

1990

## Vernon J. Thomas v. David P. Adams : Reply Brief

Utah Court of Appeals

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**BRIEF**

900094-CA

IN THE COURT OF APPEALS  
STATE OF UTAH

VERNON J. THOMAS,

Plaintiff/Appellant,

vs.

DAVID P. ADAMS,

Defendant/Appellee.

Case No. 900094-CA

Priority 16

APPELLANT'S REPLY BRIEF

APPEAL FROM SUMMARY JUDGMENT RULING IN THE  
THIRD CIRCUIT COURT OF SALT LAKE COUNTY, STATE OF UTAH,  
THE HONORABLE MICHAEL L. HUTCHINGS PRESIDING

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**FILED**

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COURT OF APPEALS

IN THE COURT OF APPEALS  
STATE OF UTAH

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VERNON J. THOMAS,	)	
	)	
Plaintiff/Appellant,	)	Case No. 900094-CA
	)	
vs.	)	
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## SUMMARY OF ARGUMENTS

### ARGUMENT 1.

When mandatory arbitration becomes fruitless, a subrogation action is the proper recourse for the aggrieved party. Both §31A-21-108 and §31A-22-309 harmoniously co-exist regarding pursuit of the subrogation claim beyond arbitration absent proof of a contrary legislative intent. Therefore, the suit below was proper.

### ARGUMENT II.

Liability for PIP benefits was an indispensable issue in the lower court and is the exact issue to be decided by arbitration under §31A-22-309. The existence of a summary judgment with prejudice renders impossible future arbitration of the issue under the doctrine of claim preclusion which bars litigation of claims which could be or are determined in any given suit.

### ARGUMENT III.

Defendant's insurer is neither based nor licensed to do business in Utah. Its failure to respond to Allstate's written inquiry evidenced its lack of cooperation sufficient to justify Allstate's resort to the judicial forum in order to guarantee the insurer's submission to the powers and laws of the State.

## STATEMENT OF FACT

Defendant falsely asserts that several documents referenced by Plaintiff do not appear in the record. Brief of Appellee, page 6. Despite its contention, Defendant references the documents in presenting its argument on appeal and includes copies thereof in its Addendum. Contrary to the assertion, each of the enumerated documents is attached as an exhibit to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, and all are located in the record as follows:

Inter-Insurer Subrogation Memorandum (R. 29, Exhibit A);  
Letter to Allstate dated April 4, 1988 (R. 30, Exhibit B);  
Letter to Mr. Stirba dated April 12, 1988 (R. 31, Exhibit C).

## ARGUMENTS

### ARGUMENT I

JUDICIAL PURSUIT OF A SUBROGATION CLAIM FOLLOWING FAILURE OF MANDATORY ARBITRATION UNDER §32A-22-309 IS APPROPRIATE, AND §32A-21-108 RETAINS FULL FORCE AND EFFECT REGARDING SUCH SUBROGATION ACTION.

Both parties to this appeal agree that a subrogation action on Allstate's outstanding subrogation claim is a proper course of action where either party refuses to arbitrate pursuant to §31A-22-309. Brief of Appellee, page 13, ll. 10-15. The parties hereto differ only as to the identities of the parties named in the subrogation action and the proper characterization of the suit filed below.

First, where PIP benefits are involved, the parties resort to §31A-22-309(6). However, this statute fails to provide appropriate guidance for pursuit of reimbursement where arbitration is rendered fruitless. Defendant maintains that a subrogation action in the name of the insurers themselves is mandated by §31A-22-309(6) by sole virtue of the statute's language requiring that one insurer reimburse the other insurer. Defendant cites no other supporting authority and provides no rational or legal reason for disregarding industry practice by naming insurers in this instance.

Section 31A-22-309 does not attempt to proscribe the procedural aspects allowed by law regarding suit on a subrogation claim except to say that such a claim for PIP benefits must be



preceded by arbitration. Section 31A-21-108 specifically allows pursuit of subrogation claims by insurers in the names of the insureds, without exception. Where two statutes address the same issue, they must be construed harmoniously absent any repeal or amendment of either. Murray City v. Hall, 663 P.2d 1314 (Utah 1983); Stahl v. Utah Transit Authority, 618 P.2d 480 (Utah 1980). Both statutes harmoniously co-exist regarding pursuit of a subrogation claim beyond the arbitration stage inasmuch as neither necessarily excludes the other, the ultimate parties are before the court in either instance, and a full adjudication is possible. Therefore, absent proof of a contrary legislative intent or legal and binding authority directing otherwise, an insurer's pursuit of a subrogation claim in the name of its insured pursuant to §31A-21-108 under the facts at hand remains a proper, valid alternative.

Second, the record indicates that Defendant's insurer had notice of the subrogation nature of the suit below at all times relevant hereto. Defendant's insurer received actual notice of Allstate's subrogation rights for Plaintiff's medical expenses (R. 29, Exhibit A); knew of Allstate's affirmative actions to collect its subrogation claim (R. 29, Exhibit A; R. 31, Exhibit C); had actual notice of Allstate's payment of Plaintiff's medical expenses through his PIP coverage (R. 31, Exhibit C; Brief of Appellee, p. 5, ll. 3-4); and knew of the existence of the Release and the fact that it prevented any claim by Plaintiff individually (R. 21-22, Exhibit A; R. 19, ll. 20-24). Defendant correctly recognized the

relief requested in the complaint as "reimbursement for medical expenses" and acknowledged the allegation that Defendant "failed and refused to pay these medical damages." (R. 19, ll. 16-20). In view of the insurer's expertise in the insurance arena, its knowledge of the surrounding facts at the time the complaint was filed, and its express recognition of the language used in the complaint, its interpretation of the suit as anything but a subrogation action for reimbursement of the only claim outstanding on the matter is unreasonable and constitutes an intentional misinterpretation of the pleadings.

#### ARGUMENT II

BECAUSE DEFENDANT HAS PREVAILED WITH PREJUDICE BY SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY FOR PIP BENEFITS, THE DOCTRINE OF RES JUDICATA PREVENTS ARBITRATION OF THE SAME CLAIM.

This appeal was mandated by the lower court's rendition of an unfavorable summary judgment with prejudice in the subrogation case below. The branch of the doctrine of res judicata termed "claim preclusion" acts to bar litigation of claims which could be or are determined in any given suit. Berry v. Berry, 738 P.2d 246 (Utah App. 1987); Copper State Thrift and Loan v. Bruno, 735 P.2d 387 (Utah App. 1987). Section 31A-22-309(6) provides as follows:

(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, ... the insurer of the person who would be held legally liable shall reimburse the other insurer for the payment ...

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

In other words, arbitration will determine if the defendant insured would be held legally liable before reimbursement may be had from the insurer. Liability for the medical damages resulting in payment of the PIP benefits is contested by Defendant based on lack of causation. Brief of Appellee, page 4, ll. 3-4. Liability for PIP benefits - the exact issue to be decided by arbitration under §31A-22-309 - is an indispensable issue in the suit below, and the summary judgment, granted with prejudice, effectively prevents a subsequent determination of the same issue. Consequently, the existence of the summary judgment renders impossible future arbitration of this matter. Therefore, the summary judgment must be reversed and the parties allowed to proceed to arbitration.

### ARGUMENT III

DEFENDANT'S INSURER'S FAILURE TO RESPOND TO A  
DIRECT REQUEST FOR ARBITRATION CONSTITUTES A  
REFUSAL TO ARBITRATE WHERE SAID INSURER IS  
NEITHER BASED IN NOR AUTHORIZED TO DO BUSINESS  
IN THE STATE.

Defendant has attempted to obscure the facts by misquoting the Brief of Appellant. The impetus of Plaintiff's suit below is its inability to pursue arbitration with Defendant's insurer, Transprotection or Vanliner Insurance Company, through normal procedures. This stems from the fact that "Defendant's insurer, represented by Frontier Adjusters, is neither based nor licensed to do business in Utah." Brief of Appellant, p. 7, ll. 22-23

(emphasis added). Defendant misquoted the statement as providing that "Frontier Adjusters is neither based nor licensed to do business in Utah." Brief of Appellee, p. 12, ll. 18-19. In so doing, Defendant unilaterally and gratuitously changed the meaning of the statement and, apparently, its veracity. Defendant's insurer is neither based nor authorized to do business in Utah, rendering ineffective the standard avenues for enforcement of arbitration. Defendant's insurer denies having refused to arbitrate, yet it admits to intentionally failing to respond to Allstate's inquiry and request for reconsideration of Allstate's claim because it determined that the letter did not call for a response. Brief of Appellee, page 5, ll. 9-10. Defendant's insurer's failure to exhibit the courtesy to reconsider the claim, discuss arbitration, or simply respond to a written inquiry, was sufficient basis upon which Allstate could reasonably anticipate a lack of cooperation from the out-of-state insurer in participating in actual, ongoing arbitration. Under the circumstances, Allstate's resort to a judicial forum was a reasonable procedure designed to guarantee Defendant's insurer's submission to the powers and laws of the State.

#### CONCLUSION

Defendant's position herein is a continuation of his efforts to prevent any formal determination of liability for the underlying subrogation claim. Below, Defendant denied Plaintiff the opportunity to fully brief its position by submitting a reply brief


supporting its Motion for Summary Judgment in which it set forth an entirely new argument and expressly rescinded its reliance on its initial supportive memorandum. Now Defendant's insurer proclaims, for the first time, an unequivocal willingness to voluntarily arbitrate this matter pursuant to statute, while at the same time strenuously maintaining that the summary judgment be affirmed, despite its res judicata effect, due to Allstate's failure to timely amend its complaint to make the obvious more obvious.

Plaintiff at no time has taken a position that the complaint below was anything other than a subrogation action filed pursuant to §31A-21-108. Neither is Plaintiff attempting by this appeal to obtain an improper determination of claims and events not at issue below. On appeal, Plaintiff need only establish that Defendant was not entitled to summary judgment as a matter of law, requiring reversal of the summary judgment in order to put the subrogation matter and the insurers in a position to proceed with arbitration or litigation. Defendant was not entitled to summary judgment as a matter of law for the reason that Plaintiff's pursuit of its subrogation claim through the judicial forum was proper under §31A-21-108 and was not barred by §31A-22-309 under the facts at hand. Further, the issue of the validity of the Release and its effect on Allstate's subrogation claim as outlined in the Brief of Appellant forms the genuine issue of material fact necessary to prevent entry of summary judgment.

Plaintiff respectfully requests that the summary judgment be

reversed and the case remanded for further proceedings.

DATED this 10 day of August, 1990.

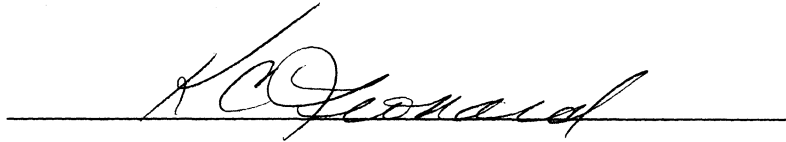
  
Kris C. Leonard  
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Attorneys for Appellant

CERTIFICATE OF MAILING

I certify that on the 10 day of August, I mailed a true copy of the foregoing, postage prepaid, to:

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Barbara Zimmerman, Esq.  
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Salt Lake City, Utah 84133

DATED this 10 day of August, 1990.

  
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KCL/REPLY3D.BRF/bjf