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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

CARRIELEE and STEVEN WILDE, Plaintiff-Appellants,	)	
vs.	)	
MID-CENTURY INSURANCE COMPANY, Defendant-Respondent,	)	Supreme Court No. 16916
- - - - - - - - - - - - - - - -	)	
MID-CENTURY INSURANCE COMPANY, Third-Party Plaintiff-Respondent,	)	
vs.	)	
NATIONWIDE INSURANCE COMPANY, Third-Party Defendant-Respondent.	)	

BRIEF OF APPELLANTS CARRIELEE AND STEVEN WILDE

Appeal from the Summary Judgment Rendered Against Appellant
In The Third Judicial District Court of Salt Lake County,
The Honorable Bryant Croft, District Judge, Presiding

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MAR 2 1980

Clerk, Supreme Court, Utah

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STATEMENT OF THE NATURE OF THE CASE

This is basically a contract action wherein plaintiffs are seeking to recover all no-fault benefits to which they are entitled under law and to establish that defendant Mid-Century has no, or only limited, subrogation rights to a judgment against a third-party tortfeasor.

DISPOSITION IN LOWER COURT

The appellants herein, Carrielee and Steven Wilde (hereinafter "Wilde"), were the insureds under a policy issued by respondent-defendant Mid-Century Insurance Company (hereinafter "Mid-Century"). In March, 1978, Mrs. Wilde was injured in an accident caused by one Verna Caffey. An action was filed in the Third District Court and came to trial in June, 1979, under the case heading of Wilde v. Caffey, Third District Court No. C-78-4523 (hereinafter referred to as "the Caffey case"). Third Party Defendant Nationwide Insurance Company (hereinafter "Nationwide") was Caffey's insurer. It is Wilde's contention that the judgment in that case was totally inadequate to compensate Wilde for her injuries.

This immediate action was filed against Mid-Century because it failed to pay Wilde the full no fault benefits to which Wilde is entitled under U.C.A. 1953 §31-41-1 et seq. The Third District Court granted Summary Judgment against Wilde on the basis of Jones v. Transamerica

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Ins. Co., 592 P.2d. 609 (Utah 1979).

Nationwide, at the conclusion of the Wilde v. Caffey case, recognized subrogation rights asserted by Mid-Century and deducted all of the no-fault benefits paid to Wilde from the amount of the judgment. This action was filed to recover from Mid-Century the full value of the no-fault benefits to which Wilde is entitled. After the action was filed and after the hearing on Summary Judgment, which was entered against Wilde on January 16, 1980, this court handed down the decision in Allstate Insurance Co. v. Ivie, S. Ct. No. 15983 (February 7, 1980). This presents an additional argument for granting Wilde's full amount of no fault benefits without subrogation.

RELIEF SOUGHT ON APPEAL

Appellant Wilde seeks reversal of the Summary Judgment entered against it by the Third Judicial District Court of Salt Lake County on January 16, 1980, the Honorable Bryant Croft, District Judge, presiding. The case should be remanded with instruction that Wilde may recover, if proved, all no-fault benefits up to the maximum allowed by law, as well as part or all of amounts subrogated to Mid-Century.

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STATEMENT OF FACTS

The essential facts herein are not in dispute. Appellant Carrielee Wilde, an insured under the policy of her husband, Steven Wilde, was injured in an automobile accident on March 24, 1978. She subsequently filed an action against one Verna Caffey (the Caffey case). Prior to the trial, Wilde was paid no-fault insurance benefits by Mid-Century in the amount of $3,587.98, which was apportioned as follows:

a.	Medical Expenses	$ 889.48
b.	Loss of wages	$1,402.50
c.	Loss of services	$1,296.00
	TOTAL	$3,587.98

Pursuant to special verdict in the Wilde v. Caffey case, the jury awarded at the trial of that matter on June 4, 1979 the following:

a.	Medical Expenses (past and future)	$ 989
b.	Lost wages (through trial date)	$2,000
c.	Lost future income benefits	-0-
d.	General damages (pain and suffering)	$1,000
	TOTAL	$3,989

Wilde maintains that this was totally inadequate compensation for her injuries and that she has not been made whole.

Mid-Century claimed subrogation for the no-fault benefits paid. Nationwide thereafter tendered Wilde a check

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for only $401.02 plus interest, which tender Wilde refused, thus preserving Mid-Century's subrogation rights against Nationwide.

After the trial, Wilde brought the present action against Mid-Century for payment of additional no-fault benefits as required under U.C.A. 1953 §31-41-1 et seq. Appellant claims that she is entitled under the act to a maximum of $4,862 for lost wages, without proof of fault. $1,402.50 was paid by Mid-Century, which it later subrogated to the judgment Wilde obtained against Caffey, which subrogation may be unlawful under Allstate v. Ivie, supra. (See Point II). Thus, with respect to the wages, Wilde is entitled to a minimum of $3,459.50, and possibly the subrogated $1,402.50, if she can establish at trial her inability to work for a year, for a total of $4,862. Wilde submitted to the court below a letter from her doctor indicating that it would not have been possible for her to return to work prior to March 27, 1979. R. 27, 40. Thus, there is a question of fact with respect to the amount of wages owed to Wilde.

With respect to household services, the maximum allowable under law is $4,380. Of this sum, Mid-Century paid $1,296 directly to Wilde. As with the compensation for lost wages, Mid-Century subrogated this sum against the judgment awarded to Wilde in the Caffey case. Under Allstate v. Ivie, Wilde is entitled to the $1,296 (see Point

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II) plus an additional $3,084 (for the total of $4,380) if she can establish factually that she was unable to perform household services for a year. This presents another factual question yet to be resolved.

ARGUMENT

POINT I

WILDE MAY RECOVER THE MAXIMUM AMOUNT OF ALLOWABLE NO-FAULT BENEFITS FROM HER INSURER, MID-CENTURY, EVEN THOUGH SHE WAS SUCCESSFUL IN RECOVERING A JUDGMENT FOR PERSONAL INJURIES AGAINST AN INDEPENDENT THIRD PARTY (CAFFEY).

Statutory Provisions

The Utah No-Fault Act provides that one of its purposes is:

> ...to require the payment of certain prescribed benefits...through...insurance on the basis of no-fault, preserving, however, the right of an insured person to pursue the customary tort claims...(where more serious injuries occur). (emphasis added) U.C.A. 1953 §31-41-2.

Section 9(1) specifically provides that a person can recover no-fault benefits and still file an action for "general damages arising out of personal injuries (resulting in)...(c) permanent disability". Thus it is clear that the act intends to "require" the payment of certain prescribed no-fault benefits. Those benefits are *inter alia* the payment for lost wages up to a year and $12.00 a day (for a

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maximum of a year) for household services, "regardless of whether any of these expenses are actually incurred". §31-41-6(b)(ii). There is not the slightest bit of evidence in the statutory language of the no-fault act to indicate that the legislature intended to cut off an injured person's rights to no-fault benefits simply because she sues the tortfeasor, pursuant to §9 and happens to be only partially successful in recovering a hoped-for, greater amount.

Jones Distinguished

Mid-Century cites the recent case of Jones v. Transamerica Insurance Co., 592 P.2d 609 (Utah 1979), as dispositive against appellant's claims in this case. (R. 73) However, the facts of that case are vastly different than the facts of the case at the bar. In Jones, a plaintiff was injured in an accident and was paid some no-fault benefits. Id. at 610. Subsequently, he went back to work and claimed that due to the injury, he was disabled and had a 25% loss of income. Id. The plaintiff also filed an action against the tortfeasor and thereafter arrived at a voluntary settlement for the sum of $6,000. The settlement agreement executed by the plaintiff recited that it was full settlement of any and all claims and that it constituted a full release of the defendant/tortfeasor from any and all further liability. Id. at 612. Thereafter, when the plaintiff in that case sought additional no-fault benefits from

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Transamerica Insurance Co., the lower court rightly denied them. This Court affirmed on the grounds that plaintiff had voluntarily entered into a settlement and signed a release for $6,000, which release had the effect of cutting off the subrogation rights of plaintiff's insurance company, Transamerica. Id.

The distinctions between Jones and this case are readily apparent. Here, Wilde has never released, voluntarily or otherwise, her tortfeasor. Wilde simply sued, as permitted by statute, to recover judgment. She was unsuccessful in obtaining an amount even equal to the full no-fault benefits that would have been available. Since there was never a release by Wilde, respondent's subrogation rights against Nationwide, the insurance company of the tortfeasor in the original action, remain as strong as ever. The cutting off of subrogation rights by settlement and release is the key issue that turned the decision in Jones. Those facts are simply not present here.

Another distinguishable factor in Jones is that the plaintiff in that case was admittedly able to work, and was simply claiming compensation for a reduction of earning capacity. The no-fault statute does not contemplate recovery on such a basis. Id. at 611-12. In the case at the Bar, the plaintiff has been totally unable to work, and the statute provides no-fault benefits for it.

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Double Recovery

The other great concern of the court in the Jones case is the issue of double recovery. Double recovery would have occurred in Jones because the plaintiff sought settlement to his own advantage of $6,000 plus a second recovery of substantial no-fault benefits. Thus, if plaintiff had prevailed in that case, he would be getting paid twice for a single item of loss: (a) allowable no-fault benefits of about $5,800 (Id. at 610); and (b) the $6,000 settlement. And this after he had cut off his own insurer's subrogation rights.

However, in the case at the bar, Wilde never received either full compensation for her injuries or the full amount that she is due under the no-fault program. In fact, $3,587 of the $3,989 judgment has already been subrogated, leaving her with $402. Hence, any amount awarded in the instant case simply supplements the amount awarded by the jury in the Caffey case, in order to make the plaintiff whole under the no-fault statute. Mid-Century may be entitled to some offsets (see Point II), but is still liable for the balance of monies due under no-fault, if and when proved.

Policy Considerations

If this Court were to sustain the lower court's Summary Judgment against appellant, it would discourage

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insurance companies from paying full no-fault benefits. One of the purposes of the act is to require the payment of "certain prescribed benefits in respect to motor vehicle accidents...on the basis of no-fault..." §31-41-2. Implicit in this stated purpose is to require the payment of those prescribed benefits (loss of wages, household services, etc.) freely without resort to legal action, incurring of attorney's fees, etc. If insurance companies do not pay those no-fault benefits freely and willingly, without compelling injured victims to resort to the courts, then the whole purpose of the no-fault act is subverted.

If Mid-Century prevails in this case, what incentive would it (or others) have in the future to pay full and complete no-fault benefits freely and willingly? Why not just pay a stingy amount of benefits, or none at all, and risk the chance of a suit? This is especially true where the victim-plaintiff has a cause of action under §9 of the Act and pursues the claim in the courts. If the victim is successful in obtaining a judgment greater than the full no-fault benefits to which the victim would otherwise be entitled, the insurance company, not having paid full benefits initially, will have use of the money during the interim before judgment. It could claim, under respondent's theory in this case, that the plaintiff had suffered no damage by the company's failure to pay the full no-fault

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benefits timely, except for a relatively brief period of loss of use, because if the no-fault benefits had been paid earlier, they would simply be subrogated at judgment. The victim would be repaying these benefits under subrogation anyway, the argument would run, and so what damage has been done.

On the other hand, if the tortfeasor were to win the law suit, or sustain a very small judgment, the company could claim that the insured had "elected its remedy" and is not entitled to any further no-fault payments (i.e. the payments that were not fully made in the first instance). This is essentially Mid-Century's position in this case where the amount of the judgment was very low, slightly more than the previous no-fault payments. Mid-Century is essentially saying here that Wilde forfeited (R. 75) the right to any further no-fault benefits by filing a §9 suit; in the same breath, it then claims subrogation on the small judgment that was awarded.

Thus, if Mid-Century's position prevails in this case, it will have taken the appellant's insurance premiums, most of appellant's judgment ($3,587 out of $3,989) and will have been reimbursed by the tortfeasor's insurance company for all no-fault benefits paid. Thus, appellant's insurance company is the only one to have been made whole in this entire situation. This is unjust and cannot have been the

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intent of the legislature.

POINT II

MID-CENTURY MAY NOT SUBROGATE, AT LEAST IN FULL, THE RIGHTS OF WILDE TO RECEIVE THE PROCEEDS OF THE JUDGMENT AGAINST CAFFEY.

Improper Subrogation

Appellant has set forth on page 3 of this Brief a summary of the no-fault benefits received from Mid-Century as well as a break down of a special verdict rendered by the jury in the Caffey case. The no-fault benefits and the verdict can be compared as follows:

ITEM	NO-FAULT PAID BY MID-CENTURY	JUDGMENT
Medicals	$ 889	$ 989
Loss of wages	$1,402.50	$2,000
Household services loss	$1,296	- 0 -
Pain and suffering	- 0 -	$1,000
Total	$3,587.50	$3,989

It is thus clear that only medical expenses and loss of wages can even arguably be claimed by Mid-Century to be subrogatable under equitable principles since, depending upon the facts, Mid-Century could claim that the medical expenses awarded in the judgment are the same as those paid by no-fault, although there is no evidence in the record that the expenses were not more. On lost wages, Mid-Century could arguably claim that $1,402.50 of the $2,000 awarded in the judgment should be subrogated.

As to the loss of household services and pain and

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suffering, totalling together $2,296, there can be little doubt that these sums are not subrogatable to the judgment by Mid-Century. The household services, although the jury made no corresponding award, were subrogated even though Mid-Century is independently required to pay the same by statute. On pain and suffering, no no-fault reimbursement was paid. At most, Mid-Century could arguably claim, depending on the interpretation of Allstate v. Ivie, subrogation rights on the following:

Medical Expenses	$ 889.48
Lost Wages	$1,402.50
Total	$2,291.98

Mid-Century has been subrogated to the tune of $3,587.98 and at minimum, has thus received a windfall of $1,296.00. Wilde should be allowed to recover this sum.

Retrospective Application of Law

This fact situation presents several threshold questions at the outset. First of all, the initial judgment in favor of Wilde against Caffey for $3,989 was not appealed. In that case, Caffey's insurer, Nationwide, allowed subrogation rights to be asserted against it by Mid-Century. Hence, when Nationwide attempted to tender the supposed balance due of the judgment after the subrogation rights were subtracted, Wilde refused tender, in part to prevent the cutting off of Mid-Century's subrogation rights.

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(R. 37-39; Statement of Facts in this Brief, p. 3). Wilde then filed an action against Mid-Century to recover the balance due of no-fault benefits, on the theory that Mid-Century had breached its Personal Injury Protection contract with Wilde in not paying the balance owed.

Subsequent to the filing of the complaint herein, this court handed down the decision in Allstate v. Ivie. Hence, counsel on remand of this case, should be allowed to amend the complaint to state a cause of action against Mid-Century for all amounts subrogated by it, which are not found at trial to have been paid as part of the judgment. Similarly, appellant Wilde should be able to amend the complaint seeking reimbursement from Mid-Century of the $1,296 for household services, which Mid-Century also deducted from the judgment herein on a subrogation theory.

There is no reason in law or equity why the application of Allstate v. Ivie should not be retrospective. Retrospective application should be the presumption, especially where no previous case was overruled.

Meaning of Allstate v. Ivie

The majority opinion in Allstate v. Ivie set forth several important principles regarding subrogation. First, an injured party should get only those damages for which no reparation has been made under no-fault. Secondly, the insurer may not subrogate funds received by the insured for

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personal injuries. As stated by the court:

> Under the Utah No-Fault Insurance Act, the tortfeasor who has the required security, is not personally liable to the injured person for payment of Section 6 benefits, Section 9(2); therefore, the tortfeasor has no personal legal obligation to reimburse the injured party's insurer. On the other hand, the tortfeasor's liability insurer, in fulfilling its duty to respond to the claims of the injured party to the limits of its policy, stands in the shoes of its insured, and pays on the basis of its insured's personal liability to the tort victim, this personal liability does not include PIP payments. Thus, the tort victim's recovery from the liability insurer cannot be reduced by the PIP payments. If the victim's recovery is reduced by the amount of PIP payments by granting his no-fault insurer a right of protection, it is the no-fault insurer who receives double recovery. This is because the insurer receives a premium for the benefits, and then receives full reimbursement, while the liability insurance available to recompense the victim is depleted by payments for which the liability insurer is not responsible to the victim. (emphasis added) Id. at 60.

Elsewhere, it is stated that the Act cannot be interpreted as "conferring on the no-fault insurer a right of subrogation to the funds received by its insured for personal injuries." Id.

Hence, several factual issues in the present case are immediately evident. Which of the stated damages awarded by the jury are "funds received...for personal injuries", and thus not to be subrogated? What amounts of the Caffey judgment are "recovery from the liability

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insurer" and hence "cannot be reduced by the PIP payments"? On the other hand, because a special verdict was used in this case, should certain portions of the judgment rightly be considered as "double recovery" if paid by Nationwide, and hence subrogatable to Mid-Century?

All of these questions involve certain questions of fact which the trial court should resolve, and which make a summary judgment inappropriate. To the extent that the questions involve legal issues, they have been wrongly decided.

Possible Resolution of the Issues

This court has several alternatives in dealing with this problem: First, it could simply hold that regardless of whether a special verdict is used, a judgment is not subrogatable by the insurer paying the no-fault benefits. This position has merit since it would avoid the very policy problems inherent in trying to decide, for example, whether the amount awarded for medical expenses is the same or supplementary to the amount paid in no-fault benefits for medicals.

This court could also, under a second alternative, rule that the lower court must deduct from the judgment those parts which are found at trial to be clearly identifiable and comparable to no-fault benefits already paid. In the case at the bar, this might include the

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medicals of $889 and loss of wages up to $1,402.50. Under no circumstances, however, should the subrogation allowed include the balance of the "lost wages" awarded by the jury in excess of what was paid by no-fault ($2,000 - $1,402.50); the amount awarded for pain and suffering by the jury: or the $100 more for medical expenses awarded by the jury.

The third alternative, used by the lower court in this case, is totally unfair since it allows the no-fault insurer double recovery by permitting subrogation to Mid-Century of <u>everything</u> paid under no fault.

Appellants contend that either of the first two alternatives, a firm policy of no subrogation to the no-fault insurer, or very limited subrogation only to clearly identifiable items of recovery in the judgment, would be acceptable. This case should be remanded to the District Court for a determination of these issues consistent with the holding in <u>Allstate v. Ivie</u>.

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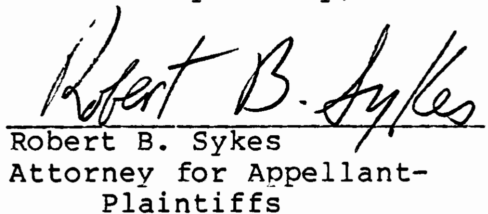
CONCLUSION

This court should reverse the Summary Judgment granted in favor of Mid-Century and remand the case for determination of the total amount of no-fault benefits to which Wilde is entitled for household services and loss of wages. Furthermore, on remand, Wilde should also be allowed to amend the complaint to set forth an additional cause of action against Mid-Century for amounts not legally subrogated, pursuant to Allstate v. Ivie.

The District Court should be instructed, upon remand, that Wilde may recover, if proven at trial, the full amount of no-fault benefits legally available, regardless of the filing of an action to recover additional general damages under §9 of the Act. The lower court should also be instructed that any amounts proven by Wilde at trial to have been subrogated unjustifiably by Mid-Century, may be recovered by Wilde.

Respectfully submitted this 2nd day of May, 1980.



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CERTIFICATE OF SERVICE

Hand Delivery

I hereby certify that I served a copy of the foregoing BRIEF OF APPELLANTS CARRIELEE AND STEVEN WILDE upon attorneys for Mid-Century and Nationwide by causing a true and correct copy thereof to be hand delivered to said persons at their offices at the following addresses:

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-and-

Mr. A. Alma Nelson
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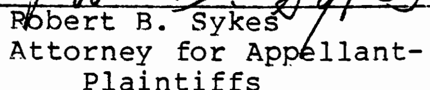
on this 2nd day of May, 1980.



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