other judicial constructions and definitions of "Subrogation".

5. Insurance ⇨606(1)

An advance by insurer of the amount of insurance to insured under a loan agreement reciting that the amount is received as a loan to be repaid only from such recovery as might be had from a third person is not an "assignment" of the insured's cause of action.

6. Subrogation ⇨1

Doctrine of subrogation is a favorite of the law and applies where one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable and which in equity and good conscience should have been discharged by the latter.

7. Subrogation ⇐1

There is no public policy forbidding subrogation of bodily injury cases.

8. Insurance ⇐452, 530

"Uninsured motorist coverage" is not likened to medical payments protection which are limited to \$500 for each person injured without regard to liability whereas "uninsured motorist coverage" compensates only when there is liability on part of another for injury, and the recovery thereunder, in addition, provides for loss of wages and income, loss of support, and pain and suffering, which might properly be compensable by the person causing the injury.

See publication Words and Phrases, for other judicial constructions and definitions of "Uninsured Motorist Coverage".

9. Contracts ⇐159

The term "proceeds" in written instruments has many meanings and the subject matter and purpose of the contract must be considered, and it means gross proceeds and net proceeds.

See publication Words and Phrases, for other judicial constructions and definitions of "Proceeds".

10. Insurance ⇐146(3)

A policy is construed most favorable to the named insured and others who are covered by it.

11. Insurance ⇐607

Within automobile policy and trust agreement executed between insurer and insured-decedent's administrator and widow providing that insurer having made payments would be entitled, to extent of payments, to "proceeds" of any settlement or judgment, "proceeds" meant what litigant would actually receive after reasonable costs of proceeding including attorneys' fees so that subrogors were entitled to attorney fees paid in connection with settlement by them of a dram shop action with portion of the proceeds of the settle-

ment of which insurer was subrogated. Ill.Rev.Stat.1957, c. 43, §§ 135, 136; S.H.A. ch. 110, § 26.1(1) (c).

See publication Words and Phrases, for other judicial constructions and definitions of "Proceeds".

Miller, Thomas, Hickey & Collins, Rockford, for appellants.

Foltz, Haye & Keegan, Rockford, for appellee.

SPIVEY, Justice.

This appeal involves an order of the Circuit Court of Winnebago County distributing the settlement proceeds for injuries in loss of support in an action under Art. VI, Sect. 14 of the Liquor Control Act, Chap. 43, Sect. 135, Ill.Rev.Stat.1957.

George W. Remsen was insured under a family automobile insurance policy issued by the intervenor, Employers Mutual Liability Insurance Company of Wisconsin. In addition to the usual and customary coverage provided, Remsen obtained and paid an additional premium for what is termed, "Family Protection Against Uninsured Motorists", said coverage affording liability limits of \$10,000 for each person and \$20,000 for each accident.

On September 29, 1957, Remsen and his wife, Elizabeth, were involved in an automobile collision with one John Reynold Carlson who carried no liability insurance on his automobile. As a result of the occurrence, Remsen received injuries from which he subsequently died and his wife, Elizabeth, was seriously injured in her person.

Subsequently, on September 23, 1958, Delbert E. Remsen, as administrator of the estate of George W. Remsen, and Elizabeth N. Remsen, individually, instituted a dram shop action under the provisions of Art. VI, Sect. 135 of the Liquor Control Act against Midway Liquors, Inc. and Town

Hall Tavern, Inc. alleging that they caused the intoxication of Carlson in whole or part.

Count I of the complaint is an action by the administrator for the benefit of the dependents of George W. Remsen, his widow, Elizabeth, and their five minor children, for injury in their means of support. Count II is an individual action by Elizabeth N. Remsen, the widow, for injuries to her person. The appeal presents no issue as to the liability of either dram shop defendant.

Following the filing of the dram shop action (date not disclosed by the record), the suit was settled by the administrator and Elizabeth Remsen individually with Midway Liquors, Inc. and a covenant not to sue executed. By the terms of this settlement Midway Liquors, Inc. paid to the administrator the sum of \$6,250 for injury to means of support and to Elizabeth N. Remsen the sum of \$6,250 for her personal injuries. On November 18, 1959, by stipulation of the administrator and Elizabeth Remsen, an order dismissing the cause of action as to Midway Liquors, Inc. was entered.

Thereafter (date not disclosed by the record), the administrator entered into a settlement agreement with the defendant Town Hall Tavern; by the terms of said agreement the administrator was paid the sum of \$13,250 for injury to means of support. On March 7, 1960, Elizabeth Remsen dismissed Count II of the complaint. The record is absent of any order dismissing Count I as to the defendant Town Hall Tavern.

Pursuant to a previous order of July 21, 1959, all settlement funds were deposited with the Clerk of the Court pending further order of distribution. This fund amounted to \$26,500 which included \$6,625 received by Elizabeth Remsen for her personal injuries, and \$19,875 received by the administrator for the loss of means of support alleged to have been sustained by the

dependents of George W. Remsen, deceased.

On February 19, 1960, Employers Mutual Liability Insurance Company of Wisconsin was granted leave to intervene and file an intervening petition as provided by Chap. 110, Sect. 26.1(1) (c), Ill.Rev.Stat. 1959.

In their intervening petition, Employers allege they have been subrogated to \$19,500 of the settlement proceeds of the dram shop action and ask that they be reimbursed in that amount out of the funds in the hands of the Clerk of the Court. The petition further alleges that Employers had paid pursuant to its insuring agreement rider for family protection against an uninsured motorist the sum of \$10,000 to Delbert E. Remsen as administrator and \$9,500 to Elizabeth N. Remsen.

In consideration of these payments Delbert E. Remsen as administrator of the estate of George W. Remsen, and Elizabeth N. Remsen each executed identical instruments (except as to amount) to Employers styled "Policy Release and Trust Agreement" each dated October 22, 1958. These instruments were prepared by a representative of Employers and provided as follows:

"Know All Men By These Presents: that for and in consideration of the payment to me of * * * by Employers Mutual Liability Insurance Company of Wisconsin, hereinafter called the Company, the receipt of which is hereby acknowledged, I do hereby fully and forever release and discharge the Company from any and all claims and demands, actions and causes of action, which I may have against the Company under the "Family Protection Against Uninsured Motorists" endorsement attached to Policy No. 0237-00-024257, because of the death of George W. Remsen, resulting or to result from that certain accident on or about the 29th day of September, 1957, at or near the intersection of Route 173 and Collins Road, County of Winnebago, State of Illinois.

"I have not made any settlement with or prosecuted to judgment any action against any person or organization who may be legally liable for bodily injury on account of which the Company is making this payment. Such person or organization, wherever mentioned in this Release and Trust Agreement, shall include John Reynold Carlson and also any person or organization who may be liable for said bodily injury under Section 14 or 15 of Article VI of An Act of the General Assembly of the State of Illinois entitled 'An Act Relating to Alcoholic Liquors,' in force February 1, 1934, or any law amendatory thereof.

"I agree that this settlement is in full compromise of a doubtful and disputed claim both as to the question of liability and that the payment is not to be construed as an admission of liability.

"I further agree that in consideration of this payment:

"(a) any amount which I may be entitled to recover from any person who is an insured under the bodily injury liability coverage of said policy shall be reduced by the amount of this payment;

"(b) that the Company shall be entitled to the extent of this payment of \$10,000 to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery I may have against any person or organization legally responsible for the bodily injury because of which this payment is made;

"(c) that I shall hold in trust for the benefit of the Company all rights of recovery to the extent of the payment of * * * which I shall have against such other person or organization because of the damages which are the subject of claim made under the 'Family Protection Against Uninsured Motorists' endorsement;

"(d) that I shall do whatever is proper to secure and shall do nothing after loss to prejudice such rights;

"(e) that if requested in writing by the Company, I shall take, through any representative designated by the Company, provided the Company pays all attorney's fees, costs and expenses, such action as may be necessary or appropriate to recover such payment as damages from such other person or organization, such action to be taken in my name; in the event of a recovery, the Company shall be reimbursed out of such recovery for expenses, costs and attorneys' fees incurred by it in connection therewith;

"(f) that I shall execute and deliver to the Company such instruments and papers as may be appropriate to secure my rights and obligations and those of the Company established by this provision."

The provisions of the policy endorsement covering Family Protection Against Uninsured Motorists (Bodily Injury Liability) as amended, insofar as they are germane provide:

"I. Damage for Bodily Injury Caused by Uninsured Automobiles.

"To 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 automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury', sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; provided, for the purpose of this endorsement, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree and the insured so demands, by arbitration."

"4. Limits of Liability. (a) The limits of liability stated in the schedule as applicable to 'each person' is the limit of the company's liability for all damages, includ-

ing damages for care or loss of services, because of bodily injury sustained by one person as the result of any one accident and, subject to the above provision respecting each person the limit of liability stated in the schedule as applicable to 'each accident' is the total limit of the company's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by two or more persons as a result of any one accident."

"7. Trust Agreement. In the event of payment to any person under this endorsement:

"(a) the company shall be entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury because of which such payment is made;

"(b) such person shall hold in trust for the benefit of the company all rights of recovery which he shall have against such other person or organization because of the damages which are the subject of claim made under this endorsement;

"(c) such person shall do whatever is proper to secure and shall do nothing after loss to prejudice such rights;

"(d) if requested in writing by the company, such person shall take, through any representative designated by the company, such action as may be necessary or appropriate to recover such payment as damages from such other person or organization, such action to be taken in the name of such person; in the event of a recovery, the company shall be reimbursed out of such recovery for expenses, costs and attorneys' fees incurred by it in connection therewith;

"(e) such person shall execute and deliver to the company such instruments and papers as may be appropriate to secure the rights and obligations of such person and the company established by this provision."

"8. Payment of Loss by the Company. Any amount due hereunder is payable (a) to the insured, or (b) if the insured be a minor to his parent or guardian, or (c) if the insured be deceased to his surviving spouse, otherwise (d) to a person authorized by law to receive such payment or to a person legally entitled to recover the damages which the payment represents; provided, the company may at its option pay any amount due hereunder in accordance with division (d) hereof."

The court by its judgment order appealed from, in addition to making certain findings of fact consistent with the facts set out in this opinion, found, that the sum of \$26,500 now in the hands of the Clerk must be distributed to resolve the claims of Deibert E. Remsen, administrator, Elizabeth N. Remsen and Employers; that plaintiff's attorneys had rendered legal services of the fair value of \$8,800 which they are entitled to recover from the aggregate sum of \$26,500; that Employers is entitled to the sum of \$10,000.00; recovered by the administrator, said sum to be deducted from the share of the proceeds after attorney's fees are deducted which amounts to \$17,700; that from the balance then remaining of \$7,000, the plaintiff, Elizabeth N. Remsen shall have deducted from her share of the recovery (\$6,625) for her personal injuries the sum of \$4,400 to be paid to Employers; and that the balance then remaining of \$3,300 be distributed to the dependents of George W. Remsen, deceased, for their loss of means of support. The judgment order then ordered, adjudged, and decreed that the Clerk pay Employers the sum of \$10,000 from the proceeds obtained under Count I; pay Employers the sum of \$4,400 from the proceeds obtained under Count II; pay plaintiff's attorneys the sum of \$8,800; and pay unto the dependents of George W. Remsen for their loss of means of support, the sum of \$3,300 to be apportioned to the widow and five children each the sum of \$550.

Insurance for protection against bodily injury as a result of the wrongful acts of

an uninsured motorist is of relative recent origin. The purpose is to provide some form of compensation for innocent victims of accidents.

Under the uninsured motorists endorsement the insurance company agrees to pay the insured all sums that he shall be legally entitled to recover as damages for bodily injury sustained by accident arising out of ownership, maintenance and use of an uninsured automobile.

In the event of payment to any person under the subject endorsement the policy provides by its endorsement conditions entitled "Trust Agreement" that the company shall be entitled to the *extent* of such payment to the *proceeds* of any settlement or judgment that may result from the exercise of any *right of recovery* of such person against *any person or organization* legally responsible for the bodily injury because of which such payment is made, and further provides that the person receiving payment shall execute and deliver to the company such instruments as may be appropriate to secure the rights and obligations of such person and the company.

Appellants contend that the Policy Release and Trust Agreements executed by the administrator and Elizabeth Remsen amounted to an assignment of an action for injuries to the body and as such are prohibited in Illinois. If as appellants urge they constitute an assignment of an action for injuries to the body they are void. *North Chicago Street Railway Co. v. Ackley*, 171 Ill. 100, 49 N.E. 222, 44 L.R.A. 177; and *Wilcox v. Bierd*, 330 Ill. 571, 162 N.E. 170.

Appellee on the other hand suggests that this instrument is a subrogation agreement and only an assignment of the proceeds of any recovery or a part thereof.

Counsel for both parties state and our research confirms, the character of the Trust Agreement has not been construed by any reviewing court in the United States.

Basically, subrogation arises in two manners, legal subrogation out of a condition or relationship by operation of law and conventional subrogation by act of the parties.

[1] Subrogation is founded on principles of justice and equity, and its operation is governed by principles of equity. It rests on the principle that substantial justice should be attained regardless of form, that is, its basis is the doing of complete, essential and perfect justice between the parties without regard to form. 83 C.J.S. Subrogation § 2a. *People ex rel. Nelson v. Phillip State Bank and Trust Company et al.*, 307 Ill.App. 464, 30 N.E.2d 771.

In 83 C.J.S. Subrogation § 16, it is said, "As a general rule, any person who, pursuant to a legal obligation to do so, has paid, even indirectly, for a loss or injury resulting from the wrong or default of another will be subrogated to the rights of the creditor or injured person against the wrongdoer or defaulter, persons who stand in the shoes of the wrongdoer, or others who, as the payor, are primarily responsible for the wrong or default."

[2] Subrogation presupposes an actual payment and satisfaction of the debt or claim to which the party is subrogated, although the remedy is kept alive in equity for the benefit of the one who made the payment under circumstances entitling him to contribution or indemnity while assignment necessarily contemplates the continued existence of the debt or claim assigned. Subrogation operates only to secure contribution and indemnity, whereas an assignment transfers the whole claim. 6 C.J.S. Assignments § 2b(12).

[3] "The word 'assignment' has a comprehensive meaning, and in its most general sense is a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of an estate or right therein." 6 C.J.S. Assignments § 1a; *Siegel v. People*, 105 Ill. 89,

and Talty v. Schoenholz, 323 Ill. 232, 154 N.E. 139.

In New York Casualty Co. v. Sinclair Refining Co., 10 Cir., 108 F.2d 65, 71, it was stated "The doctrines of subrogation and a constructive trust are analogous. The creditor is regarded as holding his claim against the principal debtor and his securities therefor in trust for the subrogee."

[4] Based upon the general principles we have set out, we conclude that the Trust Agreement is one of subrogation and not an assignment of an action for injuries to the body. It meets all of the characteristics of subrogation in that the debt was paid under a legal obligation for the wrong of another. It does not transfer the entire claim but only to the extent of the insurer's payment and is repayable only in the event of subrogor's recovery from any person liable for the injury.

An analogous proposition is found in National Shawmut Bank of Boston v. Johnson, 317 Mass. 485, 58 N.E.2d 849. In that case a claim was made by the insured under a policy of forgery insurance. The insurance carrier made payments to the defrauded insured under the terms of the policy and the insured in consideration for such payment executed and delivered a loan receipt for the amount paid. The receipt provided that the loan was repayable only to the extent of any net recovery that insured might obtain on account of such loss from the forgeries and as security for the payment the insured pledged the recovery to the carrier and insured agreed to commence and prosecute at the expense and under the control of the carrier an action against the one liable for the forgeries.

The court concluded that it was doubtless the law that the right to litigate a fraud is not assignable at law or equity being contrary to public policy but that the instrument in question was not an assignment of the claim.

[5] 46 C.J.S. Insurance § 1209(1) (c), states, "An advance by insurer of the

amount of insurance to insured, under a loan agreement reciting that the amount was received as a loan to be repaid only from such recovery as might be had from a third person, does not constitute an assignment of insured's cause of action." See also Katz v. Hotel Murida, 194 Misc. 741, 90 N.Y.S.2d 760; Kelley, Maus & Co. v. Newman, 79 Ill.App. 285; Hibernian Banking Association v. Davis, 295 Ill. 537, 129 N.E. 540; Farmers' State Bank, McNabb, Ill. v. Kidd, 313 Ill.App. 132, 39 N.E.2d 394.

Concluding as we have that the instant case presents a case of conventional subrogation, should we, under the facts in this case, extend that doctrine to injuries to the body and would its application promote justice and equity?

The application of subrogation will not create the conditions giving rise to the underlying reasons announced in all of the Illinois decisions, including the Ackley and Bierd cases, for holding an assignment of an action for injuries to the body to be against public policy.

[6] The doctrine of subrogation has been steadily expanding, is a favorite of the law and has been nurtured and encouraged. It is broad enough as now applied to include every instance in which one person not acting as a mere volunteer or intruder pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter. Smith v. Clavey Ravinia Nurseries, Inc., 329 Ill.App. 548, 69 N.E.2d 921. Cited with approval in Dworak for Use of Allstate Ins. Co. v. Tempel, 18 Ill.App.2d 225, 152 N.E.2d 197, affirmed 17 Ill.2d 181, 161 N.E.2d 258; Geneva Construction Company et al. v. Martin Transfer & Storage Company, 4 Ill. 2d 273, 122 N.E.2d 540; and Standard Industries, Inc. v. Thompson, 19 Ill.App.2d 319, 152 N.E.2d 500.

Common law subrogation has been recognized and applied to injuries to the body under the Workmen's Compensation Act of

Illinois. Geneva Construction Company et al. v. Martin Transfer & Storage Company cited above.

Our attention has not been called to any authority to the effect that subrogation, as opposed to an assignment, of injuries to the body is against public policy and not permissible.

[7] Finding no public policy reasons for forbidding subrogation of bodily injury cases, we find it was proper in this case for the same reasons they have been found proper in dram shop actions involving property damage as announced in the Dworak case cited above.

Appellants contend the court erred in allowing intervention to impress a subrogation claim in a loss of means of support dram shop action.

By the plain terms of the contract of insurance the carrier's right to repayment may be had "against *any* person or organization legally responsible for the bodily injury." (Emphasis supplied.)

The dram shop operators were legally liable for the damages and we held that subrogation under the uninsured motorists clause is proper.

It is argued that the full amount recovered shall be for the exclusive benefit of the person or persons injured in loss of support. The recovery less the subrogation claim was so distributed.

This subrogation will not deprive a recovery to those entitled to loss of means of support or damages because the funds in the hands of the administrator paid by Employers is available for distribution to the widow and next of kin under the Injuries Act for pecuniary injuries resulting from the death of George W. Remsen.

[8] Appellants further contend that the uninsured motorists protection should be likened to medical payments protection. With this suggestion we are unable to agree.

Payments under the medical payment clause are limited to \$500 for each person injured *without regard to liability*. They are limited to reasonable expenses incurred by the injured person for medical, hospital, nursing and funeral services. They stand in the same category as any contract for accident insurance. Nor is there any agreement to repay.

On the other hand, uninsured motorists coverage compensates only when there is liability on the part of another for the injury. (Also hit and run). The recovery under the uninsured motorists clause in addition provides for loss of wages and income, loss of support, and pain and suffering which might properly be compensable by the person causing the injury. Recovery under the uninsured motorists clause would not preclude recovery under the medical payments clause.

We have considered the other reasons advanced by appellants in support of their assignments of error and find they are without merit.

Intervenor-appellee filed a cross appeal and assigned as cross-error the court's awarding attorneys' fees out of the funds paid in settlement of the dram shop action. No claim is made that the attorney fees are unreasonable.

Appellee contends they are entitled to full reimbursement up to the amount of the proceeds paid the administrator and Elizabeth Remsen in the dram shop action, before attorneys' fees in that action may be deducted from the proceeds. In particular Employers say that it is entitled to the full \$6,625 of the proceeds paid Elizabeth Remsen for the injuries to her person rather than \$4,400 representing the \$6,625 less attorneys' fees.

The policy and the trust agreement both provide that the company shall be entitled, to the extent of their payments, to the *proceeds* of any settlement or judgment. We must decide what the word "proceeds" implies.

[9] In *Gould v. Lewis*, 267 Ill.App. 569, the court said, “* * * 50 Corpus Juris 427, expresses ‘a broad middle ground’ in the interpretation of the term ‘Proceeds.’ Not a word of any fixed or definite meaning, but of varying and loose significance, employed with different meanings, of equivocal import and great genuality. * * * Its meaning in case each depends on its context, depends very much on the connection in which it is employed and the subject matter to which it is applied. The same authority also states (at pages 429, 430): ‘In contracts and written instruments, the word “proceeds” has many meanings and varied usages and is in many instances of doubtful meaning. The subject matter and purpose of a contract must be considered in order to determine the meaning of the word as used by the parties. As used, the word has been variously defined, * * *; it has been held to mean gross proceeds and net proceeds.’ From a review of the many authorities cited in Corpus Juris it is clear that the statement therein contained that ‘the word “proceeds” has many meanings and varied usages and is in many instances of doubtful meaning,’ is fully justified. In 23 Am. & Eng. Ency. of Law, 195, it is stated that ‘the term (proceeds) is one of equivocal import. Its construction depends much upon the context and the subject matter to which it is applied. * * * The general rule that where the terms of a contract are ambiguous and uncertain their meaning may be determined from extrinsic evidence, also applies to the instant contract.’”

[10] A policy of insurance is construed most favorable to the named insured and others who are covered by it. *Western States Mut. Ins. Co. v. Standard Mutual Ins. Co.*, 26 Ill.App.2d 378, 167 N.E.2d 833; *Rashinski v. Travelers Casualty Ins. Co.*, 312 Ill.App. 260, 38 N.E.2d 362; and *Scott v. Inter-Insurance Exchange of Chicago Motor Club*, 267 Ill.App. 105, affirmed 352 Ill. 572, 186 N.E. 176.

The same rule of construction has oftentimes been applied against the scrivener of any instrument of contract.

As in the instant case, it is the practice of plaintiff's attorneys to make a charge for their services and should be well known to the scrivener of both the policy and the trust agreements.

[11] We feel that the only equitable construction to place on the word “proceeds” is that it means what the litigant would actually receive after the reasonable costs of the proceeding including attorneys' fees.

We find another compelling reason for this conclusion. The contract of insurance and the trust agreement permits the insured to institute proceedings against any person liable for their injuries. It is fair to foresee instances wherein the recovery might be equal to or less than the subrogation rights and after applying that deduction, it would leave the insured to pay his attorney out of his own separate funds. This very situation has been recognized in the Workmen's Compensation Act of New Jersey.

Cross-appellant cites the case of *Manion v. Chicago, R. I. P. R. Co.*, 2 Ill.App.2d 191, 119 N.E.2d 498, wherein this court held that an employer who had paid an injured employee under the Workmen's Compensation Act was entitled to reimbursement pursuant to Section 29 (now Section 5 of the Workmen's Compensation Act) out of any recovery by the employee in a common law action against any negligent third party, without bearing a share of costs and attorney fees incurred in the common law action. Worthy of note is the fact that following this decision Section 5 was amended to provide for the employer sharing in the costs and attorneys' fees in the third party common law action.

We do not feel that the Manion opinion will be in conflict in any way with our holding. That decision was based upon statutory subrogation, whereas we are deal-

ing with conventional subrogation based upon contract.

The Manion case hinged upon an interpretation of the statute as did the three cases cited therein. When the Manion case was decided the statute was silent as to attorneys' fees and the court properly concluded that it was the obvious intention of the legislation that the employer be fully reimbursed without regard to attorneys' fees.

We conclude that the trial court properly allocated the attorneys' fees among the various claimants to the proceedings of the dram shop action.

The order of the Circuit Court of Winnebago County is affirmed.

Affirmed.

CROW, P. J., and WRIGHT, J., concur.



30 Ill App.2d 167

Joseph R. ROSBOROUGH, Plaintiff-Appellant,

V.

CITY OF MOLINE, a Municipal Corporation, Defendant-Appellee,

and

Moline Heating and Construction Company, a corporation, Defendant.

Gen. No. 11494.

Appellate Court of Illinois.

Second District, Second Division.

April 21, 1961.

Suit by property owner for judgment declaring whether cost of repair and replacement of water service pipe in city street connecting water main to the property was chargeable to the owner or the

city. The Circuit Court, Rock Island County, A. J. Scheineman, J., rendered a judgment for the city, and the owner appealed. The Appellate Court, Crow, P. J., held that the owner, whose application and guarantee of water bill, which provided that acceptance of application by city should constitute contract and be subject to all existing and future regulations adopted by water department, was accepted by city, was liable for the cost under ordinance.

Affirmed.

1. Waters and Water Courses ⇨203(1)

Owner's application and guarantee of water bill, which stated that acceptance of application by city constituted contract subject to regulations adopted by city for water department was admissible as material, on issue of liability for cost of replacing service pipe, although owner's motion to strike city's defense that owner had agreed to be subject to the regulation was allowed. S.H.A. ch. 110, § 57.1.

2. Municipal Corporations ⇨122(1)

Ordinance of which court may or must take judicial notice need not be stated in pleading. S.H.A. ch. 51, § 48a.

3. Evidence ⇨32, 330

Ordinance stating that service pipes from water main to premises shall be installed and maintained at expense of property owner was properly admitted in evidence, or properly judicially noticed, and was material in suit by owner against city for judgment determining whether owner or city was liable for cost of repair to service pipe. S.H.A. ch. 51, § 48a.

4. Municipal Corporations ⇨3, 57, 59

Cities are of statutory creation, and their powers are limited to those which are expressly granted by General Assembly or are necessarily implied from such as are granted.

ADDENDUM 6

Farmers Ins. Exchange v. Christenson,
683 P.2d 1319 (Mont. 1984)

SHEEHY, Justice, dissenting:

I dissent. This plaintiff is entitled to have a jury determine whether the defendant was liable for her fall on the business premises of the defendant.

It is clear from the evidence here, and it is admitted in the defendant's brief on appeal that the color of the carpet on the raised portion of the business premises blended with the linoleum on the lower portion of the business premises. The majority have interpreted the plaintiff's statement that she "just didn't see it," as an indication that she did not look to determine the stair was there. It is as easy to interpret the statement to mean that having looked she could not see it because the carpet blended with the linoleum.

The majority decides, as the District Court decided that because the plaintiff had passed over the same step when she went in the opposite direction 45 minutes to one hour earlier, that she had knowledge of the step and therefore knew of its existence on the return trip. That interpretation establishes a test that goes beyond what might be expected of a reasonably prudent, ordinary person; it is a test for superhumans. I doubt that any of us could remember in detail the elevations in a strange business premises one hour after we had passed over the same for the first time.

This woman rose from the hair dryer, and returned to the step at the beckoning of the attendant in the business. She sustained a dangerous fall which injured her and resulted in a fracture to a bone in her ankle because she "just did not see" that the carpet was blended with the linoleum, and actually was 6 inches higher than the linoleum. It should be a jury decision as to whether she was trapped by these innocent looking premises.

This case should be submitted to the jury on the issue of whether the business operator of the premises should have anticipated the danger lurking in the coloration of the linoleum and the carpet so as the raise a duty to warn customers or alter the premises.

One need only read the majority opinion to realize that a fact issue exists in this case. Most of the majority opinion is an interpretation of the facts, and always against the plaintiff. Interpretation of facts is jury business, not court business.

The probability that plaintiff will not prevail at trial is no justification for granting summary judgment. It may appear that recovery is very remote, but that is not the test. If there is a genuine issue of material fact, summary judgment is not appropriate. Rule 56(c), M.R.Civ.P.

WEBER, Justice, dissenting:

I respectfully dissent from the majority opinion. I agree with Justice Sheehy that because there are genuine issues of material fact, summary judgment is not appropriate under Rule 56(c), M.R.Civ.P.

SHEA, Justice:

I join in the dissent of Mr Justice Sheehy.



FARMERS INSURANCE EXCHANGE,
Plaintiff and Respondent,

v.

Mark Allen CHRISTENSON, Roland J.
Christenson and Karene M. Christenson,
Defendants and Appellants.

No. 83-177.

Supreme Court of Montana.

Submitted March 2, 1984.

Decided July 12, 1984.

Uninsured motorist and his parents sought to vacate default judgment in action brought against them by injured party's uninsured motorist carrier. The District

Court, Thirteenth Judicial District, in and for the County of Yellowstone, William J. Speare, J., denied motion, and defendants appealed. The Supreme Court, Harrison, J., held that uninsured motorist carrier can make payment to insured, and when insured settles his claim or obtains judgment against third party, carrier can subrogate and collect back amount paid to insured; furthermore, uninsured motorist carrier can require that action be instituted in name of insured against uninsured motorist in order to effectuate subrogation interest of uninsured motorist carrier, but action must not impair, diminish or jeopardize insured's ability to recover any damages in excess of subrogation amount.

Affirmed.

Morrison, J., and Weber, J., filed specially concurring opinions.

Sheehy, J., filed dissenting opinion.

Shea, J., dissented and will file opinion.

Insurance §§601.25, 607.1(2)

Uninsured motorist carrier can make payment to insured, and when insured settles his claim or obtains judgment against third party, carrier can subrogate and collect back amount paid to insured; furthermore, uninsured motorist carrier can require that action be instituted in name of insured against uninsured motorist in order to effectuate subrogation interest of uninsured motorist carrier, but action must not impair, diminish or jeopardize insured's ability to recover any damages in excess of subrogation amount, and if subrogation occurs, uninsured motorist carrier must, in good faith, seek for insured any other damages that he may not have received in his payment from carrier; limiting *Allstate v. Reittler*, 628 P.2d 667. (Per Harrison, J., with two Justices concurring and two Justices concurring in result.)

Lloyd E. Hartford argued, Billings, for defendants and appellants.

Crowley Law Firm; Ronald Ladders argued, Billings, for plaintiff and respondent.

HARRISON, Justice.

This is an appeal from an order denying a motion to vacate a default judgment and stay of execution. The defendants sought to vacate a default judgment by claiming the judgment to be void. The District Court of the Thirteenth Judicial District, in and for the County of Yellowstone, denied the defendants' motion.

On June 6, 1981, defendant Mark A. Christenson apparently caused an accident by improperly operating a motor vehicle. Kristine N. Hinckley, a passenger in the vehicle, sustained injuries as a result of the accident. Both Christenson and Hinckley were minors at the time of the accident. Christenson had no insurance on the vehicle when the accident occurred.

Farmers Insurance Exchange (Farmers) insured Hinckley and paid \$7,000 on her claim arising out of the injuries she sustained in the accident. Farmers paid this under an uninsured motorist provision in the Hinckley insurance policy. As required in the policy, the Hinckleys assigned their personal injury action to Farmers as part of a subrogation clause.

On February 10, 1982, Farmers filed an action against Christenson and his parents for \$7,000 paid on the personal injury claim. The Christensons received proper service of the complaint and summons. The Christensons failed to answer or take any action to defend against this action. On April 1, 1982, Farmers filed a motion for default judgment and on July 29, 1982, the court granted said motion.

On January 11, 1983 the Christensons filed a motion to vacate the default judgment and stay the execution. They asserted the judgment was void because Farmers was an improper party in the action. The Hinckleys lacked the ability to assign their personal injury action via the subrogation clause to Farmers. Following a hearing on their case, the court found that the subro-

gation occurred properly and that the default judgment was entered properly.

Appellants raise two issues on appeal:

(1) Can an insured party subrogate a personal injury action to an insurance company following the payment of claims arising out of a policy protection against uninsured motorist?

(2) Was the default judgment void if Farmers was an improper party to the action?

Appellants contend the District Court erred in determining that respondent received a valid subrogation interest from Kristine Hinckley. They contend that an injured party cannot subrogate a personal injury claim to an insurance company. Such subrogation is invalid. Therefore, the insurance company is not a real party in interest in the suit and cannot sue the tortfeasor.

Appellants rely heavily on *Allstate v. Reitler* (Mont.1981), 628 P.2d 667, 38 St. Rep. 821, for the proposition that the insured cannot subrogate personal injury claims to an insurance company. *Reitler* involved a woman, Welton, who suffered an injury in an automobile accident caused by Reitler. Welton received \$2,000 from Allstate for her medical expenses, but that amount failed to cover the total expenses.

She then settled with Reitler's insurance company (Farmers Insurance Exchange) and signed a release of claims against them. Allstate then claimed a right to subrogation and tried to recover the \$2,000 it paid to Welton from Reitler. This Court held that subrogation clauses on medical insurance policies are invalid, and went on to say the insured could not subrogate their personal injury claim to the insurance company.

Appellants also cite *Cody v. Cogswell* (1935), 100 Mont. 496, 50 P.2d 249, to support their claim that personal injury claims cannot be assigned. That case involved a writ of attachment on a personal injury cause of action before a judgment was rendered. This Court held that personal

injury suits were not subject to writs of attachment.

Respondent distinguishes *Reitler* in that it involved medical payment coverage and not uninsured motorist coverage. It dismisses the broad statements against assignment of personal injury claims as dicta.

Justice Morrison, the author of *Reitler*, carefully limited the holding to medical payments subrogation clauses:

"We hold that medical payment subrogation clauses are invalid. In doing so, we are mindful that this Court is joining a minority of jurisdictions so holding. However, the public policy considerations militate in favor of such a result." 628 P.2d at 670, 38 St.Rep. at 824.

This is not to say we approve of the wording of the clause in this contract which in our opinion could be abused by the insurance company. The clause reads:

"Subrogation. In the event of any payment under this policy, the company shall be subrogated to *all the insured's right of recovery therefore, against any person or organization*, and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights." (Emphasis added.)

In our opinion under this clause it could be possible that the insurance company could collect an amount in excess of what was paid out to the insured. That will not be permitted. The insurance company can only be permitted to be subrogated for the amount paid out to insured.

Respondent asserts that equity dictates the need for subrogation. It cites *Skauge v. Mountain States Tel. & Tel.* (1977), 172 Mont. 521, 565 P.2d 628, to support this claim. In *Skauge*, this Court permitted subrogation of a claim for damages to personal property that resulted from defendant's negligence. We said subrogation may occur after the insured has been made whole for his entire loss.

Respondent argues that public policy requires subrogation in this case. If this

Court precluded subrogation of claims against uninsured motorists, then the uninsured motorist would probably benefit. Once the insured plaintiff receives the insurance compensation for the accident, it is less likely he will pursue litigation against the uninsured motorist. Therefore, subrogation enhances the chances that the uninsured motorist will pay for his wrongdoing, and promote the policy requiring motorists to carry insurance.

As noted above, the controlling issue here is one of public policy. We hold that an uninsured motorist carrier can make payment to an insured, and when the insured settles his claim or obtains a judgment against a third party, the carrier can subrogate and collect back the amount paid to the insured. Further, the uninsured motorist carrier can require that the action be instituted in the name of the insured against the uninsured motorist in order to effectuate the subrogation interest of the uninsured motorist carrier. But said action must not impair, diminish or jeopardize insured's ability to recover any damages in excess of the subrogation amount. If a subrogation occurs, then the uninsured motorist carrier must, in good faith, seek for the insured any other damages (general, special or punitive) that he may not have received in his payment from the carrier.

While it is argued that this issue hinges on this Court's interpretation of *Reitler*, where we denied subrogation to medical payment coverage, we believe that public policy demands that our holding in that case is limited to medical payment coverage.

Appellants' reliance on *Cody*, supra, also cited in *Reitler* for the proposition that Montana has long opposed assignment of personal injury claims, is unfounded. *Cody* never dealt with the issue of assignment. That case only involved an issue of attachment.

"In their briefs and argument on this question, counsel for both sides have devoted considerable time and space to the question of whether such a cause of action is assignable, or whether it survives

the death of the person in whom it reposes. As we view the case, these matters have no relevancy to the real issue presented here. The only question to be determined is whether a cause of action for personal injuries is subject to attachment before judgment is rendered thereon." 100 Mont. at 500, 50 P.2d at 250.

In the second issue, appellants claim that because subrogation cannot occur, then respondent cannot be a real party in interest. They cite Rule 17(a), M.R.Civ.P., that "[e]very action shall be prosecuted in the name of the real party in interest . . ." The lack of a real party in interest renders the judgment void. A void judgment is always subject to collateral attack as provided in Rule 60(b)(4), M.R.Civ.P.

Due to the fact we find the subrogation is proper, we will not treat the second issue due to mootness.

The District Court properly found such judgment valid. We hereby affirm.

HASWELL, C.J., and GULBRANDSON, J., concur.

SHEA, J., dissents and will file opinion later.

MORRISON, Justice, specially concurring:

I concur in the result but for a different reason.

This action was initiated by Farmers Insurance Exchange filing a complaint against Mark Allen Christenson, Roland J. Christenson and Karense M. Christenson seeking to recover damages in the sum of \$7,000. The record reflects that proper service was had upon defendants and they failed to appear. A default judgment was entered on July 29, 1982. Defendant's motion to vacate judgment was not filed until January 11, 1983, some 166 days later. Defendants acknowledge that the default judgment cannot be set aside upon any grounds other than that the judgment is void.

Christensons argue that the damages sought by Farmers Insurance Exchange

resulted from an unlawful assignment of a personal injury claim belonging to Farmers assignor. This argument was urged in the District Court and the District Court ruled against Christensons. The District Court based its ruling on the merits of the legal argument. The District Court held that Farmers' claim rested on a valid subrogation interest.

The District Court should not have reached the merits. There simply is no basis for arguing that the judgment entered July 29, 1982 was void. The District Court clearly had jurisdiction of both the subject matter of the action and of the parties personally. When a court has jurisdiction then a judgment can only be collaterally attacked if the court's action involves a "plain usurpation of power." 7 Moore's Federal Practice, § 60.25[2].

Here it is clear that the judgment of the District Court cannot be collaterally attacked. Christenson's motion to set aside the default judgment is not timely. This Court cannot reach the merits involving validity of Farmers' subrogation interests.

I vote to affirm.

WEBER, Justice, specially concurs as follows:

I concur in the result reached in the majority opinion for the reasons set forth in the foregoing special concurrence of Justice Morrison. I therefore vote to affirm.

SHEEHY, Justice, dissenting:

I dissent.

The ancients tell us that Aeneas descended with the Sibyl to the melancholy regions of the dead. He was shown, near the river of oblivion, a place of torment for one who perverts the law, making it say one thing today and another tomorrow.

I am not implying that by this decision the members of the majority will go to Hades. That is not in my jurisdiction. I am implying that the members of the majority should look over their shoulders to the past and their earlier pronouncements.

On May 28, 1981, we stated it was invalid in Montana to assign a personal injury claim against a tortfeasor to a subrogee. Today, in 1984, we permit such assignment.

The Court today is approving the assignment, in the name of subrogation, of a personal injury claim so the insurer can sue as the real party in interest. No statute supports the Court's action.

The facts of the case must first be understood. On June 6, 1981, Mark Allen Christenson, 17 years old, was operating a 1968 Ford motor vehicle owned by Eric T. Christenson. Mark's passenger in the automobile was Kristine N. Hinckley, a minor at the time. The automobile overturned on a county road in Yellowstone County and Kristine suffered personal injuries.

Mark Allen Christenson, the driver, was the minor son of Roland J. and Karense M. Christenson. Mark's parents, in compliance with Montana law, had agreed to assume Mark's liability so that he could get a driver's license. These parents undoubtedly did not realize, and I am sure that most parents do not realize, that in Montana, when they assume full liability for the issuance of a driver's license to a minor person, they are on the legal hook for absolute liability without limit if the minor person is driving an uninsured vehicle which injures someone, or if their own policy of liability insurance does not follow the minor when he drives a non-owned automobile.

In this case, the minor was driving an automobile owned by Eric T. Christenson, a brother, and not owned by his parents. It is quite possible (we have no record on this point) that the parents here had a policy of liability insurance, which would follow Mark and provide him coverage, unless the automobile Mark was driving was owned by a member of the same household, but was not insured under the parents' policy. In that situation, the parents' policy of insurance coverage does not follow the minor driver.

Because of this unfortunate situation, the net result to the parents of Mark Allen Christenson is that they will probably be

called upon to pay the judgment required now by the majority of this Court. While the parents were always at risk to Kristine, if she were injured through Mark's driving an uninsured vehicle, the parents were never at risk to her insurer until the majority opinion of this Court.

At the time of the collision, Kristine N. Hinckley was insured by Farmers Insurance Exchange, probably through a policy of automobile liability insurance owned by her parents, Dan K. and Rae D. Hinckley. The policy of insurance owned by the Hinckleys with the Farmers Insurance Exchange provided uninsured motorists coverage as is required in Montana. Farmers Insurance Exchange, without suit, entered into a settlement agreement with the parents of Kristine Hinckley for the sum of \$7,000. It should be remembered that when an automobile accident occurs to which an uninsured motorist coverage applies, the insurance company becomes an adversary of its own insured, taking the part of the uninsured motorist as against its insured in negotiating a settlement.

On February 10, 1982, Dan K. Hinckley, as the father and conservator of the estate of Kristine and Rae D. Hinckley as her mother, entered into a release agreement with Farmers Insurance Exchange for the sum of \$7,000, which release contains the following language.

"NOW THEREFORE the undersigned, individually, as father of Kristine Hinckley and as conservator of the estate of Kristine N. Hinckley, protected person, in consideration of the payment of Seven Thousand Dollars (\$7,000.00) received by him, does hereby forever release and discharge Farmers Insurance Exchange and Farmers Insurance Group, its agents, and employees, of and from any and all claims and causes of actions of every kind and character arising out of the injuries to Kristine Hinckley on or about June 6, 1981. The parties expressly agree, in the event that Kristine Hinckley or Dan K. Hinckley, as her guardian, successfully pursue any claim against the driver of the automobile, Mark Allen

Christenson, Farmers Insurance Exchange shall become subrogated to and entitled to indemnity for the payment made, namely Seven Thousand Dollars (\$7,000.00)."

Note please that the language in the release instrument does not constitute a transfer of the cause of action, but instead is a conditional provision for indemnity in the event that either Kristine or her guardian presses a claim against the uninsured motorist. No mention is made in the release of a suit by the insurance company, acting for itself, against the parents of Mark Allen Christenson.

This is not the first release that the Hinckley's signed for Farmers Insurance Exchange, but I will discuss that later in this dissenting opinion.

Farmers Insurance Exchange, instead of following the language of its release, above, and allowing Kristine Hinckley or her guardian to pursue the personal injury claim against Mark and his parents, chose instead to file its action in its own name directly in the District Court for the \$7,000 it paid on Kristine's claim. It took a default judgment. Some nine months after the default judgment was entered, the financial responsibility division of the Montana Highway Patrol suspended the driver's license of the father of Mark Christenson. It was this unlooked-for incident that triggered the motion of the parents of Mark to set aside the default judgment obtained against them in favor of Farmers Insurance Exchange on the ground that the assignment of a personal injury claim is invalid in Montana.

The assignment of a personal injury claim based on tort in Montana is indeed invalid, or was until now. That a personal injury claim could not be assigned was established in *Caledonia Insurance Co. v. Northern Pacific Railroad Co.* (1905), 32 Mont. 46, 79 P. 544. There Judge Hollo-way noted the distinction that a right of action growing out of a violation of property rights was assignable, but a right of action growing out of the violation of a purely personal right was not. As recently

as May 28, 1981, this was the law in Montana. This Court affirmed that position in *All-State Insurance Co. v. Reitler and Farmers Insurance Exchange* (Mont. 1981), 628 P.2d 667, 670, 38 St.Rep. 821, 824-25 (authored by Morrison, J., and concurred in by Haswell, C.J., Harrison, Shea, and Weber, J.). In that case it is stated:

"Montana has long opposed the assignment of personal injury claims (citing a case). Whether an insurance policy provides for subrogation [as in this case] or provides that the carrier has a lien on the proceeds of an insured's third party recovery, that policy has the effect of assigning a part of the insured's right to recovery against a third party tortfeasor. We hold that such an assignment is invalid." (Material in brackets added.)

As I have pointed out above, the release agreement does not permit Farmers Insurance Exchange to sue in its own name against the tortfeasor, since the release agreement is one for indemnity between the insurance company and its insured. If Farmers Insurance Exchange has an independent right of subrogation at all it must come from its insurance policy issued to the Hinckleys which includes the following clause:

"Subrogation. In the event of any payment under this policy, this company shall be subrogated to all the insured's right of recovery therefor, against any person or organization, and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights."

This is the clause on which Farmers Insurance Exchange claims the right to sue as the real party in interest against the tortfeasor for the insured's right of recovery, and against all persons or organizations from whom recovery might be obtained, including the parents of the uninsured driver. That constitutes a transfer of the personal injury claim of Kristine Hinckley. The clause appears in the general provisions of the insurance policy, and

not on the insured motorist endorsement itself. I recognize that a general subrogation clause is necessary in an insurance policy because the company has a right of subrogation for property damage payments for which it might make. There is no quarrel in Montana about that. Applying the clause however to personal injury claims paid for under the endorsement was invalid at the time of the issuance of the policy because of this Court's long standing position that personal injury claims could not be assigned or subrogated. It is this clause upon which Farmers Insurance Exchange right of action must stand or fall.

The majority members are injudicious in permitting Farmers' action here on at least the following grounds:

(1) The Court has no statutory authority to permit it; (2) The Court fails to distinguish between subrogation proper and assignment; (3) Farmers' action is not a bar to further suits by the Hinckleys against the tortfeasor; and (4) The insurer's action is improper when the insured is not fully compensated; and (5) There will be no accompanying reduction in the premiums Montanans pay for uninsured motorist coverage.

(1) Lack of Statutory Authority

In the absence of statutory authority permitting subrogation of uninsured motorist coverage claims we should scruple to permit subrogation. Other states have adopted such permitting legislation. An analysis of cases rising in other states, under permissive statutes, reveals a number of incidental questions relating to subrogation that require legislation to solve. Waiting for legislative direction in the field would undoubtedly help close the avenues to some needless litigation in our state opened up by the majority.

In examining the statutes of other states within the Pacific Digest system, we find Arizona (Section 20.259.01 Ariz.Stat.), Colorado (Colo.Rev.Stat. § 10-4-609), Hawaii (Section 431-448 HRS), and Utah (Section 41-12-21.1 UC) have provisions nearly the same as ours (Section 33-23-201, MCA).

No hint of subrogation is found in those statutes.

The California legislature has adopted the following provision (Section 11 580.-2(7)(g)):

"*Subrogation.* The insurer paying a claim under an uninsured motorist endorsement or coverage, shall be entitled to be subrogated to the rights of the insured to whom such claim was paid against any person causing such injury or death to the extent that the payment was made . . ."

Note that the California provision provides for subrogation not only against the uninsured motorist but against "any person causing such injury or death." This means that joint and several tortfeasors can be made to respond in subrogation to an insurer who has made a payment under the uninsured motorist coverage.

In California, however, the right of the subrogating insurer to collect from others in sublimated to the right of the injured party to be made whole. Thus, if the injured party is not fully compensated by the recovery of the limits of the uninsured motorist coverage, and has an action against other joint tortfeasors, the insurer making payment under the uninsured motorist coverage has no right of subrogation until the injured party has been made whole from the other tortfeasors. *United Pacific-Reliance Insurance Companies v. Kelly* (1983), 140 Cal.App.3d 72, 189 Cal. Rptr. 323; *Security National Insurance Co. v. Hand* (1973), 31 Cal.App.3d 227, 107 Cal.Rptr. 439. The majority opinion in this case ignores this restrictive provision protecting insureds.

In the case we are deciding here, the general grant of authority for subrogation by the majority of this Court to the insurer does not take into account the result as to joint tortfeasors. I submit the legislature should decide such issue.

Here is the other side of the joint tortfeasor coin: In Washington, section 48.22-040(3), R.C.W., provides:

"In the event of payment to an insured under the coverage required by this

chapter and subject to the terms and conditions of such coverage, the insurer making such payments shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such insured against any person or organization legal responsible for the bodily injury for which such payment made, . . ."

In *Hawaiian Insurance and Guaranty Company v. Mead* (1975), 538 P.2d 865, 869, the Washington Appellate Court held that the statute provided subrogation only against the *uninsured motorist*, the person causing the damage, and no right of recovery existed against other parties. The Washington decision recites that four states, Mississippi, Michigan, Missouri, and Georgia have held likewise. The majority in this case permit suit by the insurance company against the parents of the uninsured driver

Subrogation is founded upon the equitable theory that one who pays the legal obligation of another should stand in the shoes of the payee to recover the payment from the one who should have made payment. That makes equitable sense. The five states which limit the right of recovery in subrogation against the uninsured motorist, and no others, recognize that the theory on which subrogation is founded should not be extended to grant a right of recovery against parties who have not participated in the condition of being uninsured. Again the majority has deficiently considered the implications of its majority decision in this case with respect to third parties, other than the uninsured motorist.

In section 743.795 ORS, the state of Oregon is careful to keep the right of action in *the insured*, not the company, in the event of payment under an uninsured motorist coverage. Its statute sets out clauses to be included in the policy of motor vehicle insurance including 11(a) "the insurer shall be entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of

any rights of recovery of such person against any uninsured motorist ..." Clause 11(b) provides that "such person shall hold in trust for the benefit of the insurer all rights of recovery which he may have against the uninsured person ..." Clause 11(c) allows recovery to be made from joint tortfeasors. Clause 11(e) provides the insured shall bring action against the uninsured motorist or other parties if the insured is requested to do so by the insurer.

Clearly Oregon still observes the common law sanction against assignment of personal injury claims.

The statutes of Kansas (Kan.Stat. Ann. § 40-287), Idaho (Idaho Code § 41-2505), Washington (Wash.Rev.Code § 48-22-030), and Wyoming (Wyo.Stat. § 31-10-104) point to another interesting result. In those states where the statutes are nearly the same, it is provided that the insurer making a payment on the uninsured motorist coverage, "shall, to that extent, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any right of recovery" against a responsible party. Each of those statutes goes on to provide that the insurer shall have a direct right of action only if the insurer is required to make an uninsured motorist payment by virtue of the insolvency of the motorist. It may be deduced from the terms of these statutes that the right to sue remains in the insured, subject to reimbursement of the insurer making payment after judgment or settlement, but a direct right of action to the insurer is given where the responsible motorist is insolvent against his insolvent estate.

From the foregoing, it can be seen that the issue is not simply should the Court without statutory authority, allow subrogation of uninsured motorist coverage payments and direct action therefore by the insurer. The related problems are too complex to be answered by a court in a single case and the whole subject should be decided by the legislature.

(2) *The majority failed to distinguish between subrogation and assignment.*

The gist of the issue in this case is whether Farmers can bring a direct action against the uninsured motorist and his guarantors. This Court noted in *Allstate Insurance Co. v. Reitler*, supra, that a subrogation which results in a transfer of the cause of action to the insurer, is in effect an assignment and not subrogation.

The distinction should be kept clearly in mind. There is, of course, no reason why Farmers should not be able to recover to the extent it made payment its settlement under the uninsured motorist coverage clause, if that recovery is made by the insureds. Certainly that is what the release which Farmers took from the Hinckleys contemplated. I would agree if the majority held that the subrogation clause on an automobile policy merely asserted a right to reimbursement, contribution or indemnity, but I cannot agree that the insurer became the owner of the cause of action. Idaho, in *Rinehart v. Farm Bureau Mutual Insurance Co.* (1974), 96 Idaho 115, 524 P.2d 1343, was careful to note that distinction.

If Farmers according to its release was simply seeking to recover here to the extent of its payment from any judgments or settlement received in the name of the Hinckleys, I would have no quarrel with its right to such recovery. When it insists on the right to sue directly, in its own name, as a real party in interest, its subrogation becomes an assignment. In *Fifield Manor v. Finsten* (1960), 54 Cal.2d 632, 7 Cal.Rptr. 377, 354 P.2d 1073, the California Supreme Court was careful to preserve the distinction and to refuse subrogation where no statutory authority for the assignment of the cause of action existed.

(3) *Farmers action against the uninsured motorist is not a bar to further action by the Hinckley's.*

An excellent reason for refusing at this juncture, in the absence of legislative action, to permit direct suit by insurers who have made payments under uninsured motorist coverage is that such direct suits do

not bar further action by the injured parties against the same uninsured motorist or his guarantors. Thus, the cause of action is split, which goes against the grain of all jurisprudential sense and finality.

This case is an excellent illustration. Attached as an appendix is a copy of the release obtained by Farmers in this case. In the second "whereas" clause, it is noted that the policy issued to the Hinckleys included uninsured motorist and medical payments coverages. In view of those coverages, it is curious that the release also includes the following paragraph:

"In this regard, the parties agree that the original release, dated September 16, 1981, was incorrect so far as the recitations therein concerning the insurance provisions under which the \$7,000 payment was made. It is now expressly understood that the sum of \$7,000 was paid pursuant to the uninsured motorist coverage."

The release goes on to say, however, that the \$7,000 payment is full and final payment of *every kind of claim* against Farmers Insurance Group by the Hinckleys, presumably including medical coverage payments.

Two possibilities exist with respect to the release: (1) payment was made exclusively under the uninsured motorist coverage, and no payment was made to the Hinckleys under the medical payment provision. In such case, Hinckleys have the right to recover medical expenses against the uninsured motorist or his guarantors. Thus, permitting Farmers to recover on the uninsured motorist coverage and the Hinckleys to recover on the medical payments expenses constitutes a splitting of the cause of action. (2) Or, the medical payments were subsumed by Farmers in the single payment of \$7,000. In that event, Farmers is suing for medical benefits paid, under medical payments coverage, which, under our holding in *Reitler*, is invalid in Montana.

Of course, the statute of limitations may now have run as far as the Hinckley suit against the uninsured motorist is con-

cerned, but at the time of the taking of the release here in question, only seven months had elapsed. Again, this Court should consider the rule in California, quoted above, that the insurer has no right of subrogation where an insured has not been fully compensated. I would hope that we would continue the rule adopted in *Skauge v. Mountain States Tel. and Tel. Co.* (1977), 172 Mont. 521, 565 P.2d 628, 632, to the effect that when an insured has sustained a loss in excess of the reimbursement by the insurer, the insured is entitled to be made whole for his entire loss and any cost of recovery including attorneys fees before the insurer can assert its right of legal subrogation against the insured or the tortfeasors.

(4) *Action by the insurer would be improper where the insured is not fully compensated.*

We have cited the California cases above, and *Skauge*, our case, indicating that subrogation is not available to an insurer unless the insured is fully compensated. When, as in this case, a right is granted to an insured to bring direct action, there will be a race to the courthouse between the insurer and the insured to achieve a first recovery. That is the inevitable result of splitting a cause of action.

It should be a matter of embarrassment to this Court, and to the law firm involved, that the arguments made in this case, and the stance adopted by this Court, are exactly opposite to the arguments and stances adopted in *Reitler*, *supra*. In *Reitler*, the same law firm then representing Farmers Insurance Exchange filed a brief in this case in which it urged upon this Court that we had expressly recognized the rule that causes of action against personal injury are not assignable. It cited in support of that proposition *Coty v. Cogswell* (1935), 100 Mont. 496, 50 P.2d 249; *Toole v. Paumie Parisian Dye House* (1935), 101 Mont. 74, 52 P.2d 162; *Baker v. Tullock* (1938), 106 Mont. 375, 77 P.2d 1035; *Caledonia Insurance Co. v. Northern Pac. Ry. Co.* (1905), 32 Mont. 46, 79 P. 544; and 40 A.L.R.2d 480, relating to assignability of claims for

personal injury, and the Restatement (Second) of Contracts § 547.

Now, three years later, the same law firm and the same insurance company take an opposite stance, and in the name of public policy, ask this Court to reverse without statutory authority our longstanding position with respect to the non-assignability of personal injury claims. Farmers argued and the majority swallowed, that public policy in providing insurance on all motor vehicles in the state is enhanced by allowing insurers to bring direct actions against uninsured motorists! It should be evident to all of us that Farmers is not going to sue uninsured motorists who are judgment-proof. It is only because in this case the parents signed a liability form for Mark that suit had been brought in this case. Insurance companies are not eleemosynary institutions. There are no more apt to chase good money after bad than any other party.

(5) *There will be no accompanying reduction in premiums Montanans pay for uninsured motorist coverage.*

The right of subrogation granted by the majority in this case is complete gravy to the insurance company. Subrogation is not a factor used by insurance companies in determining the rate of premiums charged. Arizona took note of this fact in refusing to make any distinction between assignment and subrogation with respect to the right of the insurer to recover. It held in *Allstate Insurance Co. v. Durke* (1978), 118 Ariz. 301, 576 P.2d 489, 492:

“Also, to require an injured policy holder to return to his insurer the benefits for which he has paid premiums is to deny him the benefits of his thrift and foresight. In terms of public policy the only justification for allowing an insurance company to recoup the benefits it contracted to pay out in exchange for the receipt of premium payments which are presumably actuarially adequate would be the lowering of premium rates as the result of such a recoupment. This is generally not the case:

“‘Subrogation is a windfall to the insurer, it plays no part in the rate schedules (or only a minor one), and no reduction is made in insuring interest . . . where the subrogation right will obviously be worth something.’ Patterson, *Essentials of Insurance Law* at 151-152 (2d ed. 1957) (citing authority).” 576 P.2d at 492.

Thus, although the majority has opened up to insurance companies a right of subrogation to sue in its own name wherever it might make recovery, not only against uninsureds, but against other parties, no accompanying benefit will accrue in the form of reduced premiums to be paid by Montanans for their uninsured motorist coverage. The insurers will collect the same amount of money from us for that coverage whether or not we permit subrogation.

Insurers can rejoice in that. Subrogation is not factored in by insurers when they set the premiums for uninsured motorist coverages. The loss cost is spread among the policy holders without regard to subrogation. Montanans won't see a drop in uninsured motorist coverage premiums because of this decision. They will see a proliferation of lawsuits by insurers “enforcing public policy” as the majority believes, to collect that gravy.

The term “law” can be defined as that group of principles and precedents which, it may be fairly predicted, a court will apply to a given set of facts. Predicability is of the essence. A court which swings unpredictably from one end of the spectrum to the other, not pausing at any shades between, is not applying law. It is acting as no more than an *ad hoc* committee.

I would reverse and dismiss.

APPENDIX

PLAINTIFF'S EXHIBIT B

RELEASE

WHEREAS, on June 6, 1981, Kristine Hinckely received injuries when the automobile in which she was riding as a passenger, which automobile was operated by Mark Allan Christenson, on County Road

APPENDIX—Continued
L745 near the junction with Fly Creek Road went out of control, left the road, and overturned. Said automobile driven by Mark Allan Christenson was uninsured; and

WHEREAS, the undersigned Dan K. Hinckley holds a policy of insurance issued by Farmers Insurance Exchange which includes uninsured motorist coverage and a medical payment provision; and

WHEREAS, the undersigned Dan K. Hinckley was appointed conservator of the estate of Kristine Hinckley, and in his individual capacity as father and as conservator of the estate of Kristine Hinckley, his minor daughter, has now agreed upon a full and final settlement with Farmers Insurance Exchange and Farmers Insurance Group;

NOW, THEREFORE, the undersigned, individually, as father of Kristine Hinckley, and as conservator of the estate of Kristine Hinckley, protected person, in consideration of the payment of Seven Thousand and no/100 Dollars (\$7,000.00), received by him, does hereby forever release and discharge Farmers Insurance Exchange and Farmers Insurance Group, its agents, and employees, of and from any and all claims and causes of action of every kind and character arising out of the injuries to Kristine Hinckley on or about June 6, 1981. The parties expressly agree, in the event that Kristine Hinckley or Dan K. Hinckley, as her guardian, successfully pursue any claim against the driver of the automobile, Mark Allan Christenson, Farmers Insurance Exchange shall become subrogated to and entitled to indemnity for the payment made, namely \$7,000.00.

In this regard, the parties agree that the original release, dated September 16, 1981, was incorrect so far as the recitations therein concerning the insurance provisions under which the \$7,000 payment was made. It is now expressly understood that the sum of \$7,000 was paid pursuant to the uninsured motorist coverage.

It is the intent hereof that all claims of every kind and character against Farmers Insurance Group and Farmers Insurance

Exchange be hereby fully and finally compromised and settled.

This release is given pursuant to an order of the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone.

Dated this 10 day of February, 1982.

/s/ Dan K. Hinckley

Dan K. Hinckley, individually as father, and as conservator of the estate of Kristine Hinckley, protected person.

/s/ Rae D. Johnson Hinckley

Rae D. Johnson Hinckley, mother of Kristine Hinckley, protected person.



**Molly STRONG, Petitioner
and Appellant,**

v.

**Billy Ray WEAVER, Respondent
and Respondent.**

No. 83-424.

Supreme Court of Montana.

Submitted on Briefs April 18, 1984.

Decided July 23, 1984.

Mother appealed an order of the District Court, Flathead County, Michael Keedy, J., modifying previous child custody order. The Supreme Court, Shea, J., held that since there was no visitation hearing, no finding in order that modification was in the "best interest" of the child, and no findings and conclusions to support order, remand was necessary.

Vacated and remanded.

1. Infants ⇌ 19.3(5)

Ultimate finding of trial court that modification of custody decree would be in

ADDENDUM 7

Lyon v. Hartford Accident and Indemnity Company,
480 P.2d 739 (Utah 1971)

25 Utah 2d 310

The STATE of Utah, Plaintiff and
Respondent,

v.

David Craig CARLSEN, Defendant
and Appellant.

No. 11876.

Supreme Court of Utah.

Feb. 5, 1971.

Defendant was convicted before the First District Court, Cache County, Lewis Jones, J., of attempted second-degree burglary, and he appealed. The Supreme Court, Tuckett, J., held that where trial court directed clerk to furnish defendant true and complete copy of documents, minute entries and transcript of proceedings without cost to him and where defendant was notified that transcript filed in Supreme Court would be made available to him for purpose of aiding him in appeal, conviction for attempted second-degree burglary was not improper on ground that trial court failed to furnish defendant without cost copies of minute entries and transcript of proceedings of his trial.

Affirmed.

Criminal Law ⇨ 1077

Where trial court directed clerk to furnish defendant true and complete copy of documents, minute entries and transcript of proceedings without cost to him and where defendant was notified that transcript filed in Supreme Court would be made available to him for purpose of aiding him in appeal, conviction for attempted second-degree burglary was not improper on ground that trial court failed to furnish defendant without cost copies of minute entries and transcript of proceedings of his trial.

David Craig Carlsen, pro se.

Vernon B. Romney, Atty. Gen., Lauren N. Beasley, Asst. Atty. Gen., Salt Lake City, for plaintiff and respondent.

TUCKETT, Justice:

The defendant was found guilty of attempted second-degree burglary, and from the verdict and the judgment of the court sentencing the defendant to a term in the Utah State Prison he has appealed. The sole basis of the defendant's appeal is that the trial court failed to furnish him without cost copies of minute entries and a transcript of the proceedings of his trial. The record belies defendant's contention in that it shows that the court below did in fact make an order directing the clerk to furnish the defendant a true and complete copy of the documents, minute entries and a transcript of the proceedings without cost to the defendant. The record also shows that the defendant was notified that the transcript filed in this court would be made available to him for the purpose of aiding him in this appeal.

It appears that the defendant's contentions before this court are without merit and the verdict and judgment of the court below are affirmed.

CALLISTER, C. J., and HENRIOD, ELLETT and CROCKETT, JJ., concur.



25 Utah 2d 311

Barbara LYON, Plaintiff and Respondent,

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY and Yosemite Insurance Company, Defendants and Appellant.

No. 12068.

Supreme Court of Utah.

Feb. 9, 1971.

Injured passenger, after obtaining judgment against uninsured motorist and another for injuries sustained in motor vehicle collision, brought action to recover benefits under uninsured motorist coverage of two policies. The Third District Court,

Salt Lake County, Gordon R. Hall, J., entered judgment for the passenger. Her insurer appealed, and she cross-appealed. The Supreme Court, Callister, C. J., held that where policy contained uninsured motorist endorsement with limit of \$20,000 per person but contained provision that the endorsement applied only in amount by which limit of liability exceeded applicable limit of liability of other similar insurance and where the passenger recovered under another policy containing \$10,000 uninsured motorist endorsement, the former policy's excess-escape clause was effective and the passenger was only entitled to recover on the former policy the difference between limits of the policies' endorsements notwithstanding uninsured motorist statute, but that the passenger was entitled to interest on judgment on the policies only from time that judgment was rendered against uninsured motorist and another.

Judgment reversed and cause remanded with order to render judgment in accordance with opinion.

Henriod, J., did not participate herein.

1. Insurance §531.3

Purpose of uninsured motorist statute is to provide protection only up to minimum statutory limits for bodily injuries and not to provide insured with greater insurance protection than would have been available had he been injured by insured motorist. U.C.A.1953, 41-12-5, 41-12-21.1.

2. Insurance §531.3

Where one policy contained uninsured motorist endorsement with limit of \$20,000 per person but contained provision that the endorsement applied only in amount by which limit of liability exceeded applicable limit of liability of other similar insurance and where passenger recovered under another policy containing \$10,000 uninsured motorist endorsement the former policy's excess-escape clause was effective and the passenger was only entitled to recover on the former policy the difference between limits of the policies' endorsements not-

withstanding uninsured motorist statute. U.C.A.1953, 41-12-5, 41-12-21.1.

3. Insurance §532

Where insured's damages exceeded policy limits under uninsured motorist coverage and insurer was not subject to double exposure for the insured's medical expenses, the insurer was not entitled to set off amount that it had paid under medical payment coverage against amount that was deemed liable to pay under uninsured motorist coverage under provision of policy which stated that insurer was not obligated to pay under uninsured motorist coverage that part of damage which represented expenses for medical services.

4. Insurance §606(4)

Where insured remained uncompensated for her total damages, her insurer was not entitled to receive \$2,000 paid into court by insurer of judgment debtor on basis of former insurer's right of subrogation for medical payments.

5. Insurance §607.1(8)

Where insurer was not entitled to award from another insurer based on subrogation rights for medical payments judgment for \$500 attorneys' fees as former insurer's share of expenses in recovering the medical payments could not be maintained.

6. Interest §39(2)

Where insurer's obligation to perform under expressed terms of contract, did not arise until there was legal determination of liability of uninsured motorist and extent of damages sustained, insured was not entitled to interest on judgment against the insurer under uninsured motorist provision until from time that judgment was rendered against uninsured motorist and another.

7. Insurance §602.1

Insured was not entitled to damages for insurer's failure to bargain with her on the her claim in connection with uninsured motorist.

Harold G. Christensen, of Worsley, Snow & Christensen, Salt Lake City, for defendants-appellant.

Robert M. McRae, of Hatch, McRae, Richardson & Kinghorn, Salt Lake City, for plaintiff-respondent.

David B. Dee and Leonard W. Burningham, Salt Lake City, Utah, Utah Trial Lawyers Assn., for amicus curiae.

CALLISTER, Chief Justice:

Plaintiff sustained serious injuries in a motor vehicle collision. She was a passenger in the automobile of one Martinez; Yosemite Insurance Company had issued a liability policy upon this vehicle which contained an uninsured motorist endorsement in accordance with Sec. 41-12-21.1, U.C.A. 1953, as amended 1967. In a separate action plaintiff was granted a jury verdict of \$70,830.75 against the operators of two other motor vehicles, who were deemed jointly and severally liable. One driver, Robert G. Butcher, was insured with Allstate, his coverage conformed to the statutory minimum as provided in Sec. 41-12-5, \$10,000 for bodily injury or death to one person. The other driver, Scott G. Nickel, was an uninsured motorist.

Plaintiff was an insured under a policy issued to her father by Hartford Accident and Indemnity Company, which contained an uninsured motorist endorsement with a declared limit of \$20,000 per person. In addition, plaintiff was covered under a medical expense provision. At the conclusion of the plaintiff's tort action, Allstate, the insurer of Butcher, tendered \$10,000, the limit of its coverage. Plaintiff received \$8,000; the other \$2,000 was paid to the clerk of the court because Hartford asserted subrogation rights to the \$2,000 that it had paid plaintiff under the medical expenses coverage.

Plaintiff initiated the instant action to recover the benefits under the uninsured motorist coverage of both the Yosemite and Hartford policies. The trial court

awarded judgment to plaintiff against Hartford for \$20,000, the face amount of the uninsured motorist coverage in the policy it had issued in which plaintiff was a named insured. Plaintiff was awarded judgment against Yosemite for \$10,000, the maximum coverage contained under its uninsured motorist endorsement. In addition, plaintiff was awarded \$500 for reasonable attorneys' fees incurred in assisting Hartford in the recovery of \$2,000 medical payments from Allstate. Hartford was awarded the \$2,000 under its subrogation rights for medical payments. The trial court awarded plaintiff interest from the day of her original judgment except for the \$500 attorneys' fees. Hartford appeals, and plaintiff cross-appeals.

On appeal, Hartford asserts that under the terms of its policy its obligation to plaintiff cannot exceed \$10,000, under its uninsured motorist coverage, which is the difference between the policy limits of Yosemite and Hartford. The Hartford policy provides:

With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, the insurance under Coverage D—Uninsured Motorists shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance.

In *Russell v. Paulson*¹ this court upheld the validity of an excess-escape clause contained in an uninsured motorist provision, wherein the insurer was obligated to pay only that amount by which the limits of its policy exceeded the limits of all other available insurance. In other words, where the insured is injured in a non-owned vehicle upon which there has been issued an uninsured motorist endorsement,

1. 18 Utah 2d 157, 417 P.2d 658 (1966).

the coverage to the insured under his policy constitutes excess insurance.

Subsequent to the decision in *Russell v. Paulson*, the legislature enacted Sec. 41-12-21.1, U.C.A.1953, as amended 1967, which provides:

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 use 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. * * *

Plaintiff convinced the trial court that Sec. 41-12-21.1 indicated a legislative intent to overrule the holding in *Russell v. Paulson*; she successfully contended that this excess-escape clause limited the protection afforded the insured in a manner contrary to the policy expressed by the legislature and was therefore invalid. Plaintiff's argument is sustained by case authority, for there has been a marked divergence of opinion among the judiciary as to the proper interpretation of these uninsured motorist statutes. The two views are succinctly expressed in 28 A.L.R.3d 551, 554 Anno: Uninsured Motorists—"Other Insurance":

A number of courts have held that "other insurance" provisions, whether in

the form of a "pro rata," "excess insurance," "excess-escape," or other similar clause, are invalid as a part of uninsured motorist protection, on the ground that the statute requiring every liability policy to provide this type of protection will not permit the insurer to provide in any way that the coverage will not apply where other insurance is also "available," despite the fact that the insured may thus be put in a better position than he would be in if the other motorist were properly insured. Other courts have stated, however, that the design and purpose of uninsured motorist statutes are to provide protection only up to the minimum statutory limits for bodily injuries, and not to provide the insured with greater insurance protection than would have been available had he been injured by an insured motorist, and have held such "other insurance" provisions are valid where they do not reduce coverage below the minimum statutory limits.

[1] The latter view appears to be in accord with this State's statutory scheme. Section 41-12-21.1 is part of the Motor Vehicle Safety Responsibility Act; the minimum limits of uninsured motorist coverage are correlated with the minimum limits of coverage required for an automobile liability policy under Sec. 41-12-5, U.C.A.1953. ¹

In *Tindall v. Farmers Automobile Management Corp.*² the court rejected plaintiff's argument that an excess-escape clause contained in an uninsured motorist provision violated the Illinois uninsured motorist statute (paragraph 755(a) (Sec. 143a) of Chap. 73, Ill.Rev.Stat. (Ill. In Code)). The court observed that the statutory provision was designed to promote and encourage protection complementary that afforded by the financial responsibility act, thereby affording coverage to the same extent as would have been in effect if the tort-feasor had complied with

2. 83 Ill.App.2d 165, 226 N.E.2d 397, 28 A.L.R.3d 546 (1967).

minimum requirements of the financial responsibility act³

In *Martin v Christensen*,⁴ this court held that the provisions of Sec 41-12-21.1 did not preclude the application of a clause providing that if the company had issued more than one policy to the insured, the insurer would be liable only up to the maximum coverage of its highest limit of any one policy for any one accident or loss. This court cited as authority *M. F. A. Mutual Ins Co v Wallace*⁵ in its rejection of the argument of insured, that the statute fixed the minimum coverage under each policy separately, and, therefore, the insured was entitled to the maximum amount under both policies.

In 52 *Virginia Law Review* 538, 554-557 (1966), there is an incisive critique of the recent judicial trend of permitting the stacking of policies, i e, the courts have allowed recovery up to the combined limits of each policy available to the injured insured by ruling that "excess" or "other insurance" clauses were invalid. The author asserts that the Uninsured Motorist Acts are not being applied in a manner which places the victim of an uninsured motorist upon an equal footing with the victim of an insured motorist. In reference to the Virginia Act, the author states

In these cases the courts have looked only to the number of policies available to pay the judgment obtained against the uninsured motorist. No thought has been given to the fact that the act was intended merely to fill, not overflow, an insurance vacuum. Surely the General Assembly did not intend to foster a scheme whereby the innocent victim of an insured motorist may be penalized. It seems more logical that it intended to

guarantee a source from which an insured could recover his damages up to limits of \$15,000/\$30,000/\$5,000 with respect to any accident.

* * * * *

By their application of the Uninsured Motorist Act, the courts in many instances have placed the innocent victim of an uninsured motorist in a superior position to that which he would have occupied if his wrongdoer had had liability coverage. The pendulum has made the full swing. Before the enactment of the Uninsured Motorist Act, one who had taken pains to protect the public against the effect of his own negligence by carrying insurance was himself left unprotected against the effect of the negligence of an uninsured motorist. Today the same person, through his uninsured motorist endorsement, is usually better protected and procedurally is in a better position if the wrongdoer is uninsured.

[2] A careful review of the case law reveals that the better reasoned cases give effect to an excess-escape clause contained in an uninsured motorist endorsement. In the instant action, the trial court erred by its refusal to apply such a clause in Hartford's policy. Plaintiff is entitled to recover only the difference between the limits of the policies issued by Hartford and Yosemite, i e, \$10,000.

Defendant, Hartford, further contends that it is entitled to set off the \$2,000 that it has paid under the medical payments coverage against the amount that it is deemed liable to pay plaintiff under the uninsured motorist coverage. Hartford cites the following provision in its policy:

The company shall not be obligated to pay under Coverage D—Uninsured Mo-

³ Also see *Harris v Southern Farm Bureau Casualty Ins Co*, Ark, 448 S W 2d 652 (1970), *MFA Mutual Ins Co v Wallace*, 245 Ark 230, 431 S W 2d 742 (1968), *Jackson v State Farm Mutual Automobile Ins Co*, La App, 235 So 2d 621 (1970), *Long v United States Fire Ins Co*, La App, 236 So 2d 521 (1970), *Maryland Casualty Co v. Howe*, 106 N H 422, 213 A 2d 420 (1965),

contra, *Morelock v Millers Mutual Ins Assn*, 125 Ill App 2d 283, 260 N E 2d 477 (1970), wherein the court, Appellate, 5th District, declined to follow the holdings of the other Illinois Appellate Courts.

⁴ 22 Utah 2d 415, 417, 454 P 2d 294 (1969).

⁵ Note 3, supra.

torists that part of the damage 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.

A similar provision was interpreted by the court in *Taylor v. State Farm Mutual Automobile Ins. Co.*⁶ as follows:

* * * we consider it to be designed to protect the insurance company from double exposure for medical payments. Thus, it prevents an insured whose medical expenses have been paid under the Medical Payments Coverage from collecting for those medical expenses once again, in the event that a judgment for general damages in his favor and against the insurance company under its Uninsured Motorist Coverage falls below the policy limits of that coverage. However, in a case such as Mr. Taylor's where the award for general damages exceeds the policy limits on Uninsured Motorist Coverage, the insurance company must pay its insured the full limits of the policy, in this case \$5,000 regardless of what it has paid him under the Medical Payments Coverage. We are fortified in our interpretation of this amendment by the fact that this is the only just meaning that it could have. Mr. Taylor paid two separate premiums for two separate coverages. * * * To interpret the amendment as the company would have us do, would make the Medical Payment Coverage useless except in cases where the insured suffered physical injury as a *result of his own negligence*. * * *

[3] In the instant action, plaintiff's damages exceeded the policy limits under the uninsured motorist coverage, and Hart-

ford was not subject to double exposure for plaintiff's medical expenses. Under such circumstances, Hartford was not entitled to offset the medical payments against the uninsured motorist coverage.

Plaintiff in her cross-appeal asserts that the trial court erred in its award to Hartford the \$2,000 paid into the court by Allstate under Hartford's right of subrogation for medical payments, when plaintiff's damages far exceed her recovery therefor.

Subrogation springs from equity concluding that one having been reimbursed for a specific loss should not be entitled to a second reimbursement therefor. This principle has been accepted in the insurance field with respect to property damage, and with respect to medical costs by an impressive weight of authority. * * *

The Hartford policy provides:

In the event of any payment under Coverage B—Medical Expense of this policy, the company shall be subrogated to all the rights of recovery therefor which the injured person or anyone receiving such payment may have against any person or organization and such person shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. Such person shall do nothing after loss to prejudice such rights.

Since subrogation is an offspring of equity, equitable principles apply, even when the subrogation is based on contract, except as modified by specific provisions in the contract. In the absence of express terms to the contrary, the insured is entitled to be made whole before the insurer may recover any portion of the recovery from the tort-feasor.⁹ If the one responsible has paid the full extent of the loss, the

6. La.App., 237 So.2d 690, 693 (1970).

7. Also see *Hutchison v. Hartford Accident & Indemnity Co.*, 34 A.D.2d 1010, 312 N.Y.S.2d 789 (1970).

8. *State Farm Mutual Ins. Co. v. Farmers Exchange*, 22 Utah 2d 183, 184, 450 P. 2d 458 (1969).

9. *Providence Washington Insurance Co. v. Hogges*, 67 N.J.Super. 475, 171 A.2d 120, 124 (1961); *First National Bank of Lafayette v. Stovall*, La.App., 128 So. 2d 712, 717 (1961); 46 C.J.S. Insurance § 1209, p. 155.

insured should not claim both sums, and the insurer may then assert its claim to subrogation.¹⁰

[4, 5] In the instant action, there are no terms in this general subrogation clause which would support Hartford's subrogation claim to the \$2,000, while plaintiff remains uncompensated for her total damages. Furthermore, since Hartford is not entitled to the award, the judgment for \$500 attorneys' fees as Hartford's share of expenses in recovering the medical payments cannot be sustained.

Plaintiff further asserts that since this is an action in contract between an insured and an insurer, she is entitled to interest from the date of her loss, the date of the accident, and not from the date she was granted judgment against the tort-feasors. The insurance contract provides:

The company will pay all sums which the insured shall be *legally entitled to recover as damages* from the owner or operator of an uninsured motor vehicle.
* * * [Emphasis added.]

[6] Since Hartford's obligation to perform, under the express terms of its contract with the insured, did not arise until there was a legal determination of the liability of the uninsured motorist and the extent of the damages sustained, the insured, plaintiff, is entitled to interest only from the time that judgment was rendered against the tort-feasors.

[7] Finally, plaintiff contends that the trial court should have awarded her damages for Hartford's failure to bargain with her or settle her claim. She concedes that there is no case in point but asserts that this court should analogize her situation to that where a liability insurer refuses in bad faith to settle a claim with third parties within the policy limits and a judgment in excess of the policy limits is rendered against the insured.¹¹ She reasons that by

Hartford's failure to bargain, she was compelled to incur legal expenses for which she is entitled to be compensated.

Plaintiff's analogy is untenable because of the distinction in the relationship between a liability insurer and its insured and that between the insurer and its insured in connection with an uninsured motorist. In the former situation, the insurer must act in good faith and be as zealous in protecting the interests of the insured as it would be in regard to its own.¹² In the latter situation, the insured and the insurer are, in effect and practically speaking, adversaries.¹³

The judgment of the district court is reversed, and this cause is remanded with an order to render judgment in accordance with this opinion. Each party should bear its own costs.

TUCKETT, ELLETT and CROCKETT, JJ., concur.

HENRIOD, J., does not participate herein.



25 Utah 2d 319

James P. KNUCKLES, Plaintiff and Respondent,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation, Defendant and Appellant.

No. 12254.

Supreme Court of Utah.

Feb. 5, 1971.

Action by insured against insurer for benefits under policy for loss of sight. The Seventh District Court, Grand County,

10. McConnell v. Conaway, 62 Ohio App. 335, 23 N.E.2d 970, 971 (1939).

11. Ammerman v. Farmers Ins. Exchange, 19 Utah 2d 261, 430 P.2d 576 (1967).

480 P.2d—47½

12. Ammerman v. Farmers Ins. Exchange, note 11, supra.

13. 7 Appleman, Insurance Law and Practice, 1970 Supp., § 4331, p. 128.

ADDENDUM 8

Lima v. Chambers, 657 P.2d 279 (Utah 1982)

Admittedly, damages for inconvenience, annoyance, discomfort and mental distress are not capable of precise calculation, although those elements may reflect direct, immediate, and real injury. In this case the jury had evidence before it to justify the award of substantial damages of the type under consideration. The Branches testified to the emotional distress caused Jeanne Branch which culminated in her leaving her husband for a period of three or four months. In addition to that, the Branches were forced to truck water onto their property and to take numerous other steps to counter the nuisance created by Western.

For the foregoing reasons, we affirm the judgment of the trial court in all respects except with respect to the striking of the award of damages for mental distress, annoyance, and discomfort and remand for the re-entry of that award in the amount specified by the jury.

HALL, C.J., and OAKS and HOWE, JJ., concur.

DURHAM, J., does not participate herein.



**Barbara LIMA, Plaintiff and
Respondent,**

v.

**Earl CHAMBERS, Defendant
and Respondent,**

v.

**PRUDENTIAL PROPERTY & CASUALTY
INSURANCE COMPANY,
Intervenor and Appellant.**

No. 17622.

Supreme Court of Utah.

Nov. 26, 1982.

Automobile liability insurance carrier
providing uninsured motorist coverage

sought to intervene as of right as party defendant in tort action between its insured and uninsured motorist tort-feasor. The Second District Court, Weber County, Ronald O. Hyde, J., denied intervention, and carrier appealed. The Supreme Court, Stewart, J., held that carrier could intervene.

Reversed.

1. Parties ⇐40(7)

Automobile liability insurance carrier providing uninsured motorist coverage may intervene as of right as party defendant in tort action between its insured and an uninsured motorist tort-feasor. Rules Civ.Proc., Rule 24; U.C.A.1953, 41-12-21.1.

2. Parties ⇐41

In determining whether intervention as of right is mandated, adequacy of representation generally turns on whether there is identity or divergence of interest between potential intervenor and original party and on whether that interest is diligently represented. Rules Civ.Proc., Rules 24, 24(a), (a)(2).

3. Parties ⇐41

In determining whether intervention as of right is mandated, representation is considered to be inadequate if original party is not diligent in prosecution or defense of action or allows default judgment to be entered. Rules Civ.Proc., Rules 24, 24(a), (a)(2).

4. Parties ⇐41

Rule governing intervention as of right should be liberally construed to achieve purpose of eliminating unnecessary duplication of litigation. Rules Civ.Proc., Rule 24.

5. Parties ⇐40(7)

Because applicable section requires insurers to assume financial responsibility for judgments obtained by their insureds against uninsured motorist tort-feasors and because of insurer's contractual obligation which embodies that statutory requirement, insurer "is or may be bound" by tort judg-

ment within meaning of rule providing for intervention of parties as of right. Rules Civ.Proc., Rule 24; U.C.A.1953, 41-12-21.1.

6. Parties ⇐48

When intervention is permitted, intervenor must accept pending action as he finds it; his right to litigate is only as broad as that of other parties to the action.

7. Trial ⇐127

Identity of intervening insurance company should be made known to jury in tort action between insured and uninsured motorist tort-feasor, and intervening insurer must disclose to its insured that their respective interests may be conflicting.

8. Witnesses ⇐196

Intervening insurer in tort action between insured and uninsured motorist tort-feasor must not be allowed to use against its insured any information whatsoever gained by reason of insurer-insured relationship.

9. Attorney and Client ⇐20

If intervening insurer in tort action between insured and uninsured motorist tort-feasor has obligation to defend insured, for example as a defendant on counterclaim by uninsured motorist, insured should be allowed to choose his own independent counsel who must then be compensated by insurer. Rules Civ.Proc., Rule 24; U.C.A. 1953, 41-12-21.1.

Timothy R. Hanson, Salt Lake City, for intervenor and appellant.

David Bert Havas, pro se.

STEWART, Justice:

[1] On this appeal we decide whether an automobile liability insurance carrier providing uninsured motorist coverage may intervene as of right as a party defendant in a tort action between its insured and an uninsured motorist tortfeasor. The trial court denied intervention; we reverse.

The facts are not in dispute. In July of 1977 plaintiff, Barbara Lima, was involved in an automobile collision with defendant

Earl Chambers, an uninsured motorist. Lima brought a negligence action against Chambers, an answer was filed, and discovery ensued. Thereafter, Chambers' attorney withdrew from the case. The following day Chambers executed an affidavit prepared by plaintiff's attorney acknowledging that he was uninsured and admitting that he had caused the collision with plaintiff Lima. On the basis of that admission, plaintiff moved for and obtained a summary judgment on the issue of defendant's liability, leaving the question of damages to be decided at trial. Thereafter, plaintiff's liability insurer, Prudential Property & Casualty Insurance Company (Prudential), which is contractually liable for a judgment against an uninsured motorist, moved to intervene as a party defendant in the litigation of the damages issue. Apparently considering our prior decision in *Kesler v. Tate*, 28 Utah 2d 355, 502 P.2d 565 (1972), to be controlling, the trial court denied the motion to intervene.

Prudential appeals, urging that we overrule *Kesler* and allow intervention because (1) it will be bound by a judgment against the uninsured motorist and denial of intervention therefore violates its constitutional right to due process; and (2) Rule 24, Utah R.Civ.P., governing intervention, entitles it to intervene as of right. Plaintiff Lima counters that *Kesler* was decided correctly, that Prudential has only a potential contractual obligation to plaintiff with no interest in the pending tort action, and therefore, that neither due process nor Rule 24 requires Prudential's intervention.

I.

Utah Code Ann., 1953, § 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 because of bodily injury, sickness or disease, including death, resulting therefrom. [Emphasis added.]

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.

Because of the direct effect of the tort litigation on the insurer's contractual duty, both insureds and insurers have sought, under certain circumstances, to involve the insurer in the tort litigation. Insureds have pressed for intervention to make the tort judgment binding on the insurer, and insurers have sought intervention to make certain the tort issues are fully and fairly litigated. Three different attempts have been made in this Court to involve an uninsured motorist insurance carrier in the tort litigation between the insured and the uninsured tortfeasor.

The first attempt was in *Christensen v. Peterson*, 25 Utah 2d 411, 483 P.2d 447 (1971). There we held that to avoid the disclosure of insurance coverage to the jury, to prevent the mixture of a contract action with a tort action, and to avoid placing the insurer in a position hostile to its own insured, a plaintiff could not join its insurer as a party defendant in the tort action against the uninsured tortfeasor. The following year in *Kesler v. Tate*, 28 Utah 2d 355, 502 P.2d 565 (1972), we addressed the precise issue raised again on this appeal: Whether the insurer may, on its own motion, intervene as a party defendant in the

tort action between the insured and the uninsured tortfeasor. There we concluded that *Christensen v. Peterson* was controlling and, without discussing whether the requirements of Rule 24 were satisfied, held that the insurer could not intervene. Most recently, in *Wright v. Brown*, Utah, 574 P.2d 1154 (1978), we held that the nonparty insurer lacked standing to appeal the default judgment entered in favor of the insured against the uninsured tortfeasor. Thus, one-by-one we have closed all three doors to possible insurer participation in the tort litigation and have thereby effectively precluded the insurer from ensuring that its contractual obligation is properly and fairly invoked. As the law now stands, the insurer may not be joined, may not intervene, and may not appeal. We are here asked to open only the door of intervention.

II.

The overwhelming majority of courts have allowed an uninsured motorist insurance carrier to intervene in a tort action between its insured and an uninsured tortfeasor. See, e.g., *Oliver v. Perry*, 293 Ala. 424, 304 So.2d 583 (1974); *State Farm Mutual Automobile Ins. Co. v. Brown*, 114 Ga. App. 650, 152 S.E.2d 641 (1966); *Wert v. Burke*, 47 Ill.App.2d 453, 197 N.E.2d 717 (1964); *Indiana Ins. Co. v. Noble*, 148 Ind. App. 297, 265 N.E.2d 419 (1970); *Rawlins v. Stanley*, 207 Kan. 564, 486 P.2d 840 (1971); *Barry v. Keith*, Ky., 474 S.W.2d 876 (1971); *State v. Craig*, Mo.App., 364 S.W.2d 343 (1963); *Dominici v. State Farm Mut. Ins. Co.*, 143 Mont. 406, 390 P.2d 806 (1964); *Heisner v. Jones*, 184 Neb. 602, 169 N.W.2d 606 (1969); *Allstate Ins. Co. v. Pietrosh*, 85 Nev. 310, 454 P.2d 106 (1969); *Kirouac v. Healey*, 104 N.H. 157, 181 A.2d 634 (1962); *Keel v. MFA Ins. Co.*, Okl., 553 P.2d 153 (1976); *Glover v. Tennessee Farmers Mutual Ins. Co.*, 225 Tenn. 306, 468 S.W.2d 727 (1971). See also 7 Am.Jur.2d *Automobile Insurance* § 331 (1980); Annot., 95 A.L.R.2d 1330 (1964); Comment, *Insurer Intervention in Uninsured Motorist Cases*, 55 Ind.L.J. 717 (1980). The weight of these authorities is sufficient to persuade us to reevaluate our construction of Rule 24, upon which the outcome of this case rests.

Intervention of right is asserted in this case under Rule 24(a)(2).¹ By the terms of that rule, an applicant must be allowed to intervene if four requirements are met: 1) the application is timely; 2) the applicant has an interest in the subject matter of the dispute; 3) that interest is or may be inadequately represented; and 4) the applicant is or may be bound by a judgment in the action. The timeliness of the application to intervene in the hearing on damages in this case has not been challenged and is deemed satisfied. The remaining requirements are discussed in order.

1. To justify intervention, the party seeking intervention must demonstrate a direct interest in the subject matter of the litigation such that the intervenor's rights may be affected, for good or for ill. In *State v. Craig*, Mo.App., 364 S.W.2d 343 (1963), the court stated:

[The required] interest does not include a mere, consequential, remote or conjectural possibility of being in some manner affected by the result of the original action. It must be such a direct claim upon the subject matter of the action that the intervenor will either gain or lose by direct operation of the judgment to be rendered.

Id. at 346. See also *State Farm Mutual Automobile Ins. Co. v. Brown*, 114 Ga.App. 650, 152 S.E.2d 641, 646 (1966); *Commercial Block Realty Co. v. United States Fidelity & Guaranty Co.*, 83 Utah 414, 28 P.2d 1081 (1934).

The court in *State v. Craig*, *supra*, held that an insurer providing uninsured motorist insurance has such a direct and immediate interest because the insurer "should have the right to dispute the questions which make it liable on its contract." 364 S.W.2d at 347. *Heisner v. Jones*, 184 Neb. 602, 169 N.W.2d 606 (1969), relied on that same interest in allowing intervention:

It is apparent that the questions litigated [in] the action between the insured and

1. Rule 24(a) Intervention of Right Upon timely application anyone shall be permitted to intervene in an action (2) when the representation of the applicant's interest by existing

the uninsured tort-feasor, for liability and damages, are the identical issues which determine liability of Protective under the insurance policy and which give rise to Protective's contractual duty to pay the insured. Protective has a direct interest in the matter of litigation within the meaning of our intervention statute.

169 N.W.2d at 611. *Vernon Fire and Casualty Ins. Co. v. Matney*, 170 Ind.App. 45, 351 N.E.2d 60 (1976), identified the interest in similar terms:

Clearly the basis of the action by Matney [insured] against Vernon [insurer] is contractual. However, any action on the contract is inseparably tied to the legal liability of Thoms [uninsured tortfeasor]. Therefore, the initial action in which the liability of Thoms is determined is but the first link in an unbroken chain leading to the contractual liability of Vernon

Id. 351 N.E.2d at 64. See also *Continental Ins. Co. v. Smith*, 115 Ga.App. 667, 155 S.E.2d 713, 715 (1967). In requiring the insurer to pay its insured what the insured is "legally entitled" to recover from the uninsured tortfeasor, within the limits of the insured's policy, the legislature must have intended that the insurer would "take whatever legal steps were necessary and fitting . . . to insure that the judgment against the uninsured motorist . . . was rendered on legal and sufficient evidence." *State Farm Mutual Automobile Ins. Co. v. Glover*, 113 Ga.App. 815, 820, 149 S.E.2d 852, 856 (1966).

We agree with the reasoning of the authorities cited and conclude that since the extent of Prudential's contractual liability to its insured will be determined by the amount of damages awarded to its insured in the tort action, Prudential stands to lose by the operation of that judgment, and therefore has sufficient interest in that action to justify intervention.

2. The next issue is whether Prudential's interest is or may be inadequately

parties is or may be inadequate and the applicant is or may be bound by a judgment in the action

represented by the existing parties. Since Prudential, if allowed, would intervene as a party defendant, the question is narrowed to whether the uninsured motorist, Chambers, would adequately represent Prudential's interest in actively litigating the issue of damages. Prudential argues that its interest is inadequately represented because Chambers lacks the assistance of counsel and proposes to litigate the damages issue pro se. Because of Chambers' ready admission of liability resulting in the summary judgment establishing Chambers' liability, Prudential has a reasonable basis for anticipating that the damages issue will not be fully and fairly litigated without Chambers' personal liability for the judgment provides sufficient incentive to keep the damages low. Lima also argues that the burden of proof placed on him, coupled with the close supervision of the trial court, will ensure a just judgment.

[2] Adequacy of representation generally turns on whether there is an identity or divergence of interest between the potential intervenor and an original party and on whether that interest is diligently represented. *Alsbach v. Bader*, Mo.App., 616 S.W.2d 147, 151 (1981); Annot., 84 A.L.R.2d 1412 (1962). Generally, where the applicant's interest is different from that of an existing party, the applicant's interest is not represented. While Prudential's interest appears on the surface to be the same as Chambers', the interests are likely divergent. Chambers' primary interest appears to be not in minimizing damages, but in bringing the whole matter to a close as soon as possible, with little regard for the amount of damages awarded. In this case, litigation of the damage issue by Chambers on a pro se basis does not provide adequate representation of Prudential's interest. Although Chambers will be personally liable for the judgment and technically obligated to reimburse Prudential, that does not suffice to assure adequate representation of Prudential's interest.

[3] Closely related to the question of similarity of interests is whether the interest of the applicant, even if assumed to be

represented, is represented diligently. Representation is considered to be inadequate if the original party is not diligent in the prosecution or defense of the action or allows a default judgment to be entered. Annot., 84 A.L.R.2d 1412 at § 5 (1962). The close cooperation between plaintiff and defendant in resolving the liability issue in this case evidences an absence of the adverse relationship essential to a full and fair litigation of the damage issue. Moreover, whereas a disinterested attitude of counsel for an uninsured motorist may affect the diligence of representation, an absence of counsel for Chambers in the instant case creates a strong presumption against adequate representation. Proper representation would undoubtedly be hampered further by Chambers' apparent inability to read.

Finally, we reject plaintiff Lima's argument that a fair result is ensured by her having to meet the burden of proof and by court supervision. Neither position has merit. The burden of proof requirement is effective only when a case is actually and fairly litigated in a truly adversarial trial. As for court supervision, we need only remark that it is not the role of a judge to be an advocate. Such a concept is fundamentally contrary to the nature of our adversary system. The court in *State v. Craig*, Mo.App., 364 S.W.2d 343 (1963), responded in like manner to the suggestion that the interests of a defaulting defendant (and hence the interests of the potential intervenor) were adequately protected by the court:

We think the argument that relator's interest will be "adequately represented" in respect to Count I because the court will require proof of plaintiff's cause is specious. It is not the duty of the trial court to subpoena and interrogate witnesses who might contradict the testimony of plaintiffs or those who might testify to compelling facts which show that plaintiff is not "legally entitled to recover" the damages he claims. The court cannot, and should not, act as attorney for the defaulting defendants. Every

practicing lawyer knows that, in so far as the issues of fact are concerned, the defaulting defendants are not "adequately represented."

Id. at 346

We therefore conclude that Prudential's interest is not adequately represented.

3. Finally, we must decide whether Prudential is or may be bound by a judgment in the tort action. Prudential argues that it is "probably bound" by a judgment against the uninsured tortfeasor. Plaintiff Lima argues that a judgment binds only the defendant Chambers, and not Prudential, whose contractual obligation is merely triggered by the tort judgment.

[4] A major conflict of authority exists on the meaning of the word "bound." Annot., 84 A.L.R.2d 1412 at § 6 (1962). Some courts have applied a strict interpretation requiring a showing that the judgment would be *res judicata* as to petitioner for intervention, thus preventing the retrial of decided issues. Other courts have applied a more liberal construction requiring only a showing that the applicant would be bound in a practical sense. The federal intervention rule and many states' rules have been amended to clear up this ambiguity by deleting the "bound" requirement and requiring only that the judgment in some way impair the applicant's interest. This construction is now applied in the majority of jurisdictions, either under expressly reworded rules of intervention or through a liberal construction of the term "is or may be bound." We are of the opinion that Rule 24 should be liberally construed to achieve the purpose of eliminating unnecessary duplication of litigation. *Centurian Corp. v. Cripps*, Utah, 577 P.2d 955 (1978); *Bartholomew v. Bartholomew*, Utah, 548 P.2d 238 (1976). The language of the rule requiring only that a petitioner show that he "may be

bound," clearly contemplates that the rule should be construed broadly enough to further both fairness and economy in judicial administration.

[5] We hold that because 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 24.²

Having concluded that the four requirements for intervention of right have been met, we hold that Prudential should be allowed to intervene in the pending damages litigation between its insured and the uninsured tortfeasor. Having resolved the issue at hand on statutory grounds, we need not address Prudential's constitutional argument concerning denial of due process.

In allowing intervention in this case, we necessarily overrule *Kesler v. Tate*, *supra*, and thereby partially fulfill Chief Justice Hall's foreshadowing comment in *Wright v. Brown*, *supra* at 1155, that "the time [could be] nigh to alter the course of the law as set forth in *Christensen v. Peterson* and *Kesler v. Tate*."

III.

We do not hold that in each and every uninsured motorist case intervention must be allowed. In each case it will be necessary for the trial judge to make an assessment of the adequacy of representation. If the defendant has counsel who actively litigates the case, intervention may not be appropriate.

[6-9] When intervention is permitted, the intervenor must accept the pending ac-

2. We need not decide whether Prudential might be bound by the judgment under the doctrines of *res judicata* or estoppel. That question cannot arise until it is established that there is a right to intervene. Presumably, a nonparty insurer could not be bound in a *res judicata* sense unless it had the right and opportunity to intervene and chose not to. See *Wells v. Hartford*

Accident and Indemnity Co., Mo., 459 S.W.2d 253 (1970), *Alsbach v. Bader*, Mo. App., 616 S.W.2d 147 (1981), *Dominici v. State Farm Mut. Ins. Co.*, 143 Mont. 406, 390 P.2d 806 (1964), *Allstate Ins. Co. v. Pietrosh*, 85 Nev. 310, 454 P.2d 106 (1969), *Indiana Ins. Co. v. Noble*, 148 Ind. App. 297, 265 N.E.2d 419 (1970)

tion as he finds it; his right to litigate is only as broad as that of the other parties to the action. *E.g.*, *Beard v. Jackson*, Mo. App., 502 S.W.2d 416, 419 (1973). The identity of the intervening insurance company should be made known to the jury, and an intervening insurer must disclose to its insured that their respective interests may be conflicting.³ The insurer must not be allowed to use against its insured any information whatsoever gained by reason of the insurer-insured relationship. See *Barry v. Keith*, Ky., 474 S.W.2d 876 (1971). Finally, if the insurer has an obligation to defend the insured, for example as a defendant on a counterclaim by the uninsured motorist, the insured should be allowed to choose his own independent counsel who must then be compensated by the insurer.

The order of the trial court denying intervention is reversed and the case remanded for further proceedings. No costs.

HALL, C.J., and OAKS, HOWE and DURHAM, JJ., concur.



In the Matter of the Mental Condition of Lewis Lee GILES.

No. 17976.

Supreme Court of Utah.

Nov. 29, 1982.

Mental patient appealed from ruling of the Fourth District Court, Utah County, David Sam, J., ordering his involuntary hospitalization. The Supreme Court, Howe, J., held that: (1) the action was not mooted by

defendant's release from the hospital, and (2) necessary elements for involuntary hospitalization existed at time of patient's commitment hearing.

Affirmed.

Stewart, J., concurred in result.

1. Action ⇐6

Doctrine of collateral legal consequences, which is chiefly applied in criminal cases where absence or presence of those consequences may determine a criminal's chance of rehabilitation or recidivism, is equally applicable to patients of mental hospitals who face similar deprivations of liberty and whose commitment and hospitalization must stand scrutiny on the merits when challenged.

2. Action ⇐6

In light of collateral consequences that may have been imposed upon former mental patient were he to have faced future confrontations with legal system, action challenging his involuntary civil commitment was not mooted by his release from hospital.

3. Mental Health ⇐439

In mental patient's action challenging his involuntary hospitalization, there was evidence from which trial court could have found, beyond a reasonable doubt, that, at time of his hearing, patient suffered from a mental illness as defined by statute, posed an immediate danger of physical injury to others or himself, and lacked ability to engage in a rational decision-making process regarding acceptance of mental treatment, that no less restrictive alternative existed to a court order of hospitalization, and that hospital could provide patient with treatment that was adequate and appropriate to his conditions and needs. U.C.A.1953, 64-7-28(1), 64-7-36(10).

3. We recognize that some conflict of interests appears to be inevitable. However, the interest of fairness and judicial economy outweigh, in our view, the potential difficulties arising from a conflict of interest. See, *e.g.*, *Oliver v. Perry*, 293 Ala. 424, 304 So.2d 583 (1974). *Vernon*

Fire and Casualty Ins. Co. v. Matney, 170 Ind. App. 45, 351 N.E.2d 60, 65 (1976); *Alsbach v. Bader*, Mo.App., 616 S.W.2d 147, 153-54 (1981); *Heisner v. Jones*, 184 Neb. 602, 169 N.W.2d 606, 612 (1969).