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IN THE SUPREME COURT FOR THE STATE OF UTAH

JODY ANDERSON, individually and as Guardian of her minor children SASHA BREE ANDERSON and CONLEY KARL ANDERSON,	:	
Plaintiffs/Appellants,	:	Supreme Court No. 20020473-SC Trial Court No. 980700756
vs.	:	
UNITED PARCEL SERVICE, an Ohio corporation; and LIBERTY MUTUAL INSURANCE COMPANY, a Massachusetts company,	:	Oral Argument Priority No. 12
Cross Claim Defendants/ Appellees.	:	

BRIEF OF APPELLANTS JODY ANDERSON, individually and as Guardian of her minor children SASHA BREE ANDERSON and CONLEY KARL ANDERSON

APPEAL FROM AN ORDER IN THE SEVENTH JUDICIAL DISTRICT COURT
OF CARBON COUNTY, STATE OF UTAH,
THE HONORABLE BRYCE K. BRYNER, PRESIDING

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TABLE OF CONTENTS

Page

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUES PRESENTED AND STANDARD OF REVIEW 1

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 4

ARGUMENT

I. UTAH'S RULES OF STATUTORY CONSTRUCTION DICTATE EQUITABLE SUBROGATION MUST GOVERN THE DISTRIBUTION OF WRONGFUL DEATH DAMAGES PAID BY THIRD PARTIES TO HEIRS OF DECEASED WORKERS 5

A. THE PLAIN MEANING AND PURPOSE OF THE WCA'S SUBROGATION PROVISION IS TO PREVENT AN INJURED WORKER'S DOUBLE RECOVERY OF COMPENSATION IN ADDITION TO COMPLETE THIRD PARTY DAMAGES 6

B. THE PLAIN MEANING AND PURPOSE OF SECTION 5 IS TO PRESERVE THE RIGHT TO RECOVER DAMAGES FOR WRONGFUL DEATH WHILE MAINTAINING AN EMPLOYER'S LIMITED LIABILITY FOR WORKPLACE INJURIES 8

II. APPLICATION OF EQUITABLE SUBROGATION IS REQUIRED TO PRESERVE THE PLAIN MEANING AND INTENT OF SECTION 5 AND THE WCA, BOTH OF WHICH WOULD BE FRUSTRATED BY INSURERS' CLAIM TO FIRST DOLLAR REIMBURSEMENT FROM THE ANDERSONS' WRONGFUL DEATH RECOVERY 10

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Machine-generated OCR, may contain errors.

TABLE OF CONTENTS

Page

III. THE TRIAL COURT MUST DETERMINE EQUITABLE DISTRIBUTION OF WRONGFUL DEATH DAMAGES RECOVERED FROM THIRD PARTY TORTFEASORS **18**

CONCLUSION 19

ADDENDUM

Utah Code Ann. § 34A-2-106

Ruling on UPS' and Liberty Mutual 's Motion to Dismiss

Order of Dismissal

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TABLE OF AUTHORITIES
(Constitutional Provisions)

Page

Article XVI, Section 5 of the Utah Constitution 1, 2, 3, 4, 7, 8

(Cases Cites)

AIK Selective Self Ins. Fund v. Bush, 74 S.W.3d 251 (Ky. 2002) 15

Allstate Ins. Co. v. Bliss, 725 P.2d 1330, 1334 (Utah 1986) 7

Baio v. Commercial Union Ins. Co., 410 A.2d 502, 506 (Del. 1979) 16-17

Berry v. Beech Aircraft Corp., 717 P.2d 670, 684 (Utah 1985) 9

Cart II v. General Elec. Co., 506 S.E.2d 96 (W.Va. 1998) 15

City of Logan v. Utah Power & Light Co., 796 P.2d 697, 700 (Utah 1990) 5

Cole v. Jordan Sch. Dist., 899 P.2d 776, 778 (Utah 1995) 6

Esquivel v. Labor Comm. of Utah, 2000 UT 66 ¶ 11; 7 P.3d 777, 779 . . . . 1, 2, 5, 7

General Accident Ins. Co. v. Jaynes, 33 S.W.3d 161, 166 (Ark. 2000) 17

Graves v. Cocke Co., 24 S.W.3d 285 (Tenn. 2000) 15

Henrie v. Rocky Mtn. Pack. Corp., 196 P.2d 487, 494 (Utah 1948) 8

Hill v. State Farm Mut. Auto. Ins. Co., 765 P.2d 864 (Utah 1988) 12, 13

Hirpa v. IHC Hosp., Inc., 948 P.2d 785, 794 (Utah 1997) 9

Laney v. Fairview City, 2002 UT 79, *34 n.9 14

Lanier v. Pyne, 508 P.2d 38 (Utah 1973) 15

Liberty Mut. Ins. Co. v. Garry, 574 N.W.2d 895 (S.D. 1998) 15

Malan v. Lewis, 693 P.2d 661, 667 (Utah 1984) 8-9

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TABLE OF AUTHORITIES
(Cases Cited)

Page

Meehan v. Philadelphia, 136 A.2d 178, 181 (Pa. 1957) 16

Morrill v. J & M Constr. Co., Inc., 635 P.2d 88, 89 (Utah 1981) 9

Nelson v. Rothering, 496 N.W.2d 87 (Wis. 1993) 15

Neumann v. American Family Ins., 563 N.W. 2d 791 (Neb. 1997) 15

O'Keefe v. Utah St. Retirement Bd., 956 P.2d 279, 281 (Utah 1998) 5

Oliveras v. Caribou-Four Corners, Inc., 598 P.2d 1320 (Utah 1979) 7, 8, 9, 15

Salt Lake City v. Ohms, 881 P.2d 844, 850 (Utah 1994) 5

Star v. Industrial Comm'n, 615 P.2d 436, 437 (Utah 1980) 9

State Compensation Ins. Fund v. McMillan, 31 P.2d 347 (Mont. 2001) 13

Waith v. North Dakota Work. Comp. Bureau, 409 N.W.2d 94 (N.D. 1987). 15

Worthen v. Shurtleff & Andrews, Inc., 426 P.2d 223, 226 (Utah 1967) 15-16

Zacher v. American Ins. Co., 794 P.2d 335, 338 (Mont. 1990) 13

(Statutes Cited)

Utah Code Ann. § 34A-2-105(1) 6
Utah Code Ann. § 34A-2-106 2
Utah Code Ann. § 34A-2-106(1) 7
Utah Code Ann. § 34A-2-106(2)(a)(1) 3, 16
Utah Code Ann. § 34A-2-106(5) 7
Utah Code Ann. § 75-7-201 18
Utah Code Ann. § 75-5-401 18
Utah Code Ann. § 78-2-2 (3)(j) 1

(Other)

Editorial Board Comment to *Utah Code Ann.* § 75-5-407 18

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STATEMENT OF JURISDICTION

This appeal is in a civil case from a ruling of the Seventh Judicial District Court, Carbon County, the Honorable Bryce K. Bryner presiding. As such, the Utah Supreme Court has jurisdiction pursuant to *Utah Code Ann.* § 78-2-2 (3)(j).

STATEMENT OF ISSUES PRESENTED AND STANDARD OF REVIEW

Whether Article XVI, Section 5 of the Utah Constitution forbids Insurers from demanding first dollar reimbursement of compensation paid to the Andersons from their third party wrongful death recovery where such reimbursement would completely abrogate the Andersons' recovery?

This is an issue of law reviewed for correctness. *Esquivel v. Labor Comm. of Utah*, 2000 UT 66 ¶ 11; 7 P.3d 777, 779. It was preserved below in the Andersons' Opposition to Insurers' Motion to Dismiss (R. 155).

Whether the Andersons stated a cause of action against Insurers for application of equitable subrogation to disbursement of any wrongful death recovery in the action against the third party tortfeasors?

This is an issue of law reviewed for correctness. *Esquivel v. Labor Comm. of Utah*, 2000 UT 66 ¶ 11; 7 P.3d 777, 779. It was preserved below in the Andersons' Opposition to Insurers' Motion to Dismiss (R. 155).

Whether the trial courts should determine the equitable distribution of any third party

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recovery where an employer seeks subrogation and assets are insufficient to make the wrongful death heirs whole?

This is an issue of law reviewed for correctness. *Esquivel v. Labor Comm. of Utah*, 2000 UT 66 ¶ 11; 7 P.3d 777, 779. It was preserved below in the Andersons' Opposition to Insurers' Motion to Dismiss (R. 155).

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

Article XVI, Section 5. [Injuries resulting in death - Damages]

The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law.

Utah Code Ann. § 34A-2-106

Injuries or death caused by wrongful acts of persons other than employer, officer, agent or employee of employer – Rights of employer or insurance carrier in cause of action – Maintenance of action – Notice of intention to proceed against third party – Right to maintain action not involving employee-employer relationship – Disbursement of proceeds of recovery – Exclusive remedy. (Entire text set forth in addendum - attached)

STATEMENT OF THE CASE

On April 4, 1998, Karl Anderson was killed while in the course and scope of his employment with United Parcel Service ("UPS") (R. 129). Appellant Jody Anderson is the

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widow of Karl Anderson and the personal representative of his estate (R. 129). Mrs. Anderson commenced litigation on behalf of herself and her two children against the parties responsible for Karl's death but found those parties only insured for losses up to $100,000.00 and with minimal other assets (R. 130). Recovery of the $100,000 would not make the Andersons whole. For example, Mrs. Anderson's expert estimated that merely the economic losses arising out of her husband's death were $926,434.00 (R. 168-171).

Faced with no recovery for her losses and those of her minor children, Mrs. Anderson attempted to negotiate the worker's compensation lien with Liberty Mutual Insurance and UPS (R. 131). Despite UPS's fiduciary responsibilities for Mrs. Anderson's cause of action under *Utah Code Ann.* § 34A-2-106(2)(a)(I), UPS refused to negotiate settlement of the case in good faith (R. 131). Rather, Liberty Mutual demanded its lien be paid in full before any disbursement to Karl Anderson's widow or minor children (R. 131). The result being Mrs. Anderson and her son would continue receiving worker's compensation, her daughter would receive nothing and the employer would receive all of the recovery after attorney's fees.

Mrs. Anderson joined UPS and Liberty Mutual as involuntary plaintiffs and cross-claimed for a declaratory judgment that their subrogation claim was controlled by Article XVI, Section 5 of the Utah Constitution and the principles of equitable subrogation (R. 124). UPS moved to dismiss the cross claim which the lower court granted on May 31, 2002 (R. 140)

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This appeal arises from an Order of Dismissal entered by the Honorable Bryce K. Bryner in the Seventh Judicial District Court for the State of Utah, Carbon County (R. 202). The underlying wrongful death action remains before the trial court.

SUMMARY OF THE ARGUMENT

Determination of this appeal is governed by Utah's rules of statutory construction. Those rules demand the statutes and constitutional provisions at issue be given their plain meaning, be construed in accordance with their original intent, and avoid unnecessary constitutional conflict. The trial court's ruling which granted appellee insurers first dollar reimbursement failed to comply with any of these rules. On the other hand, appellants' appeal for application of equitable subrogation to third party wrongful death recoveries comports with them all.

Application of equitable subrogation would prevent any double recovery as intended by Workers Compensation Act. Only equitable subrogation could prevent a double recovery either to the heirs of deceased workers, or to workers compensation insurers who have been paid premiums to undertake the risk of injury or death. Equitable subrogation would also continue to allow employers to pay no fault compensation to injured workers and protect employers from damage suits as intended by Article XVI, Section 5 of the Utah Constitution. Only application of equitable subrogation, moreover, would maintain the plain and ordinary meaning of "compensation" and "damages" as used in the WCA and Section 5. In contrast,

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the trial court's ruling places the WCA's reimbursement provision in direct conflict with Section 5. The trial court's ruling places limitations on a wrongful death recovery for "damages" which Section 5 strictly forbids.

Accordingly, equitable subrogation must be applied to wrongful death recoveries from third parties. Where such a recovery makes the heirs whole, an employer or insurer would be entitled to excess funds to offset its compensation payments. However, if those heirs are not made whole, it is they who are entitled to damages from the third party tortfeasor.

ARGUMENT

I. UTAH'S RULES OF STATUTORY CONSTRUCTION DICTATE EQUITABLE SUBROGATION MUST GOVERN THE DISTRIBUTION OF WRONGFUL DEATH DAMAGES PAID BY THIRD PARTIES TO HEIRS OF DECEASED WORKERS

Resolution of this appeal is governed by certain well-defined rules under Utah law. First, Utah's Constitution and statutes "are to be construed according to their plain language." *O'Keefe v. Utah St. Retirement Bd.*, 956 P.2d 279, 281 (Utah 1998); *Salt Lake City v. Ohms*, 881 P.2d 844, 850 (Utah 1994). Second, the goal of any such construction "is to give effect to the legislature's intent based on the purpose of the statute." *Esquivel*, 2000 UT 66; 7 P.3d at 781. Finally, "[w]hen interpreting statutes, every effort should be made to interpret them as being consistent with the dictates of the constitution." *City of Logan v. Utah Power & Light Co.*, 796 P.2d 697, 700 (Utah 1990). Hence, "it is [the Supreme Court's] policy to interpret a statute if possible to avoid potential constitutional conflicts."

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Cole v. Jordan Sch. Dist., 899 P.2d 776, 778 (Utah 1995).

The parties' arguments must be governed by these principles. Here, the Andersons' proposed construction recognizes the plain meaning of the terms used in Utah's Constitution and the Utah Workers Compensation Act ("WCA"), whereas UPS and Liberty Mutual ("Insurers") simply ignore terms they find contrary to their position. The Andersons' argument also comports with the intent of the WCA. Insurers, on the other hand, ignore the intent and purpose of the Act to seek only their own benefit. Finally, the Andersons' position is consistent with the dictates of the Constitution and the only construction which would avoid Constitutional conflict between Section 5 and the WCA. Therefore, as set forth more fully below, Utah's rules of statutory construction dictate equitable subrogation must govern the distribution of wrongful death damages under the WCA.

A. THE PLAIN MEANING AND PURPOSE OF THE WCA'S SUBROGATION PROVISION IS TO PREVENT AN INJURED WORKER'S DOUBLE RECOVERY OF COMPENSATION IN ADDITION TO COMPLETE THIRD PARTY DAMAGES

The Worker's Compensation Act has been the law in Utah since 1917. For injured workers, it is "the exclusive remedy against the employer." *Utah Code Ann.* § 34A-2-105(1). The Act provides compensation to injured employees, regardless of fault. The Act, however, does not eliminate an injured employee's ability to additionally sue third parties whose negligence caused their injuries. Yet, to prevent these two separate claims (one against the employer and the other against a third party) from resulting in a double recovery, Section

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34A-2-106(5) provides the employer a subrogation interest in the third party recovery to recover compensation paid to the injured employee.

Specifically, 34A-2-106(5) directs any damages obtained in a third party action must be disbursed accordingly: (1) costs and attorneys' fees are paid; (2) "[t]he person liable for compensation payments shall be reimbursed;" and (3) any remaining damage proceeds are left for the injured worker and his dependents. According to this Court, "[t]he purpose of the right of reimbursement established by this section is only to prevent double recovery by the employee or his or her dependents." *Allstate Ins. Co. v. Bliss*, 725 P.2d 1330, 1334 (Utah 1986); *Oliveras v. Caribou-Four Corners, Inc.*, 598 P.2d 1320, 1325 (Utah 1979); *Esquivel v. Labor Comm'n*, 2000 UT 66; 7 P.3d 777, 781. The purpose and intent of the provision is thus clear, to prevent double recovery of both compensation and complete third party damages.

It should be further noted the WCA expressly distinguishes between "compensation" and "damages." Specifically, the Act provides that when injured,

(a) the injured employee, or in the case of death, the employee's dependants, may claim compensation; **and**

(b) the injured employee or the employee's heirs or personal representative may have an action for damages against the third person.

Utah Code Ann. § 34A-2-106(1). Article XVI, Section 5 of the Utah Constitution uses the

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same terms. Insurers attempt to bury any different meaning of the terms, but statutory construction demands they be given their plain and obvious meanings. The distinct meaning of "compensation" and "damages" has been described by this Court:

> Compensation is a concept wholly different from that of damages. Damages are based upon fault, are generally limited only by the findings and conscience of the jury, and in death cases are payable to heirs or personal representatives without regard to dependency. Compensation, on the other hand, generally has no relation to fault, is fixed or limited by statute, and is payable to dependents only.

Henrie v. Rocky Mtn. Pack. Corp., 196 P.2d 487, 494 (Utah 1948); *Oliveras*, 598 P.2d at 1323. Here, the WCA plainly distinguishes between the employee's claim against his employer for "compensation", and his claim for "damages" against a negligent third party.

B. THE PLAIN MEANING AND PURPOSE OF SECTION 5 IS TO PRESERVE THE RIGHT TO RECOVER DAMAGES FOR WRONGFUL DEATH WHILE MAINTAINING AN EMPLOYER'S LIMITED LIABILITY FOR WORKPLACE INJURIES

Since its original draft, the Utah Constitution has protected the right to sue and collect damages for wrongful death. In its original form, Article XVI, Section 5 ("Section 5") read,

> The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation.

This Court has repeatedly stated the purpose of Section 5 is "to prevent the abolition of the right of action for a wrongful death 'whether in a wholesale or piecemeal fashion.'" *Malan*

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v. Lewis, 693 P.2d 661, 667 (Utah 1984); *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 684 (Utah 1985); *Hirpa v. IHC Hosp., Inc.*, 948 P.2d 785, 794 (Utah 1997).

In 1921, in specific response to passage of the WCA, Section 5 was amended. The amendment added, "except in cases where compensation for injuries resulting in death is provided for by law." As stated by this Court, "[t]he purpose of the 1921 amendment to the Constitution was to permit the limitation of an employer's liability for fatal work-related injuries to the payment of death benefits under the Act." *Oliveras*, 598 P.2d at 1323; *see also Star v. Industrial Comm'n*, 615 P.2d 436, 437 (Utah 1980); and *Morrill v. J & M Constr. Co., Inc.*, 635 P.2d 88, 89 (Utah 1981). As clearly stated, the amendment was meant to limit an employer's liability to compensation. The amendment allowed the WCA to substitute an employer's payment of compensation for an injured worker's civil action against his employer for wrongful death. *Berry*, 717 P.2d at 680 (finding substitute legislative remedy must provide comparable protection to claimant's person or property). Otherwise, the amendment left damage recoveries untouched. Hence, damages for wrongful death still could not be limited or restricted in any way.

Despite the narrow scope of the 1921 amendment, Insurers argue the amendment also granted the legislature, through the provisions of the WCA, the power to distribute wrongful death damages in third party actions. The trial court agreed ruling: "The constitutional provision is clear that recovery from the third party is not subject to limitation except in those

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instances where compensation is provided for by statute" (R. 200). As set forth below, this position ignores the plain distinction between a claim for compensation against an employer and a claim for damages against a third party. It ignores the intent and purpose of Section 5 and the WCA and places the WCA subrogation provision in direct conflict with the Constitution. Thus, the trial court's ruling should be overturned.

II. APPLICATION OF EQUITABLE SUBROGATION IS REQUIRED TO PRESERVE THE PLAIN MEANING AND INTENT OF SECTION 5 AND THE WCA, BOTH OF WHICH WOULD BE FRUSTRATED BY INSURERS' CLAIM TO FIRST DOLLAR REIMBURSEMENT FROM THE ANDERSONS' WRONGFUL DEATH RECOVERY

Equitable subrogation must be applied to third party recoveries in wrongful death cases to avoid Constitutional conflict between Section 5 and the WCA's subrogation provision. Insurers argue, on the other hand, the WCA grants them first dollar reimbursement from any third party proceeds when they have paid compensation. Based on the exception in Section 5, "except in cases where compensation for injuries resulting in death is provided for by law," Insurers argue the legislature was granted free reign in workers compensation cases to distribute wrongful death damages in any way it saw fit.

Both the plain meaning and purpose of Section 5, as well as the intent and purpose of the legislature in passing the WCA, are maintained by the application of equitable subrogation, while ignored by Insurers' demand of first dollar reimbursement. There is no question the amendment to Section 5 allowed the WCA to substitute an employer's

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compensation payments for the heirs' wrongful death action against the employer. But it did not give the legislature the power to limit or restrict damages obtained in third party lawsuits for wrongful death. Rather, third party claims for damages remain governed by the pre-amendment Section 5 which specifically states "the amount recoverable shall not be subject to any statutory limitation."

The plain meaning of the terms "compensation" and "damages" have been established and differentiated by this Court. Section 5 dictates the Andersons' right of action to recover damages against a tortfeasor cannot be abrogated nor subject to statutory limitation. The amendment to Section 5 excepts one class of persons from this otherwise sweeping mandate, i.e. an employer who pays workers compensation. The plain language of the amendment, however, does not affect the Andersons' claim against a tortfeasor responding in damages. In the instance of a tortfeasor responsible for damages, the Andersons' right to recover explicitly "shall not be subject to statutory limitation." Insurers' application of the WCA's subrogation provision cannot be read as anything other than a statutory limitation on the Andersons' third party damage recovery. To avoid this unacceptable conflict, equitable subrogation must be applied.

Equitable subrogation satisfies the intent and purpose of Section 5 and the WCA whereas first dollar reimbursement for Insurers does not. The intent and purpose of the WCA's subrogation provision is to prevent double recovery. It would be impossible for the

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Andersons to approach anything akin to a double recovery in this action. Specifically, the third party tortfeasors have a liability insurance limit of $100,000. Merely the economic losses in this case were professionally estimated at $926,434 (R. 168-171). After attorneys' fees in the third party action, the Andersons would recover approximately $65,000. In addition to these third party damages, the Andersons received their minimal compensation from Insurers. Sasha Anderson, daughter of decedent Karl Anderson, was fourteen (14) years old when her father was killed. She turned eighteen (18) on July 1, 2001. Conley Anderson, Karl Anderson's son, was twelve (12) years old when his father was killed. He will turn eighteen (18) on November 14, 2003. Mrs. Jody Anderson, their mother, received workers compensation benefits of $395 per week until Sasha turned 18, when the amount was reduced to $390 a week. Thus, the compensation paid by Insurers as a direct result of Sasha being a dependent under 18 was $5 a week. Insurers currently pay $5 in compensation benefits for Conley being under the age of 18. In total, Sasha received $845 for the death of her father. Conley will receive a total of $1,195.

There is clearly no danger of the Andersons reaping a windfall or double recovery from the wrongful death of Karl Anderson. In this sense, this case is very similar to *Hill v. State Farm Mut. Auto. Ins. Co.*, 765 P.2d 864 (Utah 1988), wherein the tortfeasors' insurance was clearly inadequate to respond to plaintiff in damages. Regardless, State Farm demanded full reimbursement of expenses paid to plaintiff which this Court rejected. This

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Court taught, "[s]ubrogation is an equitable doctrine and is governed by equitable principles. This doctrine can be modified by contract, but in the absence of express terms to the contrary, the insured must be made whole before the insurer is entitled to be reimbursed from a recovery from the third-party tortfeasor." *Id.* at 866. This Court's holding in *Hill* demonstrates there is no danger of double recovery where insurance proceeds plus the maximum contribution possible from a third party tortfeasor do not make a victim whole.

Double recovery will result, however, if Insurers are successful in convincing this Court the WCA and Section 5 dictate the reimbursement scheme they propound. Insurers collected premiums to cover the very risk of employee injury and/or death. Yet, if Insurers prevail, they will command all of the recovery in the third party action, while the children receive nothing from the tortfeasor. This is a result the Montana Supreme Court recently found unsupportable. In *State Compensation Ins. Fund v. McMillan*, 31 P.3d 347 (Mont. 2001), the Supreme Court determined the State Fund was not entitled to subrogation until the victim was made whole. Otherwise, "[i]t is State Fund who would reap a windfall under this argument . . . 'The insurer has been paid for the assumption of the liability for the claim, and . . . where the claimant has not been made whole, equity concludes that it is the insurer which should stand the loss, rather than the claimant.'" *Id.* at 350; *quoting Zacher v. American Ins. Co.*, 794 P.2d 335, 338 (Mont. 1990). Incredibly, Insurers ignore the irony of demanding double recovery in direct contravention of the very purpose of the WCA while

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leaving the actual victims of the tort with nothing. Application of equitable subrogation would prevent either party from obtaining a double recovery.

Similarly, equitable subrogation satisfies the intent and purpose of Section 5 which is to permit limitation of an employer's liability to payment of compensation under the WCA. This Court's most recent pronouncement on Section 5 stated the provision was amended, "to permit the legislature to fix the amount of compensation . . . for wrongful death, while continuing to prohibit the complete abrogation of the right to recover." *Laney v. Fairview City*, 2002 UT 79, *34 n.9. Here again, the legislature was given the power to limit an employer's liability to compensation, but was not granted authority to similarly limit damages. The Andersons' position does not abrogate an employer's protection nor increase an employers' exposure. As set forth in Section 5, UPS's liability has been and remains limited to payment of compensation for injuries resulting in death as provided for by the WCA.

Lastly, there is no support for Insurers' position that the legislature intended to make Insurers whole by requiring first dollar reimbursement at the expense of the actual victims of the wrongful death. The WCA is inherently an equitable arrangement. In exchange for limited liability, the employer pays compensation regardless of fault through a quick and inexpensive mechanism. It is simply unrealistic to argue the legislature intended this equitable arrangement to be twisted by Insurers to satisfy only their own interests.

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The Andersons recognize a number of courts have found their legislatures did abrogate subrogation's equitable foundations by statutorily granting insurance companies first dollar reimbursement.[1] However, as stated by this Court in *Oliveras*, "in neither of these cases was it necessary to reconcile a constitutional provision such as ours with the language of the applicable Workmen's Compensation Statute." *Oliveras*, 598 P.2d at 1325. In Utah, there is a constitutional provision protecting the Andersons' right to recover damages from third party tortfeasors which cannot be limited by statute.

There is also the professed understanding the WCA did not statutorily abrogate equity, but was rather intended to preserve it. For example, in *Lanier v. Pyne*, 508 P.2d 38 (Utah 1973), this Court stated in dicta,

> we think it reasonable to conclude that the rights conferred upon the insurance carrier should be regarded as secondary to the plaintiff's interest, and . . . should not be deemed to diminish or adversely affect the right of the injured employee to proceed against the third party. This is in accord with the purpose of the Workmen's Compensation Act, which is to benefit injured employees and not to impair or destroy natural rights which exist by reason of the common law to sue for the redress of wrongful acts.

Id. at 253. Similarly, in *Worthen v. Shurtleff & Andrews, Inc.*, 426 P.2d 223, 226 (Utah 1967), this Court stated, "[i]t is more reasonable to assume that the Legislature intended this

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[1] *See e.g. AIK Selective Self Ins. Fund v. Bush*, 74 S.W.3d 251 (Ky. 2002); *Graves v. Cocke Co.*, 24 S.W.3d 285 (Tenn. 2000); *Cart II v. General Elec. Co.*, 506 S.E.2d 96 (W.Va. 1998); *Liberty Mut. Ins. Co. v. Garry*, 574 N.W.2d 895 (S.D. 1998); *Neumann v. American Family Ins.*, 563 N.W. 2d 791 (Neb. 1997); *Nelson v. Rothering*, 496 N.W.2d 87 (Wis. 1993); and *Waith v. North Dakota Work. Comp. Bureau*, 409 N.W.2d 94 (N.D. 1987).

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application of the [WCA] which comports with its equitable purpose than one which would bring about a contrary result." These pronouncements are offered merely to show the WCA is equitable in its purpose, intent and design. That is why the WCA named Insurers as the "trustees" of the Andersons' action. *See Utah Code Ann.* § 34A-2-106(2)(a)(I). It is incomprehensible the legislature intended the trustee to put its interests ahead of the beneficiaries, especially with such tragic consequences.

There is simply no basis to assert the legislature attempted to broaden its authority under Section 5's amendment to include limitations on third party damages or to dispense with all equitable principles in the drafting of the WCA. It is more reasonable to assert the legislature did not intend insurance companies to attempt to justify their mendaciousness by claiming they had the legislature's blessing. Rather, Utah's Constitution and the WCA demonstrate an intent to do equity.

Utah, hence, is akin to courts which have preserved the equitable foundations of subrogation and workers compensation schemes in interpreting their statutes. For example, the Pennsylvania Superior Court ruled equitable principles still applied to the state's workers compensation statutes because, "subrogation is a matter of pure equity, and is never allowed where it would be inequitable to do so." *Meehan v. Philadelphia*, 136 A.2d 178, 181 (Pa. 1957). Similarly, in *Baio v. Commercial Union Ins. Co.*, 410 A.2d 502, 506 (Del. 1979), the Delaware Supreme Court held, "no matter what the form, subrogation is an equitable remedy

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and one who seeks it must, in turn, do equity. That applies in a subrogation claim brought under a Workmen's Compensation Statute." Likewise, the Arkansas Supreme Court found that even a statutorily created subrogation interest in the workers compensation carrier could never arise until the insured was made whole. *General Accident Ins. Co. v. Jaynes*, 33 S.W.3d 161, 166 (Ark. 2000).

In this case, applying equitable subrogation to third party wrongful death damage recoveries comports with the intent and purpose of both the WCA and Section 5 by preventing double recoveries; by preserving an employer's limited liability; and by upholding the equitable foundation of the WCA. In contrast, Insurers' construction accepted by the trial court has the actual, pragmatic effect of abrogating the third party wrongful death action of the Andersons who, absent Karl's death, would have had a lifetime of care, companionship and guidance. Under Insurers' proffered scenario, the Andersons are entitled to nothing for the death of their husband and father while Insurers collect premiums plus full reimbursement of any monies they paid out on those premiums. It is difficult to fathom the drafters of Section 5 and the WCA ever intended such an inequitable result.

Accordingly, the Andersons stated a cause of action below for the application of equitable subrogation to any wrongful death damages recovered from the third party tortfeasors. Insurers' Motion to Dismiss should have been denied and the trial court's dismissal must be overturned.

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III. THE TRIAL COURT MUST DETERMINE EQUITABLE DISTRIBUTION OF WRONGFUL DEATH DAMAGES RECOVERED FROM THIRD PARTY TORTFEASORS

As equitable subrogation must be applied to wrongful death recoveries from third party tortfeasors, it is the trial courts which must determine the equitable distribution of such recoveries. Pursuant to *Utah Code Ann.* § 75-7-201, "[t]he court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts. Proceedings which may be maintained under this Section are those concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters, involving trustees and beneficiaries of trusts." Thus, the trial courts must declare the respective interests of the parties in any third party recovery.

Furthermore, the trial courts are vested with the power to demand those respective interests be defined equitably. Under *Utah Code Ann.* § 75-5-401, *et seq.*, the trial courts have jurisdiction over the minor dependents' recovery from any third party settlement. As stated in the Editorial Board Comment to § 75-5-407, "[t]he section establishes a framework within which professionals, including the judge, attorney and physician, if any, may be expected to exercise good judgment in regard to the minor or disabled person who is the subject of the proceeding." Thus, the trial courts have the power to equitably adjust the interests of all parties to protect and preserve third party wrongful death recoveries. Only in such manner can the trial courts exercise their discretion under § 75-5-401, *et seq.* while

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still giving meaning to the provisions of the WCA.

Accordingly, the trial courts can and must equitably determine the parties' interests in any third party recoveries.

CONCLUSION

Equitable subrogation must be applied to wrongful death recoveries from third party tortfeasors under the WCA's reimbursement scheme. Only equitable subrogation would prevent double recoveries. Furthermore, only equitable subrogation would comply with the Constitution's mandate to limit an employer's liability to compensation for wrongful death while placing no restrictions on the heirs' recovery of damages from third party tortfeasors. The trial court's grant of first dollar reimbursement to Insurers, on the other hand, ignores the plain meaning and intent of these provisions and places the WCA in intolerable conflict with Section 5. Therefore, equitable subrogation must be applied to wrongful death recoveries from third party tortfeasors.

DATED this 22nd day of November, 2002.

SILVESTER & CONROY, L.C.

Fred R. Silvester
Spencer Siebers
Attorneys for Plaintiffs-Appellants

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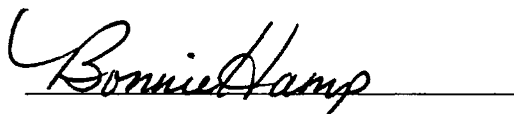
CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of November, two (2) copies of the foregoing **BRIEF OF APPELLANTS JODY ANDERSON, individually and as Guardian of her minor children SASHA BREE ANDERSON and CONLEY KARL ANDERSON** were served by mailing the same via first-class U.S. Mail, postage prepaid to:

Michael E. Dyer
Kira M. Slawson
BLACKBURN & STOLL, LC
Attorneys for UPS and Liberty Mutual Insurance Co.
77 West 200 South, Suite 400
Salt Lake City, UT 84101



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Addenda

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34A-2-106. Injuries or death caused by wrongful acts of persons other than employer, officer, agent, or employee of employer – Rights of employer or insurance carrier in cause of action – Maintenance of action – Notice of intention to proceed against third party – Right to maintain action not involving employee-employer relationship – Disbursement of proceeds of recovery – Exclusive remedy

(1) When any injury or death for which compensation is payable under this chapter or Chapter 3, Utah Occupational Disease Act is caused by the wrongful act or neglect of a person other than an employer, officer, agent, or employee of the employer

(a) the injured employee, or, in case of death, the employee's dependents, may claim compensation; and

(b) the injured employee or the employee's heirs or personal representative may have an action for damages against the third person

(2)(a) If compensation is claimed and the employer or insurance carrier becomes obligated to pay compensation, the employer or insurance carrier

(i) shall become trustee of the cause of action against the third party, and

(ii) may bring and maintain the action either in its own name or in the name of the injured employee, or the employee's heirs or the personal representative of the deceased

(b) Notwithstanding Subsection (2)(a), an employer or insurance carrier may not settle and release a cause of action of which it is a trustee under Subsection (2)(a) without the consent of the commission

(3)(a) Before proceeding against a third party, to give a person described in Subsections (3)(a)(i) and (ii) a reasonable opportunity to enter an appearance in the proceeding, the injured employee or, in case of death, the employee's heirs, shall give written notice of the intention to bring an action against the third party to

(i) the carrier, and

(ii) any other person obligated for the compensation payments

(b) The injured employee, or, in case of death, the employee's heirs, shall give written notice to the carrier and other person obligated for the compensation payments of any known attempt to attribute fault to the employer, officer, agent, or employee of the employer

(i) by way of settlement, or

(ii) in a proceeding brought by the injured employee, or, in case of death, the employee's heirs

(4) For the purposes of this section and notwithstanding Section 34A-2-103, the inured employee or the employee's heirs or personal representative may also maintain an action for damages against any of the following persons who do not occupy an employee-employer relationship with the injured or deceased employee at the time of the employee's injury or death

(a) a subcontractor,

(b) a general contractor,

(c) an independent contractor,

(d) a property owner, or

(e) a lessee or assignee of a property owner

(5) If any recovery is obtained against a third person, it shall be disbursed in accordance with Subsections (5)(a) through (c)

(a) The reasonable expense of the action, including attorneys' fees shall be paid and charged proportionately against the parties as their interests may appear Any 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

(b) The person liable for compensation payments shall be reimbursed, less the proportionate share of costs and attorneys' fees provided for in Subsection (5)(a), for the payments made as follows

(i) without reduction based on fault attributed to the employer, officer, agent, or employee of the employer in the action against the third party if the combined percentage of fault attributed to persons immune from suit is determined to be less than 40% prior to any reallocation of fault under Subsection 78-27-39(2), or

(ii) less the amount of payments made multiplied by the percentage of fault attributed to the employer, officer, agent, or employee of the employer in the action against the third party if the combined percentage of fault attributed to persons immune from suit is determined to be 40% or more prior to any reallocation of fault under Subsection 78-27-39(2)

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

(6) The apportionment of fault to the employer in a civil action against a third party is not an action at law and does not impose any liability on the employer The apportionment of fault does not alter or diminish the exclusiveness of the remedy provided to employees, their heirs, or personal representatives, or the immunity provided employers pursuant to Section 34A-2-105 or 34A-3-102 for injuries sustained by an employee, whether resulting in death or not Any court in which a civil action is pending shall issue a partial summary judgment to an employer with respect to the employer's immunity as provided in Section 34A-2-105 or 34A-3-102, even though the conduct of the employer may be considered in allocating fault to the employer in a third party action in the manner provided in Sections 78-27-37 through 78-27-43 1997

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FILED
MAR 11 2002
SEVENTH DISTRICT COURTS

IN THE SEVENTH DISTRICT COURT IN AND FOR CARBON COUNTY, STATE OF UTAH

JODY ANDERSON, individually and as Guardian of her Minor Children, **SASHA BREE ANDERSON** and **CONLEY KARL ANDERSON**; **UNITED PARCEL SERVICE**, an Ohio corporation; and **LIBERTY MUTUAL INSURANCE COMPANY**, a Massachusetts company, Plaintiffs, vs. **JACOB THEODORE GREGORY, STEPHEN E. GREGORY, HERITAGE ENTERPRISES IV**, an asset trust, Defendants.	)	**RULING ON UPS' AND LIBERTY MUTUAL'S MOTION TO DISMISS** Civil No. 980700756 Judge Bryce K. Bryner

The court heard oral argument on UPS' and Liberty Mutual's *Motion to Dismiss* on January 11, 2002. The court has read the memorandum and has considered the arguments of counsel and now issues this ruling.

I. Background

Mr. Anderson, the deceased husband of the plaintiff Jody Anderson, suffered a fatal car accident while he was in the scope of his employment with defendant UPS. UPS and its workmen's compensation carrier, Liberty Mutual, have paid compensation benefits to Mrs. Anderson.

Mrs. Anderson filed this action on behalf of herself, as guardian of her children, and on behalf of UPS and Liberty Mutual, seeking damages for the alleged negligence of the defendants.
She later filed a Cross-Claim against UPS and Liberty Mutual seeking a declaratory judgment finding: (1) UPS waived its right to statutory subrogation; (2) UPS can have no recovery under

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equitable subrogation according to the doctrine of unclean hands; or in the alternative, (3) the court should allocate the distribution of proceeds from any Third Party Action in accordance with the principles of equitable subrogation.

II. Positions of the Parties

UPS and Liberty Mutual (hereinafter "Liberty") seek a ruling dismissing plaintiff Jody Anderson's cross-claim against them for failure to state a claim upon which relief can be granted, and in support thereof allege:

1. Utah Code Ann. 34A-2-106 is the legal remedy in a third-party recovery, and a carrier does not lose its subrogation rights when it attempts to apply this law.
2. UPS and Liberty have no duty to appear in a civil action in order to protect their subrogation interest.
3. UPS and Liberty owe no duty to Anderson other than the statutory reduction for costs and attorney fees.
4. "Equitable Subrogation" is not appropriate in this case because statutory subrogation exists.
5. The Utah Constitution is not frustrated by applying Utah's longstanding law of statutory subrogation.

The Insurers claim they are entitled to first recover because there is a statutory provision in place, UCA 34A-2-106, which provides that attorney fees should first be paid, then reimbursement to the carrier who has paid compensation benefits, and the balance is to be then distributed to the plaintiffs.

Mrs. Anderson claims that she should receive the first dollars from any recovery to make her and her children whole because the Utah Constitution provides that the right to recover damages shall not be abrogated, and that, according to Mrs. Anderson, is in conflict with the Workmen's

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Compensation Act. To avoid this conflict Mrs. Anderson contends that the principles of equitable subrogation are appropriate in this case because any recovery will be minimal, and it appear that if the Compensation Act distribution scheme were followed, all of the recovery would go to the insurers.

III. Ruling

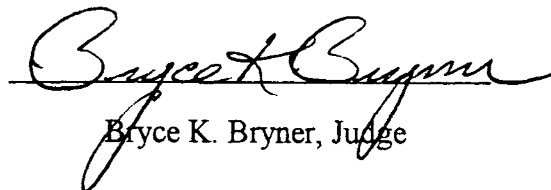
The court is persuaded that there is no conflict between the Utah constitutional provision (Article XVI, Sec. 5) and the distribution scheme under the Workmen's Compensation Act. The constitutional provision is clear that recovery from the third party is not subject to limitation except in those instances where compensation is provided for by statute.

Although some states have recognized the principle of equitable subrogation in appropriate cases, no cases have been cited where Utah courts have adopted such a doctrine. Because a statutory scheme is in place which provides for the disposition of proceeds from a third party tortfeasor, this court declines to invoke the concept of equitable subrogation.

The court also finds that UPS and Liberty Mutual did not waive their rights to statutory subrogation by failing to initiate suit against the defendants nor did they have a duty under Section 34A-2-106 to appear in a civil action in order to protect their subrogation interests. There is no provision under Utah law requiring UPS or Liberty Mutual to enter an appearance or waive their rights to subrogation. Section 34A-2-106 (1) clearly provides that the insurance carrier or employer "... may bring and maintain the action..." The statute does not state that failure to do so will result in a waiver of subrogation interests.

In summary, the court finds that the cross claim seeks relief contrary to Utah law and it therefore fails to state a cause of action. The motion to dismiss the cross claim is granted.

DATED this 9th day of March, 2002.



Bryce K. Bryner, Judge

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CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 980700756 by the method and on the date specified.

METHOD	NAME
Mail	STEPHEN G. MORGAN PAYOR KEARNS BLDG., Eighth Floor 136 S. Main SALT LAKE CITY, UT 84101
Mail	MICHAEL E DYER ATTORNEY 77 WEST 200 SOUTH SUITE 400 SALT LAKE CITY UT 84101
Mail	ROBERT L. JEFFS ATTORNEY 90 NORTH 100 EAST P.O. BOX 888 PROVO UT 84603
Mail	FRED R. SILVESTER ATTORNEY 230 S 5th E, STE 590 SALT LAKE CITY UT 84102
Mail	KIRA M. SLAWSON ATTORNEY 77 W 200 S, STE 400 SALT LAKE CITY UT 84101

Dated this 11th day of Mar, 2002.

[signature]
Deputy Court Clerk

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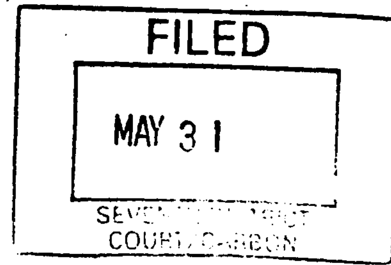
Attorneys for UPS and Liberty Mutual Insurance Company



IN THE SEVENTH JUDICIAL DISTRICT COURT OF CARBON COUNTY

STATE OF UTAH

JODY ANDERSON, individually and as Guardian of her Minor Children SASHA BREE ANDERSON and CONLEY KARL ANDERSON; UNITED PARCEL SERVICE, an Ohio corporation; and LIBERTY MUTUAL INSURANCE COMPANY, a Massachusetts company, Plaintiffs, vs. **JACOB THEODORE GREGORY, STEPHEN E. GREGORY, HERITAGE ENTERPRISES IV, an asset trust.** Defendants.	**ORDER OF DISMISSAL** Civil No. 980700756 Judge: Bryce K. Bryner

This matter came for hearing before the court on the 11th day of January, 2002. Michael E. Dyer of Blackburn & Stoll, LC appeared on behalf of Co-Plaintiffs Liberty Mutual Insurance Company ("Liberty Mutual") and United Parcel Service ("UPS"). Fred Silvester appeared on

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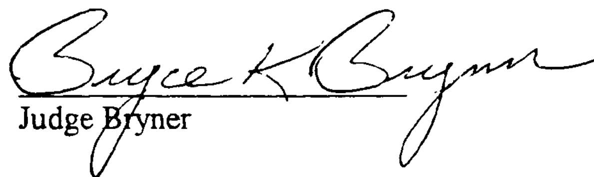
behalf of Plaintiff Jody Anderson. The Court reviewed Liberty Mutual's Motion to Dismiss and supporting Memoranda, and the Plaintiff, Jody Anderson's, Memorandum in Opposition, and subsequently issued a written Ruling on March 9, 2002. Based upon the Ruling by the Court, it is hereby,

ORDERED, ADJUDGED, AND DECREED that Jody Anderson's cross-claim against Liberty Mutual and UPS fails to state a claim upon which relief can be granted, and is hereby dismissed with prejudice. The Court hereby determines that there is no just reason for delay, and therefore, further directs that this shall be a final judgment pursuant to Rule 54(b) as to the Cross Claim of Jody Anderson against Liberty Mutual and UPS.

DATED this 31st day of ~~March~~ May, 2002. GKC

BY THE COURT



Judge Bryner

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing ORDER OF DISMISSAL was faxed and mailed this 31st day of ~~March~~ May, 2002, to:

Fred R. Silvester
Spencer C. Siebers
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S. Brundage

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