

1990

Vernon J. Thomas v. David P. Adams : Brief of Appellant

Utah Court of Appeals

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Peter Stirba; Barbara Zimmerman; McKay, Burton & Thurman; Attorneys for Defendant/Appellee.
Don E. Olsen; Kris C. Leonard; Matheson, Mortensen & Olsen; Attorneys for Plaintiff/Appellant.

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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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DEFENDANT/APPELLEE

JUN 11 1990

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
JURISDICTION OF COURT OF APPEALS	1
NATURE OF PROCEEDINGS	1
ISSUES PRESENTED FOR REVIEW	2
DETERMINATIVE LAW	2
STATEMENT OF CASE	2
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENTS	5
ARGUMENTS	6
STANDARD OF REVIEW	6
ARGUMENT I - WHERE ALLSTATE WAS PREVENTED BY DEFENDANT'S INSURER FROM PURSUING ITS RIGHT TO REIMBURSEMENT THROUGH ARBITRATION, ALLSTATE PROPERLY PURSUED REIMBURSEMENT THROUGH A SUBROGATION ACTION.	6
ARGUMENT II - THE REFUSAL OF DEFENDANT'S INSURER TO SUBMIT TO ARBITRATION FORESTALLS THE COURT'S AWARD TO IT OF SUMMARY JUDGMENT BASED ON THE FACT THAT ARBITRATION IS MANDATORY.	9
ARGUMENT III - EXECUTION OF THE RELEASE BETWEEN PLAINTIFF & DEFENDANT'S INSURER WITH FULL KNOWLEDGE OF ALLSTATE'S UNSETTLED SUBROGATION CLAIM DID NOT EXTINGUISH ALLSTATE'S SUBROGATION RIGHTS.	10
CONCLUSION	12
<u>ADDENDUM</u>	
(A) Complaint	
(B) Defendant's Motion for Summary Judgment	
(C) Defendant's Memorandum in Support of Motion for Summary Judgment	
(D) Release of All Claims	

- (E) Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment
- (F) Defendant's Reply Memorandum in Support of Motion for Summary Judgment
- (G) Request for Ruling on Defendant's Motion for Summary Judgment
- (H) Order granting Defendant's Motion for Summary Judgment
- (I) Notice of Filing Cost Bond
- (J) Notice of Appeal
- (K) Section 31A-21-108, Utah Code Annotated (1953), as amended
- (L) Section 31A-22-309, Utah Code Annotated (1953), as amended
- (M) State Farm Mutual Insurance Co. v. Farmers Insurance Exchange, 27 Utah 2d 166, P.2d 1002 (1972)

TABLE OF AUTHORITIES

<u>CASES CITED</u>	<u>PAGE</u>
<u>English v. Kienke</u> , 774 P.2d 1154 (Utah App. 1989)	6
<u>Johnson v. Utah State Retirement Office</u> , 621 P.2d 1234 (Utah 1980)	8
<u>Leader National Ins. Co. v. Torres</u> , 751 P.2d 1252, 1255 n2 (Wash. App. 1988)	10
<u>Murray City v. Hall</u> , 663 P.2d 1314 (Utah 1983)	7
<u>Stahl v. Utah Transit Authority</u> , 618 P.2d 480 (Utah 1980)	7
<u>State v. Hunt</u> , 13 Utah 2d 32, 368 P.2d 261 (1962)	7
<u>State Farm Mutual Ins. Co. v. Farmers Insurance Exchange</u> , 27 Utah 2d 166, 493 P.2d 1002 (1972)	2, 10
<u>Tanner, In re</u> 549 P.2d 703 (Utah 1976)	8
<u>Utah State Coalition of Senior Citizens v. Utah Power & Light Company</u> , 776 P.2d 632 (Utah 1989)	6
<u>Young v. Barney</u> , 20 Utah 2d 108, 433 P.2d 846 (1967)	7

OTHER AUTHORITIES

PAGE

Rule 56, Utah Rules of Civil Procedure

6

31A-21-108, Utah Code Annotated (1953), as amended

throughout

31A-22-309, Utah Code Annotated (1953), as amended

throughout

JURISDICTION OF COURT OF APPEALS

This Appeal is from an Order of the Third Circuit Court dated January 22, 1990, granting Respondent's Motion for Summary Judgment and dismissing with prejudice Plaintiff's claim, thereby disposing of all issues before the Court. This Court is vested with jurisdiction to hear and decide this Appeal pursuant to Article VIII, Sections 1 and 5, Utah Constitution, Section 78-2(a)-3(2)(c), Utah Code Annotated (1953), as amended, and Rule 4A, Rules of the Utah Court of Appeals.

NATURE OF PROCEEDINGS

On or about October 9, 1989, Allstate Insurance Company filed a subrogation suit in the name of its insured in the Third Judicial Circuit Court in Salt Lake County, State of Utah (R. 1). The matter was assigned to the Honorable Michael L. Hutchings. On or about November 17, 1989, Defendant filed a Motion for Summary Judgment (R. 14), to which Allstate responded by filing a Memorandum in Opposition to Defendant's Motion for Summary Judgment (R. 24). Defendant filed a Reply Memorandum (R. 34) and a Request for Ruling on its Motion (R. 39).

Thereafter, on or about December 22, 1989, the Circuit Court entered its Order Granting Defendant's Motion for Summary Judgment (R. 41). Allstate then filed its Notice of Appeal (R. 45), and its Notice of Filing Cost Bond (R. 43) on February 20, 1990, appealing from the Circuit Court's Order Granting

Defendant's Motion.

ISSUES PRESENTED FOR REVIEW

1. Whether the right granted by Section 31A-21-108 to Allstate to enforce its subrogation rights in the name of its insured is extinguished by the existence of Section 31A-22-309 where Defendant's insurer refuses to enter into arbitration.

2. Whether the lower Court's grant of Summary Judgment based on the fact that the claim is subject to statutorily-mandated binding arbitration is proper where the prevailing party refused to participate in arbitration.

3. Whether the release executed by Allstate's insured without Allstate's knowledge and after Defendant's insurer's receipt of notice of Allstate's unsettled subrogation claim extinguishes Allstate's subrogation rights.

DETERMINATIVE LAW

Appellant does not know of any legal authority which is determinative of the first two issues. As to the third issue, the determinative case is State Farm Mutual Insurance Co. v. Farmers Insurance Exchange, 27 Utah 2d 166, 493 P.2d 1002 (1972).

STATEMENT OF CASE

On or about October 9, 1989, Plaintiff's insurer, Allstate Insurance Co. (hereinafter "Allstate"), brought a subrogation suit against Defendant's insurer for medical expenses resulting from a motor vehicle accident. (R. 1-2). On or about November

17, 1989, Defendant filed it's Motion for Summary Judgment, eventually citing as grounds Plaintiff's previous execution of a full release, the failure of the suit to be one for a subrogation claim, and the requirement that the claim at issue was statutorily subject to mandatory binding arbitration between the insurers. (R. 14-15, 34-38). The Circuit Court granted the Motion in favor of Respondent based on its finding that, because the suit involved a subrogation claim, the insurance companies were the proper parties and the matter should be resolved by binding arbitration. (R. 41-42).

The Circuit Court's Order was signed and entered on January 22, 1990. Appellant filed its Notice of Appeal on February 20, 1990. (R. 45).

STATEMENT OF FACTS

On or about December 14, 1987, on US Interstate 15 at approximately 600 North in Salt Lake City, the named parties were involved in a motor vehicle accident. (R. 1-2). As a direct and proximate result of the accident, Plaintiff suffered a heart attack and incurred reasonable and necessary medical expenses in excess of \$3,000. (R. 2). At the time of the collision, Plaintiff was insured by Allstate Insurance Company, (R. 24), and Defendant was insured by Transprotection or Vanlines Insurance Company (represented by Frontier Adjusters) through his employer A & M Moving & Storage. (R. 21, Exhibit A; 30, Exhibit B). Allstate paid Plaintiff for his medical expenses under Plaintiff's personal injury protection (PIP) coverage. (R. 25-

26; 31, Exhibit C). On January 12, 1988, Allstate filed a no-fault subrogation claim with Frontier Adjusters. (R. 29, Exhibit A). Three months later, by letter dated April 4, 1988, Frontier Adjusters expressly denied the subrogation claim. (R. 30, Exhibit B). By letter dated April 12, 1988, Allstate requested reconsideration of Frontier's rejection of Allstate's subrogation claim, expressly indicating its intent to file suit should the insurer prove not to be a member of the inter-company arbitration. (R. 31, Exhibit C). No response was ever received by Allstate to this letter.

On August 9, 1989, Allstate's insured (Plaintiff) signed a "Release of All Claims" releasing Defendant and his insurer from all liability arising from the accident and expressly representing that no unsettled subrogation rights existed. (R. 21-22, Exhibit A). Two months later, on October 9, 1989, Allstate filed its subrogation suit pursuant to Section 31A-21-108, Utah Code Annotated (1953), as amended. (R. 1-2). One month later, on November 1, 1989, Defendant notified Allstate for the first time of the existence of the release executed by Allstate's insured. (R. 25).

On January 22, 1990, the Circuit Court entered Summary Judgment against Appellant, stating that "(1) This is a subrogation claim and should be decided at arbitration; (2) The proper parties are insurance companies." (R. 41-42).

From this Order of the Circuit Court, Allstate filed its Appeal.

SUMMARY OF ARGUMENTS

ARGUMENT I:

The Circuit Court found that Plaintiff's suit was based on a subrogation claim which should be resolved by binding arbitration pursuant to Section 31A-22-309. When Defendant's insurer would not enter into arbitration, Plaintiff properly brought suit on it's subrogation claim in the form of a subrogation action pursuant to Section 31A-21-108. Section 31A-22-309 does not bar an insurer's right to sue on its subrogation rights where arbitration has become impossible, and Allstate's right to format its claim as a subrogation action pursuant to statute remains in full force and effect. Therefore, the Summary Judgment should be reversed.

ARGUMENT II:

The Circuit Court granted Summary Judgment in part based on the fact that the claim is subject to statutorily-mandated binding arbitration. Prior to the filing of the suit, Defendant's insurer refused to participate in the required arbitration, preventing Allstate's pursuit of its claim under Section 31A-22-309. The Summary Judgment based on a failure to arbitrate is not proper where said failure was due to the prevailing party's own actions.

ARGUMENT III:

Allstate's insured signed a full release of liability

without Allstate's knowledge or consent. At the time the release was executed, and for eighteen months prior thereto, Defendant's insurer possessed knowledge of Allstate's unsettled subrogation claim. Consequently, execution of the release was ineffective to extinguish Allstate's subrogation rights.

ARGUMENTS

STANDARD OF REVIEW

In determining whether the trial court properly granted Summary Judgment as a matter of law, the Court on appeal reviews the trial court's conclusions for correctness, giving no deference to the trial court's view of the law. Utah State Coalition of Senior Citizens v. Utah Power & Light Company, 776 P.2d 632 (Utah 1989); English v. Kienke, 774 P.2d 1154 (Utah App. 1989). This Court must reverse the Circuit Court's Order granting Summary Judgment to Defendant upon a finding by this Court that Defendant is not entitled to judgment as a matter of law under the facts advanced by Plaintiff. Rule 56, Utah Rules of Civil Procedure.

ARGUMENT I

WHERE ALLSTATE WAS PREVENTED BY DEFENDANT'S INSURER FROM
PURSUING ITS RIGHT TO REIMBURSEMENT THROUGH
ARBITRATION, ALLSTATE PROPERLY PURSUED
REIMBURSEMENT THROUGH A SUBROGATION ACTION.

The Utah Legislature first enacted Section 31A-21-108 in 1947, providing that ". . . in subrogation actions [the insurer] may sue in the name of its insured." This section was re-enacted by the Legislature in 1986. Section 31A-22-309, dealing specifically with personal injury benefits, did not become

effective until 1974, at which time it first appeared as Section 31-41-11(b) using wording substantially identical to that found in the current version. Subsection 6 of this section requires that liability for reimbursement of PIP benefits "shall be decided by mandatory, binding arbitration between the insurers." These provisions, both embodied in the Insurance Code, 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). Further, these statutes must be construed with a view towards the promotion of justice. Young v. Barney, 20 Utah 2d 108, 433 P.2d 846 (1967); State v. Hunt, 13 Utah 2d 32, 368 P.2d 261 (1962).

Allstate's subrogation suit against Defendant concerns reimbursement to Allstate of PIP benefits paid to its insured and for which Allstate has a right to reimbursement pursuant to statute. Section 31A-22-309. Allstate is required by statute to pursue mandatory arbitration to obtain reimbursement for these funds. However, this statute is not exhaustive of the remedies available to Allstate nor may it under the facts at hand act to bar Allstate's subrogation claim for reimbursement of the benefits.

Defendant's insurer, represented by Frontier Adjusters, is neither based nor licensed to do business in Utah. Its sole contact with Utah was its insured's transitory presence in this state at the time of the accident. Prior to bringing suit, Allstate inquired of the insurer regarding submission of the

matter to binding arbitration pursuant to statute. By letter to Defendant's counsel dated April 12, 1988, Allstate stated that "[i]f the carrier you represent is not a member of inter-company arbitration, we would have no option but to file suit to recover our costs." (R. 31). Frontier Adjusters refused to respond to Allstate's arbitration inquiries.

Implicit in Section 31A-22-309 is the assumption that reluctant insurers may be required to participate in arbitration. As a general rule, such enforcement may be achieved through the filing of a Complaint with the insurance commissioner. However, the facts of this case render such action ineffective. Allstate was forced to abandon the limiting provisions of Section 31A-22-309 and instead pursue its right to reimbursement of the proceeds through suit in state court. Allstate's failure to initiate arbitration proceedings was justified where such action clearly would be futile, would serve no useful purpose, and would meet with no cooperation from Defendant's insurer. Johnson v. Utah State Retirement Office, 621 P.2d 1234 (Utah 1980); In re Tanner, 549 P.2d 703 (Utah 1976). The most effective and efficient way of dealing with the parties' relative rights where one was not subject to the jurisdiction of the State was to pursue a subrogation action pursuant to 31A-21-108. Such an action would ensure Defendant's insurance carrier's submission to the jurisdiction of this Court in its defense of its insured while allowing Allstate to pursue its own remedy in the format available by law.

As a general rule, Sections 31A-21-108 and 31A-22-309 do not conflict when an insurer pursues reimbursement for PIP benefits paid to its insured. However, where one insurer may refuse with impunity to participate in statutorily-mandated arbitration, these provisions must be read together to promote justice and to give effect to both without nullifying either. Consequently, Allstate's right to enforce its subrogation claim in the name of its insured pursuant to statute must survive and coexist with the later provision mandating arbitration for reimbursement of PIP benefits where both provisions are reasonably necessary to do justice in the given situation.

ARGUMENT II

THE REFUSAL OF DEFENDANT'S INSURER TO SUBMIT TO ARBITRATION FORESTALLS THE COURT'S AWARD TO IT OF SUMMARY JUDGMENT BASED ON THE FACT THAT ARBITRATION IS MANDATORY.

The principles of justice and equity were violated when the Court condoned Defendant's insurance carrier's refusal to arbitrate by granting Defendant Summary Judgment on the basis that arbitration should have occurred. Instead, the Court should have entered an Order compelling arbitration and staying the proceedings pending the outcome of the arbitration. See, e.g., Section 78-31A-4.

In granting Defendant Summary Judgment, the Circuit Court effectively and completely barred Plaintiff's pursuit of its claim by court-mandated arbitration or otherwise. Defendant's insurance carrier remains free to reject any further arbitration attempts with impunity. Further, the Order of the Court gives

res judicata affect to any and all subsequent proceedings involving identical issues, effectively barring any remaining rights of Plaintiff to have the issue of liability for the PIP benefits tried and decided. Equity demands, therefore, that the Circuit Court's grant of Summary Judgment be reversed and the case be remanded for further proceedings.

ARGUMENT III

EXECUTION OF THE RELEASE BETWEEN PLAINTIFF & DEFENDANT'S INSURER WITH FULL KNOWLEDGE OF ALLSTATE'S UNSETTLED SUBROGATION CLAIM DID NOT EXTINGUISH ALLSTATE'S SUBROGATION RIGHTS.

Defendant initially submitted it's Motion for Summary Judgment based on the release executed by Allstate's insured, arguing that the release extinguished Allstate's right to reimbursement or subrogation. However, a clear majority of jurisdictions follow the rule that an insurer's right to the amount paid by it to its insured survives a settlement between its insured and the tortfeasor if: (1) the tortfeasor knows of the payment and the right of subrogation, (2) the insurer does not consent to the settlement, and (3) the settlement does not exhaust the tortfeasor's assets. State Farm Mutual Insurance Company v. Farmers Insurance Exchange, 27 Utah 2d 166, 493 P.2d 1002 (1972); see also extensive list of jurisdictions following rule as cited in Leader National Insurance Company v. Torres, 751 P.2d 1252, 1255 n.2 (Wash. App. 1988). No allegation has yet been made that the settlement exhausted the assets of Defendant's insurer, a party to the release.

Allstate submitted notice of its claim to Defendant's

insurer on or about January 12, 1988, nineteen months before execution of the release. (R. 29, Exhibit A). The notice specifically referenced the existence of Allstate's "rights of subrogation for No-Fault benefit payments" for medical expenses. (R. 29, Exhibit A). Frontier Adjusters acknowledged their receipt of Allstate's claim by letter dated April 4, 1988, expressly denying the claim. (R. 30, Exhibit B). Allstate sent a second notice to Frontier Adjusters dated April 12, 1988. (R. 31, Exhibit C). Sixteen months later, on August 9, 1989, Allstate's insured executed the document entitled "Release of All Claims." (R. 32-33, Exhibit D). The document purports to release Defendant from any claim arising from the motor vehicle accident and declares that "the undersigned further represent that there are no unresolved subrogation claims and agree that if any such claims should be made, they will indemnify and save harmless those parties released hereby." (R. 32, Exhibit D). Allstate's first notice of the existence of the Release came one month after it filed suit (R. 25), giving Allstate no opportunity to object or consent to the agreement. Given the acknowledged notice of Allstate's claim and the lack of Allstate's consent to the release, Defendant's insurance carrier was not released from liability for Allstate's payment to its insured, and Allstate's right to payment survived execution of the Release, leaving Allstate free to enforce its right pursuant to Section 31A-22-309(6) or, when that avenue proved futile, by suit pursuant to Section 31A-21-108.

Finally, the issue of the validity of the Release and its affect on Allstate's claim creates a genuine issue of material fact barring Summary Judgment in favor of Defendant. Therefore, the Circuit Court's Order must be reversed and remanded for further proceedings.

CONCLUSION

The Circuit Court ruled as a matter of law that Defendant was entitled to Summary Judgment. However, the Court erred in interpreting the applicable statutory provisions and rendered an inappropriate remedy based on the facts and circumstances of the case before it.

The Circuit Court's determination that suit for a subrogation claim must be brought in the name of both insurers is contrary to the express language of Section 31A-21-108. This section expressly allows the filing of a subrogation suit in the name of the insurers, and Allstate's actions in judicially pursuing its subrogation rights in the name of its insured were both reasonable and lawful.

Having found pursuit of its remedy under Section 31A-22-209(6) foreclosed and rendered ineffective by Defendant's carrier's refusal to arbitrate, Allstate was within its rights to force intervention of the Courts and pursue its remedies under Section 31A-21-108. The subsequent award of Summary Judgment to Defendant where Defendant's actions prevented the realization of mandatory arbitration is incongruous with the concepts of equity and justice and must be reversed.

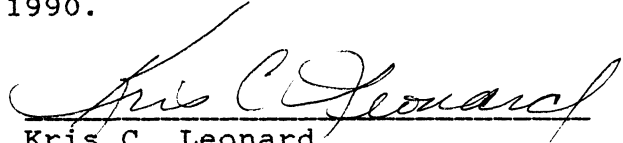
The Court's imposition of Summary Judgment in favor of Defendant activates the doctrine of res judicata and effectively denies Allstate's right to seek any recovery on its subrogation claim. Allstate should not summarily be made to suffer loss of its claim where the Court may otherwise remedy the parties' failure to meet the arbitration requirements of Section 31A-22-309. Therefore, the Summary Judgment should be reversed and the case remanded with directions for the trial court to stay the proceedings and compel arbitration between the parties.

Finally, the release executed by Allstate's insured absent Allstate's consent cannot defeat Allstate's rights to reimbursement of the PIP benefits paid to its insured. Defendant's insurance carrier had actual knowledge of the existence of Allstate's claim nineteen months prior to execution of the release, preventing the insurer from escaping liability for the claim. With its subrogation rights remaining intact, Allstate was within its rights to pursue reimbursement through a subrogation suit pursuant to Section 31A-21-108.

This case has potentially far-reaching consequences to Utah's insurance community. A large number of insurers not licensed to do business in Utah and having only transitory contact through their insureds' transition through the State are in a position to subvert the purposes behind Section 31A-22-309(6). If Section 31A-21-108 is meaningless, as the Circuit Court's ruling suggests, then it is incumbent upon this Court to so notify the insurance industry as well as the Utah Legislature

so that appropriate measures may be taken. Consequently, Plaintiff respectfully requests that the Summary Judgment be reversed and the case remanded for further proceedings.

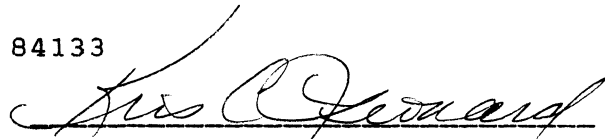
DATED this 11th day of June, 1990.


Kris C. Leonard
Attorney for Plaintiff/
Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of June, 1990, I caused to be mailed a true and accurate copy of BRIEF OF APPELLANT, postage prepaid, to the following:

Peter Stirba
Barbara Zimmerman
McKAY, BURTON & THURMAN
Suite 1200
Kennecott Building
Salt Lake City, UT 84133



ADDENDUM

- (A) Complaint
- (B) Defendant's Motion for Summary Judgment
- (C) Defendant's Memorandum in Support of Motion for Summary Judgment
- (D) Release of All Claims
- (E) Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment
- (F) Defendant's Reply Memorandum in Support of Motion for Summary Judgment
- (G) Request for Ruling on Defendant's Motion for Summary Judgment
- (H) Order granting Defendant's Motion for Summary Judgment
- (I) Notice of Filing Cost Bond
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- (K) Section 31A-21-108, Utah Code Annotated (1953), as amended
- (L) Section 31A-22-309, Utah Code Annotated (1953), as amended
- (M) State Farm Mutual Insurance Co. v. Farmers Insurance Exchange, 27 Utah 2d 166, 493 P.2d 1002 (1972)

kcr\thomas.brf

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FILED
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CLERK OF THE DISTRICT COURT
SALT LAKE DEPARTMENT

CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

VERNON J. THOMAS,)	
)	
Plaintiff,)	COMPLAINT
)	
vs.)	
)	
DAVID P. ADAMS,)	
)	
Defendant.)	Civil No. 893010107CV

Plaintiff complains of Defendant and for cause of action alleges:

1. That at all times pertinent hereunto, Defendant was a resident of the State of Utah, and the amount in controversy is less than \$10,000.00.

2. At all times pertinent hereunto, Defendant, as a resident of the State of Utah, was operating a motor vehicle over and upon the highways of the State of Utah within the terms of Section 41-12a-505, Utah Code Annotated, 1953 as amended, and Plaintiff is informed and reasonably believes that Defendant has left the State of Utah and his last known address is as follows:

David P. Adams
19326 Fernwood Drive
Chippewa Falls, Wisconsin 54729.

3. On or about December 14, 1987, on a public street known as SR15, at or near 600 North structure, in Salt Lake City, Salt Lake County, Utah, Defendant negligently and carelessly caused a

motor vehicle operated by her to collide with a vehicle owned by Plaintiff.

4. As direct and proximate result of Defendant's negligence and carelessness aforesaid, Plaintiff suffered an heart attack occasioned by stress brought on from collision, and has incurred reasonable and necessary medical expenses in the sum of \$3,000.00.

5. Defendant has paid damage to Plaintiff's vehicle but has failed and refused to pay Plaintiff's medical expenses.

WHEREFORE, Plaintiff prays for judgment against the Defendant for the sum of \$3,000.00 together with interest at the highest lawful rate from and after December 14, 1987, until date of judgment herein, for Plaintiff's costs of court and such other relief as the Court deems just.

DATED this 9th day of October, 1989.

MATHESON, MORTENSEN & OLSEN


Don E. Olsen

FILED

NOV 17 1989

CLERK OF DISTRICT COURT

SALT LAKE COUNTY

PETER STIRBA (Bar No. 3118)
McKAY, BURTON & THURMAN
Attorneys for Defendant
1200 Kennecott Building
10 East South Temple
Salt Lake City, Utah 84133
Telephone: (801) 521-4135

IN THE THIRD CIRCUIT COURT, STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

VERNON J. THOMAS,	:	MOTION FOR SUMMARY JUDGMENT
Plaintiff,	:	
vs.	:	
DAVID P. ADAMS,	:	Civil No. 893010107CV
Defendant.	:	Judge Michael L. Hutchings

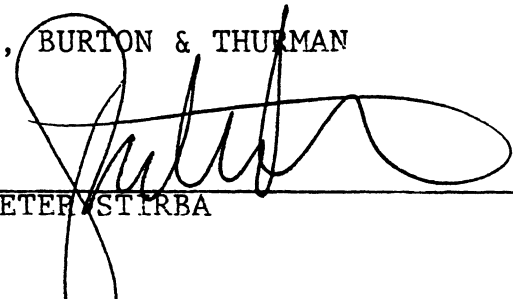
Defendant David P. Adams, by and through his attorney of record, Peter Stirba, and pursuant to Rule 56 of the Utah Rules of Civil Procedure, moves this Court for Summary Judgment in that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

This Motion is supported by Defendant's Memorandum in Support of Motion for Summary Judgment filed contemporaneously herewith.

DATED this 17th day of November, 1989.

McKAY, BURTON & THURMAN

By:


PETER STIRBA

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION FOR SUMMARY JUDGMENT was mailed, postage prepaid, this 17th day of November, 1989, to the following:

Don E. Olsen, Esq.
MATHESON, MORTENSEN & OLSEN
648 East 100 South
Salt Lake City, Utah 84102

Laurie Albred

PS6

FILED

NOV 17 1987

U.S. DISTRICT COURT
SALT LAKE COUNTY

PETER STIRBA (Bar No. 3118)
McKAY, BURTON & THURMAN
Attorneys for Defendant
1200 Kennecott Building
10 East South Temple
Salt Lake City, Utah 84133
Telephone: (801) 521-4135

IN THE THIRD CIRCUIT COURT, STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

VERNON J. THOMAS,	:	DEFENDANT'S MEMORANDUM IN
	:	SUPPORT OF MOTION FOR
Plaintiff,	:	SUMMARY JUDGMENT
vs.	:	
DAVID P. ADAMS,	:	Civil No. 893010107CV
	:	Judge Michael L. Hutchings
Defendant.	:	

Defendant David P. Adams, by and through his attorney of record hereby submits the following Memorandum in Support of his Motion for Summary Judgment.

STATEMENT OF FACTS

1. On or about December 14, 1987, on a public highway known as U.S. Interstate 15, at or near the location known as 600 North, in Salt Lake City, Salt Lake County, Utah the parties were involved in a motor vehicle accident.

2. The plaintiff allegedly sustained personal injuries as a result of said accident.

3. On or about August 9, 1989, the plaintiff and his attorney entered into an agreement with the defendant where, in

consideration of payment of the sum of Five Thousand Dollars (\$5,000), the plaintiff forever released and discharged the defendant from any and all claims, demands, benefits, either past or future, causes of action both for property damage, damages, costs, loss of services, expenses or compensation on account of or in any way growing out of the motor vehicle accident in question. See Release of All Claims, Vernon J. Thomas, attached herein as Exhibit A.

4. The release signed by Mr. Thomas and his attorney further stated that the release was a full, complete and final release of the defendant for any matter or thing done or omitted to be done by the said parties and as a result of the motor vehicle accident. See Release of All Claims, Vernon J. Thomas.

5. On or about October 9, 1989 the plaintiff filed suit against the defendant claiming damages in the amount of Three Thousand Dollars (\$3,000) for medical expenses allegedly incurred as a result of the heart attack suffered by the plaintiff immediately after the motor vehicle accident in question.

6. Such cause of action is directly in contravention of the release signed by the plaintiff and his attorney.

ARGUMENT

POINT 1: THERE IS NO GENUINE ISSUE OF MATERIAL FACT AND THE DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW IN THAT THE RELEASE SIGNED BY THE PLAINTIFF AND HIS ATTORNEY IS DISPOSITIVE OF THE ALLEGATIONS MADE BY THE PLAINTIFF.

Rule 56 of the Utah Rules of Civil Procedure states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". Rule 56, Utah Rules of Civil Procedure.

The purpose of summary judgment is to bar the court from having to hear unnecessary and unjustified litigation. McBride v. Fidelity & Guar. Insurance Underwriters, Inc., 16 Utah 2d 211, 398 P.2d 685, 688 (1965). It is appropriate when, as a matter of law, there is no reasonable possibility that the losing party could win if given a trial. Judkins v. Toone, 27 Utah 2d 17, 492 P.2d 980, 983 (1972).

Summary judgment is also appropriate in a case involving an affirmative defense, such as a valid release. Ulibarri v. Christensen, 2 Utah 2d 367, 275 P.2d 170, 171 (1954).

On August 9, 1989 the plaintiff executed a document entitled "Release of All Claims". This document was signed by the plaintiff and was also signed by one Philip C. Story, Jr., as the attorney for Vernon J. Thomas.

In consideration of the payment to Mr. Thomas of the total sum of Five Thousand Dollars (\$5,000), the receipt of which was acknowledged, Mr. Thomas released and discharged the

defendant, David P. Adams, "from and of any and all claims, demands, benefits either past or future, causes of action both for property damage, damages, costs, loss of services, expenses or compensation on account of or in any way growing out of" the motor vehicle accident. See Exhibit A.

Releases are to be accorded deference under Utah law. They are to be avoided only if any evidence of invalidity offered is "clear, unequivocal and convincing". Ulibarri v. Christenson, 2 Utah 2d 307, 275 P.2d 170, 171 (1954); Jimenez v. O'Brien, 213 P.2d 337, 340 (Utah 1949). As the Plaintiff has failed to allege or insinuate that the release signed by the plaintiff and his attorney is invalid it must be presumed that it is in fact valid.

The plaintiff's Complaint, dated October 9, 1989, fully two months after the plaintiff signed the Release, asks for reimbursement from the defendant for medical expenses allegedly incurred as a result of the heart attack suffered by the plaintiff after the motor vehicle accident. Complaint at Para. 4. The plaintiff also claims that the defendant has failed and refused to pay these medical damages. However, an examination of the Release form signed by the plaintiff and his attorney clearly shows that the plaintiff has released the defendant from the obligation, if any ever existed, to pay the plaintiff's claimed medical expenses.

Because the release signed by the plaintiff and his attorney is dispositive of this case, and because it was signed fully two months before this Complaint was filed, there is no genuine issue as to any material fact and the defendant is entitled to summary judgment as a matter of law.

DATED this 17th day of November, 1989.

McKAY, BURTON & THURMAN

By: 

PETER STIRBA

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT was mailed, postage prepaid, this 17th day of November, 1989 to the following:

Don E. Olsen, Esq.
MATHESON, MORTENSEN & OLSEN
648 East 100 South
Salt Lake City, Utah 84102



VERNON J. THOMAS
v.
DAVID P. ADAMS
#893010107CV

RELEASE OF ALL CLAIMS

For and in consideration of the payment to the undersigned of the total sum of FIVE THOUSAND AND NO/100 DOLLARS (\$5,000.00), the receipt of which is hereby acknowledged, the undersigned, VERNON J. THOMAS and PHILIP C. STORY, JR., his attorney, hereby forever release and discharge DAVID P. ADAMS, A&M MOVING AND STORAGE, INC., TRANSPROTECTION INSURANCE COMPANY and VANLINER INSURANCE COMPANY, and any and all other persons, firms, or corporations, from and of any and all claims, demands, benefits either past or future, causes of action both for property damage, damages, costs, loss of services, expenses or compensation on account of or in any way growing out of an incident which occurred on or about December 14, 1987, on Interstate 15, at or near Salt Lake City, Utah.

The undersigned hereby declare and represent that the damages sustained by the undersigned are or may be permanent and progressive and that recovery therefrom may be uncertain and indefinite and in making this release and agreement, it is understood and agreed that the undersigned rely wholly upon their own judgment, belief and knowledge of the nature, extent and duration of said damages and in granting this complete release, they do not rely upon anything told to them or represented to them by the persons, firms or corporations who are being released, or by any person or persons representing them.

The undersigned further understand and agree that this settlement is a compromise of a doubtful and disputed claim and that payment is not to be construed as an admission of liability on the part of any of the persons or companies referred to above and who are released herein and by whom liability is expressly denied.

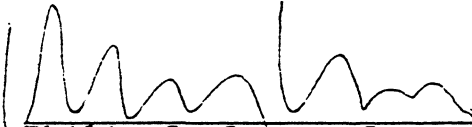
The undersigned further acknowledge and accept the advice of counsel in the settlement of this matter that this is a full, complete and final release of the above-named parties for any matter or thing done or omitted to be done by the said parties and as a result of the incident referred to above. The undersigned further represent that there are no unresolved subrogation claims and agree that if any such claims should be made, they will indemnify and save harmless those parties released hereby.

The undersigned further states that they have carefully read the foregoing Release of All Claims, know the contents thereof

and that they sign the same as their own free act, and it is their intention to be legally bound thereby.

DATED this _____ day of 8-9, 1989.


Vernon J. Thomas

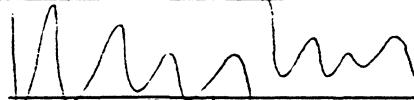

Philip C. Story, Jr.
Attorney for Vernon J. Thomas

STATE OF UTAH

County of Salt Lake

On this 9 day of August, 1989, personally appeared before me VERNON J. THOMAS, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

DATED this 9 day of August, 1989.


Notary Public
Residing at: SLL

My Commission Expires:

12-21-89

DON E. OLSEN #2460
KRIS C. LEONARD #4902
MATHESON, MORTENSEN & OLSEN
Attorneys for Plaintiff
648 East First South
Salt Lake City, Utah 84102
Telephone: (801) 363-2244

IN THE THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

VERNON J. THOMAS,)	
)	PLAINTIFF'S MEMORANDUM
)	IN OPPOSITION TO
Plaintiff,)	DEFENDANT'S MOTION FOR
)	FOR SUMMARY JUDGMENT
vs.)	
)	Civil No. 893010107CV
DAVID P. ADAMS,)	Judge Michael L. Hutchings
)	
Defendant.)	

Plaintiff Vernon J. Thomas, by and through his undersigned counsel, hereby submits the following Memorandum in Opposition to Defendant's Motion for Summary Judgment.

STATEMENT OF FACTS

1. On or about December 14, 1987, on a public street known as U.S. Interstate 15, at or near approximately 600 North, in Salt Lake City, Salt Lake County, Utah, the parties were involved in a motor vehicle accident.

2. As a direct and proximate result of the accident, Plaintiff suffered a heart attack occasioned by stress brought on from the collision and incurred reasonable and necessary medical expenses in the sum of \$3,000.00.

3. On or about January 12, 1988, Plaintiff's insurer, Allstate Insurance Company (hereinafter "Allstate"), filed a no fault subrogation claim with the insurer of the carrier employing Defendant at the time of the accident.

4. By letter dated April 4, 1988, Defendant expressly denied the subrogation claim.

5. On or about October 9, 1989, Plaintiff filed the subject suit against the Defendant for the above-referenced medical expenses, said suit being a subrogation case filed pursuant to Section 31A-21-108, Utah Code Annotated (1953), as amended.

6. On or about November 1, 1989, Defendant notified Allstate of the existence of a document entitled "Release of All Claims" (hereinafter "Release"). Said Release was allegedly executed by Plaintiff and Plaintiff's attorney on or about August 9, 1989.

ARGUMENTS

Point I

Defendant's Knowledge of the Existence of Allstate's Claim Renders the Release Ineffective, Creating a Genuine Issue of Material Fact for This Court's Determination.

Upon the filing of a Motion for Summary Judgment, the party opposing the Motion has the burden of setting forth specific facts showing the existence of a genuine issue for trial in order to defeat the Motion. Rule 56(e), Utah Rules of Civil Procedure. The facts herein and the documents submitted herewith together raise the genuine issue of the validity and effectiveness of the Release upon which Defendant's Motion is based, requiring a denial of Defendant's Motion.

Following the accident in question, Plaintiff's insurer, Allstate Insurance Co., investigated the occurrence, settled with

Plaintiff under the terms of its policy, and received from Plaintiff an assignment of rights. On or about January 12, 1988, Allstate submitted to Defendant's employer's insurer, Frontier Adjusters, its no fault subrogation claim concerning the accident at issue, indicating its possession of "rights of subrogation for No-Fault benefit payments" for medical expenses. A copy of said claim is attached hereto as Exhibit "A" and incorporated herein by reference. In response to said claim, Plaintiff received from Defendant's counsel a letter dated April 4, 1988, expressly denying Plaintiff's subrogation claim. A copy of said letter is attached hereto as Exhibit "B" and incorporated herein by reference. By this denial Defendant has failed and refused to pay the medical damages incurred by Plaintiff. By letter dated April 12, 1988, Plaintiff requested a reconsideration of Defendant's denial of his claim. A copy of the April 12 letter is attached hereto as Exhibit C and incorporated herein by reference. No response to said letter was received by Plaintiff.

As the sole support for his Motion for Summary Judgment, Defendant relies upon a document entitled "Release of All Claims" purportedly executed by Plaintiff on August 9, 1989. A copy of said document is attached hereto as Exhibit "D" and incorporated herein by reference. Said document purports to release Defendant from any claim or demand arising from the collision between the parties occurring on December 14, 1987, and declares that "[t]he undersigned further represent that there are no unresolved subrogation claims and agree that if any such claims should be

made, they will indemnify and save harmless those parties released hereby." See Exhibit D, paragraph 4.

The submission of Plaintiff's claim and Defendant's denial thereof, as outlined above, occurred more than nineteen months prior to the execution of the subject Release. Consequently, Defendant had full knowledge and notice of Allstate's subrogation position more than nineteen months prior to its acceptance of a release stating that no such subrogation claim existed. In addition, Defendant was on notice of the unresolved status of Allstate's claim as evidenced by the request for reconsideration submitted by Allstate to which Defendant failed to respond. Defendant's denial of Allstate's claim is an acknowledgment that Defendant knew of the claim and knew that Plaintiff Thomas had collected payment from Allstate under its insurance policy and had assigned his rights to Allstate. Defendant's actions in subsequently obtaining a Release from Plaintiff which expressly denies the existence of a claim of which Defendant has full knowledge should not be summarily condoned. Neither should Defendant be allowed to rely to its benefit on a Release obtained under such questionable circumstances.

Defendant's actions herein suggest not only an intentional attempt to belatedly circumvent its liability in this matter, but also raise the question of bad faith by Defendant in obtaining Plaintiff's execution of the Release. Defendant has not properly avoided its liability to Allstate in this matter. Rather, Defendant's remedy is one of indemnity from Plaintiff Thomas pursuant to the terms of their agreement. See Exhibit D,

paragraph 4. Defendant's securing of and reliance on the Release obtained nineteen months after the submission of the claim raises an issue of material fact upon which trial must be had in this matter.

CONCLUSION

The peculiar circumstances of this case, including Defendant's prior knowledge of the existence of an unresolved subrogation claim nineteen months prior to obtaining the Release denying the existence of such claim, create a genuine issue of material fact, the existence of which requires a denial of Defendant's Motion for Summary Judgment.

DATED this 27th day of November, 1989.

MATHESON, MORTENSEN & OLSEN

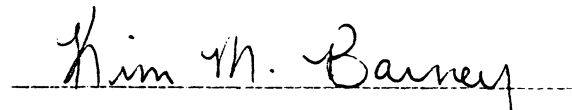


Don E. Olsen
Attorney for Plaintiff

Certificate of Mailing

I hereby certify that on the 27th day of November, 1989, I mailed a true and correct copy of the foregoing Plaintiff Memorandum in Opposition to Defendant's Motion for Summary Judgment to the following:

Peter Stirba
McKAY, BURTON & THURMAN
Suite 1200
Kennecott Building
Salt Lake City, UT 84133



INTER-INSURER SUBROGATION MEMORANDUM

FILE IDENTIFICATION:

Your Claim No.: 1310092067
 Your Insured: United Leasing
 Your Insured's Address: #1 United Drive
Fenton Missouri
 Accident: I-15 Northbound (I-40 N.) 12-14-87
 (Place) (Date)

DATE: JAN 12, 1988
 Our Claim No.: 1310092067
 Our Insured: Vernon J Thomas

FROM: ☒ Allstate Insurance Co.
☐ Allstate Indemnity Co.
☐ Allstate County Mutual Ins. Co. (Texas only)

MARKET CLAIM OFFICE

5650 South 410 West
 Salt Lake City UT 84123-0000

Signature: Andrea N Hogan

TO: Frontier
7109 So Highland #102A
SLC UT 84121

REGARDING OUR SUBROGATION CLAIM AGAINST YOUR COMPANY...

☐ 1. Repair or replacement of our insured's motor vehicle or other property is being made under the terms of our insured's policy. Our subrogation claim is forthcoming. Please protect Allstate's interests.

☒ 2. Our investigation reveals that your insured was at fault for the accident, and:

☒ a. Payment for repairs to our insured's motor vehicle (or other property _____) have been completed and documentation is attached. Please honor our claim:

Allstate's interest: \$ 1509.00

Insured's deductible (if indicated): \$ 100.00

TOTAL: \$ 1609.00

Please send a separate draft for our insured's deductible ☐ Yes ☒ No

☐ b. Our insured's vehicle was a total loss. Documentation is attached. Basis for our claim:

Amount paid to our insured:	\$ _____
PLUS initial towing and storage charges:	\$ _____
TOTAL (1)	\$ _____
Gross recovery on sale of salvage:	\$ _____
LESS fees in sale of salvage:	\$ _____
NET SALVAGE RECOVERY (2)	\$ _____
Our subrogation interest (1 minus 2)	\$ _____
PLUS our insured's deductible interest (if applicable):	\$ _____
TOTAL SUBROGATION CLAIM:	\$ _____

☐ c. We possess rights of subrogation for Medical Expense Coverage payments. Documentation is attached. Please honor our claim for: \$ _____

☒ d. We possess rights of subrogation for No-Fault benefit payments. Documentation is attached. Please honor our claim for:

Medical:	\$ <u>pending</u>	Ess. Serv.:	\$ <u>Vernon Thomas</u>	Surv. Loss:	\$ _____
Work Loss:	\$ _____	Funeral:	\$ _____	TOTAL:	\$ _____

☐ 3. Following earlier correspondence to you regarding our subrogation claim, we incurred additional expense involving the loss. Documentation is attached. Please include the following amount in our subrogation claim: \$ _____

☐ 4. Our assessment of liability factors warrants a subrogation demand of less than 100%. In lieu of the amount shown in 2a or 2b above, a _____% a compromised request is indicated as follows:

☐ Allstate's interest only: \$ _____
☐ Allstate's interest including our insured's deductible interest: \$ _____

☐ 5. Documentation of our claim was sent to you earlier. Please remit payment.

☐ 6. An arbitration decision in our favor was rendered on _____. When may we expect payment?

☐ 7. Your offer of settlement is accepted. Please send your draft.

☐ 8. Your offer of settlement is unacceptable. We will proceed with legal action (or arbitration if applicable) unless our demand is met within 20 days.

MCKAY, BURTON & THURMAN

A PROFESSIONAL CORPORATION

ATTORNEYS AND COUNSELORS AT LAW
SUITE 1200 KENNECOTT BUILDING
10 EAST SOUTH TEMPLE STREET

SALT LAKE CITY, UTAH 84133

(801) 521-4135

OF COUNSEL
DAVID L. MCKAY

TELEFAX 801-521-4252

WILFORD M. BURTON
BARRIE G. MCKAY
WILLIAM T. THURMAN
DAVID P. BROWN
WILLIAM THOMAS THURMAN
PETER STIRBA
DAVID L. BIRD
REID TATEOKA
STEPHEN W. RUPP
HARRY CASTON
BRYAN A. LARSON
SCOTT C. PIERCE
JOEL T. MARKER
BENSON L. HATHAWAY, JR.
R. BRET JENKINS

April 4, 1988

Allstate Insurance Company
Market Claim Office
5650 South 410 West
Salt Lake City, Utah 84123-0000

Attention: Andra N. Hogan

Re: Subrogation Claim/Vernon J.
Thomas

Dear Ms. Hogan:

I have reviewed Allstate's no fault subrogation claim with the carrier for A & M Moving & Storage. Inasmuch as it is our position that your insured's injuries did not arise out of the accident, for which no fault benefits were provided, your claim previously submitted to Frontier Adjusters is denied.

Very truly yours,

Peter Stirba
/kp

PETER STIRBA

PS1:kp

cc: Libby Lowther
Faye Strothers

EXHIBIT B

COPY

April 12, 1988

Mr. Peter Stirba
McKay, Burton & Thurman
Suite 1200 Kennecott Bldg.
10 East South Temple Street
Salt Lake City, Utah 84133

506.10
119.29
1569
-213231

RE: Our Claim Number : 1310092067 J30
Our Insured : Vernon J. Thomas
Accident Date : December 14, 1987
Your Client : Frontier Adjusting for
A&M Moving & Storage

Dear Mr. Stirba:

Thank you for your correspondence of April 4, 1988.

While I can appreciate your concerns regarding the relatedness of the heart surgery to the automobile accident, the matter was carefully and fully investigated prior to any payments being made.

Enclosed is another copy of Dr. Okawa's January 12, 1988 medical report when he states "I feel definitely that the accident did precipitate his (Vernon J. Thomas) myocardial infarction, aggravating a pre-existing condition". I had a long conversation with Dr. Okawa during which he strongly reiterated his assessment that had the accident not occurred, Mr. Thomas would have remained asymptomatic and treatment for his coronary artery disease would not have been necessary.

Dr. Okawa firmly established the relationship between the resulting treatment and the auto accident. Once the correlation was made, we had no option but to cover the reasonable and necessary expenses under Mr. Thomas' personal injury protection coverage.

RELEASE OF ALL CLAIMS

For and in consideration of the payment to the undersigned of the total sum of FIVE THOUSAND AND NO/100 DOLLARS (\$5,000.00), the receipt of which is hereby acknowledged, the undersigned, VERNON J. THOMAS and PHILIP C. STORY, JR., his attorney, hereby forever release and discharge DAVID P. ADAMS, A&M MOVING AND STORAGE, INC., TRANSPROTECTION INSURANCE COMPANY and VANLINER INSURANCE COMPANY, and any and all other persons, firms, or corporations, from and of any and all claims, demands, benefits either past or future, causes of action both for property damage, damages, costs, loss of services, expenses or compensation on account of or in any way growing out of an incident which occurred on or about December 14, 1987, on Interstate 15, at or near Salt Lake City, Utah.

The undersigned hereby declare and represent that the damages sustained by the undersigned are or may be permanent and progressive and that recovery therefrom may be uncertain and indefinite and in making this release and agreement, it is understood and agreed that the undersigned rely wholly upon their own judgment, belief and knowledge of the nature, extent and duration of said damages and in granting this complete release, they do not rely upon anything told to them or represented to them by the persons, firms or corporations who are being released, or by any person or persons representing them.

The undersigned further understand and agree that this settlement is a compromise of a doubtful and disputed claim and that payment is not to be construed as an admission of liability on the part of any of the persons or companies referred to above and who are released herein and by whom liability is expressly denied.

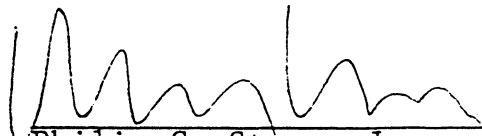
The undersigned further acknowledge and accept the advice of counsel in the settlement of this matter that this is a full, complete and final release of the above-named parties for any matter or thing done or omitted to be done by the said parties and as a result of the incident referred to above. The undersigned further represent that there are no unresolved subrogation claims and agree that if any such claims should be made, they will indemnify and save harmless those parties released hereby.

The undersigned further states that they have carefully read the foregoing Release of All Claims, know the contents thereof

and that they sign the same as their own free act, and it is their intention to be legally bound thereby.

DATED this _____ day of 8-9, 1989.


Vernon J. Thomas

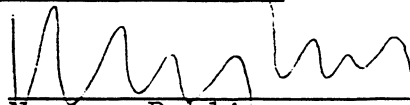

Philip C. Story, Jr.
Attorney for Vernon J. Thomas

STATE OF UTAH

County of Salt Lake

On this 9 day of August, 1989, personally appeared before me VERNON J. THOMAS, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

DATED this 9 day of August, 1989.


Notary Public
Residing at: SLC.

My Commission Expires:

12-21-89

FILED

SEP 11 1989

CLERK OF DISTRICT COURT

PETER STIRBA (Bar No. 3118)
McKAY, BURTON & THURMAN
Attorneys for Defendant
1200 Kennecott Building
10 East South Temple
Salt Lake City, UT 84133
Telephone: (801) 521-4135

IN THE THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

VERNON J. THOMAS,	:	DEFENDANT'S REPLY MEMORANDUM
	:	IN SUPPORT OF MOTION FOR
Plaintiff,	:	SUMMARY JUDGMENT
vs.	:	
DAVID P. ADAMS,	:	Civil No. 893010107CV
Defendant.	:	Judge Michael L. Hutchings

PRELIMINARY SUMMARY

It is obvious from reading Plaintiff's Statement of Facts that plaintiff is not aware of what allegations have been made in his Complaint. There is not one single allegation in the Complaint referencing that this action is a subrogation action. There is not one single allegation that this matter, although being brought in the name of Vernon J. Thomas, is really brought by Allstate Insurance Company. Furthermore, this matter is brought against the driver who was involved in the accident, rather than against his insurance carrier. There is no question that if this case is in fact a subrogation action for PIP benefits under §33A-22-309(6) U.C.A. (1953), as amended,

the proper party to the lawsuit is defendant's insurance carrier, not defendant individually.

Plaintiff's counsel may characterize this lawsuit any way he wishes. The fact remains, however, that the allegations in this case constitute a straight forward negligence claim for special damages brought by plaintiff, Vernon Thomas, against defendant, David P. Adams, for special damages incurred as a result of an automobile accident that occurred on December 14, 1987. The Release signed by Mr. Thomas and his attorney clearly and completely settle any such claim.

ARGUMENT

A. The allegations in the Complaint are not in the nature of a subrogation claim and therefore the Complaint must be dismissed based upon the existing Release of all claims signed by the plaintiff.

There is no question that the plaintiff is seeking damages for the accident of December 14, 1987. There is no dispute that the plaintiff and his attorney released the defendant and his agents from any further liability arising out of the accident. Further, there is no dispute that in paragraph 4 of the Release the plaintiff represented there were no unresolved subrogation claims, and further warranted that should there be any subrogation claims in the future, that the

plaintiff and his attorney would indemnify and hold harmless any party to the Release who was being charged with a subrogation claim.

Thus, based upon the existing allegations in plaintiff's Complaint the foregoing Release is dispositive of this case. This case as pled is not a subrogation case and there is absolutely no reference in the Complaint to suggest that it is. That being the case, the existing Complaint should be dismissed based upon the express language of the prior release executed by the plaintiff.

B. The express language of §31A-22-309(6) requires that this matter be dismissed.

Assuming arguendo, that plaintiff's Complaint should be construed differently than what has been alleged, and this case is really a subrogation case, then the express language of §31A-22-309(6) U.C.A. (1953), as amended, requires that this case be dismissed. Section 33A-22-309(6) states in pertinent part as follows:

(6) Every policy providing personal injury protection coverage is subject to the following:

(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 Workman's 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 the reimbursement and its amount shall be decided by mandatory binding arbitration between the insurers. (emphasis added).

Accordingly, plaintiff's Complaint is deficient and flawed in two major ways.

First, defendant David P. Adams is the not proper party to be sued. The "insurer" is liable for the reimbursement, not the individual tort feisor. Thus, even if there is an existing subrogation claim, it is between "insurers" and the proper party defendant is Mr. Adams' insurer.

Second, the liability that is being asserted for presumably no fault benefits that have been paid by Allstate to its insured, must be decided by "mandatory, binding arbitration between the insurers". That being the case, this lawsuit is a completely inappropriate remedy for Allstate to seek reimbursement against Mr. Adams' insurance carrier. It must pursue its remedy through arbitration, and not the courts.

The issue of notice is completely irrelevant and is immaterial to defendant's its motion. Defendant's position is that this lawsuit cannot be something more than what plaintiff has alleged in his complaint. Plaintiff has already released this defendant from damages sustained in the December 14, 1987 accident. That being so, defendant's Motion should be granted.

However, even assuming for purposes of argument that plaintiff now wishes to characterize this lawsuit as really a subrogation claim of Allstate Insurance Company, the lawsuit should still be dismissed and defendant's Motion should be granted because §32A-22-309(6) is controlling. Statutorily, Allstate can't sue the individual tort feisor for any reimbursement, and must pursue this matter through binding arbitration.

Under the foregoing analysis, the question of notice has no bearing on the Court in deciding this case. While the impact of the language of the release on any subrogation claim may become important at some future time, that language is not being relied upon by plaintiff at this point in support of this Motion.

DATED this 4th day of December, 1989.

McKAY, BURTON & THURMAN

By: 

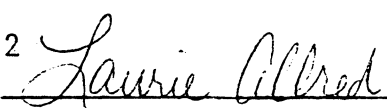
PETER STIRBA

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT was mailed, postage prepaid, this 4th day of December, 1989 to the following:

Don E. Olson, Esq.
648 East 100 South
Salt Lake City, UT 84102

MISC4/adams


Laurie Alfred

PETER STIRBA (Bar No. 3118)
McKAY, BURTON & THURMAN
Attorneys for Defendant
Suite 1200, Kennecott Building
Salt Lake City, Utah 84133
Telephone: (801) 521-4135

IN THE THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

VERNON J. THOMAS,	:	REQUEST FOR RULING ON
Plaintiff,	:	DEFENDANT'S MOTION FOR
	:	SUMMARY JUDGMENT
-vs-	:	
DAVID P. ADAMS,	:	Civil No. 893010107CV
Defendant.	:	Judge Michael L. Hutchings

Plaintiff, pursuant to Rule 4-501 of the Utah Code of Judicial Administration, hereby requests the clerk to submit Defendant's Motion for Summary Judgment for ruling. All responsive pleadings have now been filed, and the issue is ripe for a determination.

DATED this 22 day of December, 1989.

McKAY, BURTON & THURMAN

By: 

Benson L. Hathaway for
Peter Stirba

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing REQUEST FOR RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT was mailed, postage prepaid, this 2nd day of December, 1989, to the following:

Don E. Olsen, Esq.
MATHESON, MORTENSEN & OLSEN
648 East First South
Salt Lake City, Utah 84102

PS18

Alice R. White

PETER STIRBA (Bar No. 3118)
McKAY, BURTON & THURMAN
Attorneys for Defendant
Suite 1200, Kennecott Building
Salt Lake City, Utah 84133
Telephone: (801) 521-4135

IN THE THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

VERNON J. THOMAS,	:	ORDER GRANTING
Plaintiff,	:	DEFENDANT'S MOTION FOR
	:	SUMMARY JUDGMENT
-vs-	:	
DAVID P. ADAMS,	:	Civil No. 893010107CV
Defendant.	:	Judge Michael L. Hutchings

This matter was submitted to the Court for decision based upon the memoranda of the parties and the pleadings on file with the Court. The Court, having reviewed Defendant's Motion for Summary Judgment and the entire file in this matter, and good cause appearing therefor,

HEREBY ORDERS that Defendant's Motion for Summary Judgment is hereby granted and this case is dismissed with prejudice *for 2 reasons. 1) This is a subrogation claim and should be decided at arbitration. 2) The proper parties are insurance companies.*
DATED this 22 day of January, 1990.

BY THE COURT:

Michael L. Hutchings
Michael L. Hutchings
Circuit Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT was mailed, postage prepaid, this 12th day of January, 1990, to the following:

Don E. Olsen, Esq.
MATHESON, MORTENSEN & OLSEN
648 East First South
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PARTMENT

ICE OF FILING COST
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e No. 893010107CV

e Michael L. Hutchin

Defendant,

Judge Michael L. Hutchings

DATED this 20th day of February, 1990.

Kris C. Leonard
MATHESON, MORTENSEN & OLSEN
Attorneys for Plaintiff

I hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing to Defendant's attorney on this 27th day of February, 1990, as follows:

4133

Kris O'Connell

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Attorneys for Plaintiff
648 East First South
Salt Lake City, UT 84102
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IN THE THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

VERNON J. THOMAS,

Plaintiff,

VS.

DAVID P. ADAMS,

Defendant,

NOTICE OF APPEAL

Case No. 893010107CV

Judge Michael L. Hutchings

Notice is hereby given that Plaintiff Vernon J. Thomas
appeals to the Court of Appeals of the State of Utah from the
January 22, 1990, Order of the Honorable Michael L. Hutchings
granting Defendant's Motion for Summary Judgment. DATED this
20th day of February, 1990.

Kris C. Leonard
MATHESON, MORTENSEN & OLSEN
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on the 20 day of February, 1990, I mailed a true and accurate copy of the foregoing Notice of Appeal, postage prepaid, to the following:

Peter Stirba
McKAY, BURTON & THURMAN
Suite 1200, Kennecott Building
Salt Lake City, UT 84133

KC Jones

(b) the fact misrepresented or falsely warranted contributes to the loss.

(3) No failure of a condition prior to the loss and no breach of a promissory warranty affects the insurer's obligations under the policy unless it exists at the time of the loss and either increases the risk at the time of the loss or contributes to the loss. This subsection does not apply to failure to tender payment of premium.

(4) Nondisclosure of information not requested by the insurer is not a defense to an action against the insurer. Failure to correct within a reasonable time any representation that becomes incorrect because of changes in circumstances is misrepresentation, not nondisclosure.

(5) If after issuance of a policy the insurer acquires knowledge of sufficient facts to constitute a general defense to all claims under the policy, the defense is only available if the insurer notifies the insured within 60 days after acquiring the knowledge of its intention to defend against a claim if one should arise, or within 120 days if the insurer considers it necessary to secure additional medical information and is actively seeking the information at the end of the 60 days.

The insurer and insured may mutually agree to a policy rider in order to continue the policy in force with exceptions or modifications. For purposes of this subsection, an insurer has acquired knowledge only if the information alleged to give rise to the knowledge was disclosed to the insurer or its agent in connection with communications or investigations associated with the insurance policy under which the subject claim arises.

(6) No trivial or transitory breach of or noncompliance with any provision of this chapter is a basis for avoiding an insurance contract. 1986

31A-21-106. Incorporation by reference.

(1) No insurance policy may contain any agreement or incorporate any provision not fully set forth in the policy or in an application or other document attached to and made a part of the policy at the time of its delivery. However:

(a) any policy may by reference incorporate rate schedules and classifications of risks and short-rate tables filed with the commissioner; and

(b) by rule or order, the commissioner may authorize incorporation by reference of provisions for administrative arrangements, premium schedules, and payment procedures for complex contracts.

(2) Except as provided in Subsection (3) or (4), or as otherwise mandated by law, no purported modification of a contract during the term of the policy affects the obligations of a party to the contract unless the modification is in writing and agreed to by the party against whose interest the modification operates.

(3) Subsection (2) does not prevent a change in coverage under group contracts resulting from provisions of an employer eligibility rule, the terms of a collective bargaining agreement, or provisions in Federal Employee Retirement Income Security Act plan documents.

(4) Subsection (2) does not prevent a premium increase at any renewal date which is applicable uniformly to all comparable persons. 1986

31A-21-107. Contract rights under noncomplying policies.

(1) Except as otherwise specifically provided by this title, a policy is enforceable against the insurer

according to its terms, even if it exceeds the authority of the insurer.

(2) Any insurance policy, rider, or endorsement issued after July 1, 1986, and which is otherwise valid, which contains any condition or provision not in compliance with the requirements of this title, is not rendered invalid by this title.

However, those conditions and provisions shall be construed and applied as if the policy, rider, or endorsement was in full compliance with this title.

(3) Upon written request of the policyholder or an insured whose rights under the policy are continuing and not transitory, an insurer shall reform and reissue or amend by a clearly stated rider its written policy to comply with the requirements of the law existing at the date of issuance of the policy. Subject to this section and Section 31A-21-102, a person seeking to reform a written insurance agreement by complaint or petition to a judicial authority shall show by clear and convincing evidence the existence of facts establishing the reformation. 1986

31A-21-108. Subrogation rights.

Subrogation actions may be brought by the insurer in the name of its insured. 1986

Part II. Approval of Forms.

31A-21-201. Filing and approval of forms.

31A-21-202. Explicit approval required.

31A-21-203. Authorized clauses for insurance forms.

31A-21-201. Filing and approval of forms.

(1) No form subject to Subsection 31A-21-101 (1), except as exempted under Subsections 31A-21-101 (2) through 31A-21-101 (6), may be used unless it has been filed with the commissioner.

(2) (a) The commissioner may at any time disapprove a form upon a finding that:

(i) it is inequitable, unfairly discriminatory, misleading, deceptive, obscure, or encourages misrepresentation;

(ii) it provides benefits or contains other provisions that endanger the solidity of the insurer;

(iii) in the case of the basic policy, though not applicable to riders and endorsements, it fails to provide the exact name of the insurer and its state of domicile; or

(iv) it violates a statute or a rule adopted by the commissioner, or is otherwise contrary to law.

(b) Whenever the commissioner disapproves a form under Subsection (2) (a), the commissioner may order that, on or before a date not less than 30 nor more than 90 days after the order, the use of the form be discontinued or that appropriate changes be made.

(c) The commissioner's disapproval under this Subsection (2) shall be in writing and constitutes an order. This order shall state the reasons for disapproval in reasonable detail to guide the insurer in reformulating its proposals or appealing the order.

(3) Insurance policy forms need not conform to the requirements of this chapter until July 1, 1987, though insurance policies issued after July 1, 1986, are subject to Section 31A-21-107. 1988

31A-21-202. Explicit approval required.

(1) The following clauses are disapproved unless the commissioner gives them explicit approval:

(a) clauses requiring more expeditious notice of loss or proof of loss than is required by Section 31A-21-312 or rules adopted under that section; and

(b) a schedule of reinstatement fees under Section 31A-22-608, if made a part of the policy. This

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

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

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

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

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

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

(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;

(iv) for any injury sustained by any person arising out of the use of any motor vehicle while located for use as a residence or premises;

(v) for any injury due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing; or

(vi) for any injury resulting from the radioactive, toxic, explosive, or other hazardous properties of nuclear materials.

(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 Section 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 Section 31A-22-307 shall be made on a monthly basis as expenses are incurred. Benefits for any period are overdue if they are not paid within 30 days after the insurer receives reasonable proof of the fact and amount of expenses incurred during the period. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after that proof is received by the insurer. Any part or all of the remainder of the claim that is later supported by reasonable proof is also overdue if not paid within 30 days after the proof is received by the

insurer. If the insurer fails to pay the expenses when due, these expenses shall bear interest at the rate of 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 is subject to the following:

(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. 1988

31A-22-310. Assigned risk plan.

(1) After consultation with insurers authorized to issue policies containing the provisions specified under Section 31A-22-302, the insurance commissioner shall approve a reasonable plan for the equitable apportionment among the insurers of applicants for those policies who are in good faith entitled to, but are unable to procure, these policies through ordinary methods.

(2) Upon the commissioner's approval of a plan under this section, all insurers issuing policies described under Section 31A-22-302 shall subscribe to and participate in the commissioner's approved plan.

(3) Any applicant for a policy under the commissioner's plan, any person insured under the plan, and any insurer affected by the commissioner's plan may appeal to the insurance commissioner from any ruling or decision of the manager or committee designated to operate the plan.

(4) Section 31A-2-306 applies to the commissioner's decision on this appeal. 1987

Part IV. Life Insurance and Annuities.

31A-22-400. Scope of part.

31A-22-401. Prohibited life insurance policy provisions.

31A-22-402. Grace period.

31A-22-403. Incontestability.

31A-22-404. Suicide.

31A-22-405. Misstated age.

31A-22-406. Table of installments.

31A-22-407. Reinstatement.

31A-22-408. Standard Nonforfeiture Law for Life Insurance.

31A-22-409. Standard Nonforfeiture Law for Individual Deferred Annuities.

31A-22-410. Trustee and deposit agreements.

31A-22-411. Contracts providing variable benefits.

31A-22-412. Assignment of life insurance rights.

31A-22-413. Designation of beneficiary.

31A-22-414. Evidence as to death.

31A-22-415. Simultaneous death.

31A-22-416. [Reserved].

31A-22-417. Physical examination and autopsy.

31A-22-418. Participating and nonparticipating policies.

31A-22-419. Insurer's purchase of and loans on policies.

31A-22-420. Policy loans.

31A-22-421. Facility of payment under certain life insurance policies.

31A-22-422. Conditional coverage.

27 Utah 2d 166
STATE FARM MUTUAL INSURANCE
COMPANY, Plaintiff and
Respondent,

v.

FARMERS INSURANCE EXCHANGE,
Defendant and Appellant.
No. 12442.

Supreme Court of Utah.

Feb. 7, 1972.

Proceeding by insurer of automobile whose passenger sustained personal injuries in collision with vehicle insured by defendant to recover medical payments paid by plaintiff to its insurer's passenger on theory of subrogation. The Third District Court, Salt Lake County, James S. Sawaya, J., entered judgment in favor of plaintiff, and defendant appealed. The Supreme Court, Tuckett, J., held that decision that an insurer may be subrogated with respect to medical expenses paid to its insured where notice of its claim for reimbursement was given to other insured prior to settlement and which was not shown to result in injustice or adversely affect administration of justice was applicable to plaintiff insurer's subrogation action arising out of accident which occurred before the decision.

Affirmed.

1. Insurance ⇨606(4)

An insurer may be subrogated with respect to medical expenses paid to its insured where notice of its claim for reimbursement is given to other insured prior to settlement.

2. Courts ⇨100(1)

An overruling decision ordinarily has retroactive operation although decision may operate prospectively if it is shown that persons who entered into contracts and other business relationships based upon justifiable reliance on prior decisions of courts would be substantially harmed if retroactive effect were given or if retroac-

tive operation might greatly burden administration of justice.

3. Courts ⇨100(1)

Decision that an insurer may be subrogated with respect to medical expenses paid to its insured where notice of its claim for reimbursement was given to other insured prior to settlement and which was not shown to result in injustice or adversely affect administration of justice was applicable to plaintiff insurer's subrogation action arising out of accident which occurred before the decision.

Don J. Hanson, Salt Lake City, for defendant and appellant.

L. L. Summerhays, Salt Lake City, for plaintiff and respondent.

TUCKETT, Justice:

The plaintiff commenced these proceedings to recover medical payments in the sum of \$844.64 made by State Farm Mutual Insurance Company to Louise Castleberry. The court below entered judgment in favor of the plaintiff and the defendant is here seeking a reversal of that decision.

On November 6, 1966, Louise Castleberry was a passenger in an automobile being operated by Vernon L. Hall at the time it was involved in an accident with an automobile being driven by Evert Dykhuizen. At that time the Hall vehicle was insured by State Farm Mutual Insurance Company and the Dykhuizen vehicle was insured by Farmers Insurance Exchange.

Pursuant to the medical provisions of the policy State Farm Mutual Insurance Company paid medical bills incurred by Louise Castleberry in the sum of \$844.64. Louise Castleberry made a claim against the defendant's insured and on his behalf the defendant settled the claim. This settlement included reimbursement to Louise Castleberry for the medical expenses she had incurred by reason of her injuries and a general release was taken. Prior to the settlement State Farm Mutual Insurance Company had notified Farmers Insurance

Exchange of its claimed right for reimbursement of the medical expenses paid by it pursuant to the subrogation provisions of its policy.

[1] It is the defendant's contention in these proceedings that no right of subrogation existed with respect to medical payments before the decision handed down by this court in the case of State Farm Mutual Insurance Company v. Farmers Insurance Exchange, found in 22 Utah 2d 183, 450 P.2d 458 (1969). The holding in that case was to the effect that an insurer may be subrogated with respect to medical expenses paid to its insured where notice of its claim for reimbursement was given to the other insured prior to settlement.

Defendant does not quarrel with the decision of the court in the prior case but it claims that the decision substantially changed the law of subrogation in this jurisdiction and should be given prospective effect only. The defendant argues that prior to the decision above referred to the Utah decisional law was to the effect that the cause of action for personal injuries was not assignable and that insurers could not be subrogated to the rights of an insured to recover medical expenses.

[2] Ordinarily an overruling decision has retroactive operation. There have been instances where courts have held that the rule established by an overruling decision will operate in the future only. The leading case establishing such a doctrine is that of Great Northern Railway v. Sunburst Oil & Refining Company¹ and the rule announced in that decision is commonly referred to as the Sunburst Doctrine. The rule is based upon the proposition that where persons had entered into contracts and other business relationships based upon justifiable reliance on the prior decisions of courts, those persons would be substantially harmed if retroactive effect were given to overruling decisions. An additional factor was that retroactive oper-

ation might greatly burden the administration of justice.

[3] The record in this case would not support a decision limiting the effect of the prior decision to future application. There is no showing that any considerable number of persons or corporations would be affected by letting the decision apply retrospectively. There is no showing that injustice would result or that administration of justice would in any way be affected.

We see no reason to disturb the decision of the trial court and it is affirmed. Respondent is entitled to costs.

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



27 Utah 2d 169

Jerry SKOUSEN, Plaintiff and Respondent,
v.

Alvin I. SMITH, Defendant and Appellant.
No. 11598.

Supreme Court of Utah.

Feb. 4, 1972.

Suit on promissory note. The Third District Court, Salt Lake County, Stewart M. Hanson, J., entered judgment in favor of plaintiff, and appeal was taken. The Supreme Court, Henriod, J., held that where there was no evidence of any mutual mistake and note was drafted and executed by defendant, the note, which contained provision that drawer would not be liable until and unless payment was received from third party on notes executed

1. 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360, 85 A.L.R. 254; Linkletter v. Walker, 381 U.S. 618, 14 L.Ed.2d 601, 85 S.Ct. 1731.

Rubalcava v. Giseman, 14 Utah 2d 344, 384 P.2d 389.