1982

The Ohio Casualty Insurance Company v. Barbara Brundage et al : Brief of Plaintiff-Respondent

Utah Supreme Court

L. Rich Humpherys; Attorney for Defendant-Appellant;
Taylor D. Carr; Ray H. Ivie; Attorneys for Plaintiff-Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

THE OHIO CASUALTY INSURANCE COMPANY, Plaintiff-Respondent, vs. BARBARA BRUNDAGE, RAY H. IVIE and J. RULON MORGAN, Defendants-Respondents, ALLSTATE INSURANCE COMPANY, Defendant-Appellant.	Case No. 18288

BRIEF OF PLAINTIFF-RESPONDENT

APPEAL FROM THE ORDER OF THE FOURTH JUDICIAL DISTRICT COURT
THE HONORABLE GEORGE E. BALLIF PRESIDING

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CITATIONS

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STATEMENT OF THE CASE

Plaintiff-Respondent adopts the statement of the case set forth in Brief of Appellant.

DISPOSITION IN LOWER COURT

Plaintiff-Respondent adopts the outline set forth in Brief of Apellant.

RELIEF SOUGHT ON APPEAL

Plaintiff-Respondent seeks affirmation of the holding of the lower court and seeks specific ruling by this court that the Arbitration Committee to which Allstate must submit, be bound by the ruling of the lower court and that Appellant Allstate is not entitled to equitable reimbursement from Brundage and her attorneys and that Appellant Allstate must submit to inter-company arbitration for the sole purpose of determining liability of the respective insurance company's drivers and the amount of personal injury protection payments and reimbursement thereof.

STATEMENT OF THE FACTS

Plaintiff-Respondent The Ohio Casualty Insurance Company controverts

the Statement of the Facts set forth by Defendant-Appellant Allstate Insurance Company in the following respects:

At least a year and two months prior to the tort trial of the Brundage vs. Kernan case, Ohio Casualty had placed Allstate on notice of its subrogated interest and had demanded return of the PIP payment made to Mrs. Brundage pursuant to the provisions of Section 31-41-11 U.C.A. 1953 (as amended) (R.109). Continued demands were made through the following year. (R. 110-116). A formal arbitration demand was made September 9, 1977 (R. 179). Ohio Casualty also specifically informed Brundage's attorney verbally and by letter September 9, 1977 that he was not to represent Ohio Casualty with respect to the reimbursement of said PIP payments in view of the fact that Ohio Casualty was statutorily entitled to seek direct reimbursement from Allstate. (R. 11). Notwithstanding this, at the conclusion of the trial of Brundage vs. Kernan on September 14, 1977, Allstate's attorney and Brundage's attorney joined in a motion that the sums representing Ohio Casualty's PIP payments be paid to Mrs. Brundage and her attorneys instead of being remitted from the judgment, thus giving Mrs. Brundage double recovery of her PIP payments and windfall attorney's fees to Rulon Morgan and Ray Ivie, Mrs. Brundage's attorneys. (R. 232), (R. 20). This was done despite the fact that all parties were on notice of Ohio Casualty's reimbursement demand prior to trial of the tort action. Allstate Insurance Company and Brundage therefore had the opportunity to allow reimbursement of said monies to be handled pursuant to the statutory arbitration provisions. Allstate, nevertheless, joined in the aforesaid motion at the conclusion of the trial to pay the amounts representing the PIP payments directly to Mrs. Brundage, in contravention of the clear statutory language mandating that such amounts be paid directly to the no-fault insurer (Ohio Casualty).

Contrary to Appellant's Statement of the Facts, Ohio Casualty did not wait until October 21, 1977 to commence arbitration proceedings. Demands

for reimbursement were commenced on July 16, 1976, which demands were acknowledged by return mail by Allstate on several occasions. For example, Allstate writes on the bottom of Ohio Casualty's letter of July 16, 1976, "We will consider your subro as soon as we settle with Attorney Rulon Morgan". (R. 109). Continued demands for reimbursement were made before trial of Brundage vs. Kernan. (R. 109-116). Appellant's Statement of the Facts would lead one to believe that Ohio Casualty waited until after the trial to begin its demand for reimbursement which is entirely contrary to the facts of this case.

ARGUMENT

POINT I

APPELLANT ALLSTATE'S ONLY REMEDY IS SUBMISSION TO INTER-COMPANY ARBITRATION PURSUANT TO SECTION 31-41-11 AND APPELLANT ALLSTATE IS TO BE BOUND BY THE RULING OF THE SAID ARBITRATION COMMITTEE WITH RESPECT TO LIABILITY AND REIMBURSEMENT OF PIP PAYMENTS.

The Utah Automobile No-Fault Insurance Act preserves subrogation-like rights of reimbursement among no-fault carriers. Section 31-41-11 provides:

> (1) Every insurer authorized to write the insurance required by this act shall agree as a condition to being allowed to continue to write insurance in the State of Utah:
>
> (a) That where its insured is or would be held legally liable for the personal injuries sustained by any person to whom benefits required under this act have been paid by another insurer, including the state insurance fund, it will reimburse such other insurer for the payment of such benefits, but not in excess of the amount of damages so recoverable, and
>
> (b) That the issue of liability for such reimbursement and the amount of same shall be decided by mandatory, binding arbitration between the insurers.

The recent Utah Supreme Court Decision of Allstate v. Ivie, 606 P.2d 1197 (1980), construed this statue and the rights of subrogation it confers upon insurers. The rule of law which emerges from this case is that a no-fault insurer and its insured have independent remedies in connection with claims arising out of automobile accidents. The insured on the one hand, has a right of action against the tort-feasor, provided he can satisfy the therehold require-

ments set out in Section 31-41-2, to recover damages for injuries not already compensated through PIP benefits. On the other hand, the no-fault insurer has a right to reimbursement from the insurer of a negligent tort-feasor, for PIP benefits paid to its insured.

The Supreme Court of Utah has determined that these remedies are mutually exclusive and has further determined that an injured person cannot properly assert any claim, in a lawsuit or otherwise, against a tort-feasor for damages for which he has already received PIP benefits from his insurer. Allstate v. Ivie, supra. This is so primarly because the tort-feasor is not liable for such.

> There is no provision in the statutory scheme to indicate the tort-feasor who has complied with the security provisions of the act, becomes personally liable for the PIP benefits provided in Section 6, when the injured party is entitled under the threshold provisions of Section 9(1) to maintain a claim for personal injuries. In such a situation, the injured party should plead only for those damages for which he has not received reparation under his first party insurance benefits. Allstate v. Ivie, supra at page 1200.

The no-fault insurer, on its part, has no right of subrogation to the funds received by its insured for personal injuries, but rather must look to the liablity insurer for reimbursement of funds to which it is entitled under Section 31-41-11(1)(a).

> ...Section 11 in the Utah No-Fault Insurance Act cannot be interpreted as conferring on the no-fault insurer a right of subrogation to the funds received by its insured for personal injuries. Section 11 grants the no-fault insurer a limited equitable right to seek reimbursement in arbitration proceedings against the liability insurer. Section 11 cannot be deemed as conferring subrogation rights on the no-fault insurer, vis-a-vis, its insured as to his recovery in a settlement or legal action. Allstate v. Ivie, supra, at page 1202.

The Supreme Court in Ivie has mandated that the no-fault insurer and its insured pursue their separate remedies. (See also Justice Stewart's concur-

ring opinion). The remedy of the no-fault insurer is to seek reimbursement from the liability insurer, and these claims are the subject of mandatory, binding arbitration between the insuers. The Ivie case has made it clear that Section 31-41-11 is an essential and unavoidable part of the Utah No-Fault Insurance Act. See also the recent Utah Supreme Court decision of Allstate Insurance Co. v. Anderson, 608 P.2d 235 (1980), and especially the concurring opinion of Chief Justice Crockett.

The facts presented in the Ivie case were different from those presented here in two important respects. These differences strenghten Respondent Ohio Casualty's claim for affirmation of the lower court's ruling. First, the parties in Ivie reached a compromise settlement, whereas the defendants in the instant case obtained a jury verdict upon submission of special interrogatories. Among other things, a specific finding was made concerning the existance and the amount of special damages. All parties agree that the amount so found represents Ohio Casualty's PIP payments. Secondly, and most importanty, Allstate's attorney and Brundage's attorney at the time of trial joined in a motion that said PIP payments not be remitted from the judgment in favor of Brundage but that they be paid to Mrs. Brundage and her attorneys. It is totally irreconcilable that Allstate is now asking that the ruling on its own motion be reversed and that Brundage be made to pay said payments back to Ohio Casualty. Allstate should not now be heard to complain that Brundage "...is allowed to keep her double recovery" (Appellant Brief p.13).

All cases decided subsequent to Ivie have decided that the PIP carrier has no right of subrogation to amounts obtained by its insured in a tort action and must submit to arbitration proceedings between the carriers. For example, in Street v. Farmerms Ins. Exch., 609 P.2d 1343 (1980), the insured initiated an action against the tort-feasor and then settled with the tort-feasor's liabilty carrier. The parties stipulated that specific portions of the proceeds were for

medical expenses, lost wages and loss of services (all PIP benefits). The PIP carrier asserted a subrogation right to all the proceeds relating to PIP benefits. The Court stated that the PIP carrier had no right of subrogation to these amounts because the insurance company's right of subrogation must be excercised in arbitration proceedings between the insurance companies. In so ruling, the Supreme Court in Street v. Farmers explained the holding of Ivie as follows:

> It holds that the Utah No-Fault Insurance Act does not contemplate the granting of a right of subrogation to a no-fault insurer in an action by the no-fault insured against a third-party tort-feasor. The right of subrogation, as explained in Ivie, is a right to be exercised in an arbitration proceeding between insurance companies of the respective parties so that double recovery can be avoided, unnecessary litigation made less likely, and the inherent conflicts between the insured and the insurer avoided. Street v. Farmers Ins. Exch., supra, at page 1346.

It is clear pursuant to the facts presented here and the applicable law, that Allstate's argument that it will, in effect, have to reimburse PIP payments twice is no defense to the requirement that Allstate comply with Section 11, as demanded by Ohio Casualty. The record clearly shows that Ohio Casualty at all times complied with the requirements of Section 31-41-11 taking the only course available to it under the statute. Ohio Casulaty had no right to be part of the Brundage vs. Kernan action and therefore could not have "protected its interest" as has been pointed out by Appellant in other memoranda and briefs.

Ohio Casualty has, in all respects, acted timely and properly to preserve its rights of subrogation according to the applicable statutory provisions. From the very beginning Ohio Casualty recognized that its remedy, its right of subrogation, was preserved to it by reason of Section 31-41-11, Utah Code Ann., and that this statutory provision allowed Ohio Casualty the procedure of binding arbitration whereby it could secure its remedy. Accordingly Ohio Casualty acted timely to give notice to Allstate of its subrogation claims and to seek redress through the arbitration process. Furthermore, Ohio Casualty notified the attor-

ney for the insured that he was not to represent the interest of Ohio Casualty in the trial of Ohio Casualty's insured against the tort-feasor.

In other words, Ohio Casualty was astute enough to interpret properly the statutory provisions of the Utah No-Fault Act, and did so prior to the decision in Ivie. Ohio Casualty should not now be penalized for properly interpreting the statute. Appellant Allstate would have the court believe that by reason of the mistaken assumptions made by the trial court and the parties to the liability action in Brundage vs. Kernan, which assumptions proved wrong with the appearance of the decision in Ivie, Ohio Casualty should now be made to suffer.

POINT II

IN THE EVENT THAT THIS COURT DETERMINES THAT BRUNDAGE IS LIABLE FOR THE RETURN OF SAID PIP PAYMENTS, ATTORNEYS IVIE AND MORGAN ARE NOT ENTITLED TO RETAIN ATTORNEY'S FEES

The Utah Supreme Court has held that in certain narrow circumstances, a subrogated insurance carrier must pay its fair share of attorney's fees in connection with a recovery of funds in an action against a third-party tort-feasor. Street v. Farmers Ins. Exch., supra., Guaranty National Insurance Company v. Morris, 611 P.2d 725 (1980). As indicated this court has articulated several conditions which must be met before the duty to pay attorney's fees arises.

First, there must be a benefit conferred upon the insurer by reason of the handling of the case, and the benefit must have been conferred by reason of some mistake. Street v. Farmers Ins. Exch., supra., at page 1346.

In Street, the plaintiff-insured brought an action against her no-fault carrier claiming, among other things, that the no-fault insurer should be compelled to contribute toward the attorneys fees. Her claim was based on the fact that in the trial against the third-party tort-feasor, a recovery was made, mistakenly, of the PIP benefits. These funds were "mistakenly" recovered because, by reason of Ivie, the court in the liability action had no authority to hear the issues relating to the recovery of PIP amounts. This Court in Street held

that perhaps if a benefit was rendered by this mistake, the insurer should contribute towards payment of attorney's fees, provided the other condition (hereinafter discussed) is met.

The second condition imposed by those decisions is that appropriate findings of fact be made by the trial court concerning the propriety of an award of attorney's fees, and specifically concerning the existance of a benefit conferred upon the insured and the existance of a "mistake" as discussed above. Street v. Farmers..., supra.; Guranty...v. Morris, supra.

In the present action, an award of attorney's fees would be improper for the reason that no benfit was conferred upon Ohio Casualty, and even if there were such a benefit, any "mistake" was a unilateral mistake made by the attorneys for Mrs. Brundage, which unilateral mistake was made after said attorneys were made fully aware of the applicable issues and posture of Ohio Casualty. From the beginning Ohio Casualty informed the attorneys for Mrs. Brundage that Ohio Casualty intended to look to arbitration procedures, as set forth in the No-Fault Act, for recovery of the PIP benefits, and that said attorneys were not to represent the interests of Ohio Casualty.

In the present action, no benfit was received by Ohio Casualty for the reason that the liability of the tort-feasor was clear, or, at least any question concerning liability was insignificant.

The important point, however, is that according to Ivie, Mrs. Brundage and her attorneys had no right to assert the claims for recovery of PIP benefits and, in fact were specifically informed not to assert them.

Again, Ohio Casualty accurately interpreted the No-Fault Act in so acting, and Ohio Casualty should not now be penalized merely because the other parties to this action failed properly to so interpret. Ohio Casualty could have done nothing more than it already had done to protect its interests and preserve its rights, and it should not now be penalized for mistakes of others.

POINT III

THE TRIAL COURT DID NOT ERR IN SETTING ASIDE THE JUDGMENT OF DISMISSAL IN FAVOR OF ALLSTATE.

The trial court has discretion pursuant to Rule 60(b)(7), Utah Rules of Civil Procedure, to grant relief from any final judgment or order for any reason justifying such relief. The Utah Supreme Court has held on various occasions that it will not reverse the trial court where it appears that the trial court was in possession of the relevant facts and considered those facts merely because the motion could have been granted, and has further stated that it will not substitute its discretion for that of the trial court. Warren v. Dixon Ranch Company, 123 U.416 260 p.2d 741; Mayhew v Standard Gilsonite Company, 14 U.2d 52,376 P.2d 951.

This court has further stated that the provisions of Rule 60(b)(7) are sufficiently broad to permit a trial court to set aside its former order which appeared to be entered upon an erroneous assumption. Stewart v. Sullivan 29 U.2d 156, 506 P.2d 74 (1973).

It is generally understood that there is no such vested right in a judgment as to preclude a re-examination and a setting aside of the judgment according to established statutory procedures and it is also a well recognized rule that a judgment may be set aside or corrected when it is based upon a judgment which is subsequently reversed, especially in the event where there exists considerable equity or extreme hardship. 46 AmJur 2d Judgments Section 768.

As has been previously indicated, the present case presents some unusual circumstances for the reason that the law in this area was in a state of uncertainty at the time of the original decision when the trial court dismissed Allstate from the present action. The fact that the law was in a state of uncertainty was recognized by all of the parties to this action. Specifically all of said parties were aware of the fact that the Utah Supreme Court was pre-

sently considering the Ivie case at the time of the prosecution of the subject action. Although it is not a part of the record, this author would represent that a verbal agreement existed between the parties to this case that a trial date would not be requested until after resolution of the Ivie case. In other words, contrary to the assertion made in Appellant's Brief, all the relevant facts and law supporting Plaintiff's claim were not known at the time the trial court entered said Order of Dismissal.

The three month time limit imposed by Rule 60(b) with respect to certain grounds asserted to set aside a judgment does not apply with respect to motions made under Rule 60(b)(7) motions. In such cases the Rule states that the motion shall be made within a resonable time. Plaintiff-Respondent asserts that a determination of what constitutes a "reasonable time" must be determined in light of all existing circumstances.

The court at the time of the hearing on the motion to set aside the judgment of dismissal was made aware of all the existing facts including the then recently decided case of Ivie. After a full consideration of these issues, the trial court exercised its discretion and set aside the judgment of dismissal, and that order should not now be reversed.

POINT IV

APPELLANT ALLSTATE OWES RESPONDENT OHIO CASUALTY THE AMOUNT OF $6,583.08 TOGETHER WITH STATUTORY INTEREST

The trial court has set aside the judgment of dismissal as to Allstate and has subsequently granted summary judgment in favor of Ohio Casualty, and accordingly the trial court has ordered Allstate to submit to binding arbitration. Ohio Casualty asserts that any outstanding issue with respect to the liability of Allstate to Ohio Casualty and the amount of the claim owed to Ohio Casualty have now been determined by the trial court in the underlying tort action; and need not now be the subject of review by any arbitration committee.

Section 31-41-11, Utah Code Annotated requires as follows:

Every insurer authorized to write the insurance required by this act shall agree as a condition to being allowed to continue to write insurance in the state of Utah:

(a) That where its insured is or would be held legally liable for the personal injuries by any person to whom benefits required under this act have been paid by another insurer, including the state insurance fund, it will reimburse such other insurer for the payment of such benefits, but not in excess of the amount of damages so recoverable, (Emphasis added) and

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

Respondent Ohio Casualty asserts that these issues have been decided in as much as the trial court in the case of Brundage vs. Kernan determined liability and the amount of special damages (Reduced by 20% fault attributable to Brundage) in the sum of $6,538.08, and that this determination by the said trial court is res judicata as to the issue of liability and amount of damages as between Allstate and Ohio Casualty.

By reason of the judgment rendered in the case of Brundage vs. Kernan Plaintiff-Respondent Ohio Casualty is entitled to recover statutory interest from Allstate from the date of the decision in September, 1977, at the rate of 12% per annum. Respondent-Ohio Casualty asserts that the liability of Allstate to Ohio Casualty was determined as of the date of the judgment in the lower court decision of Brundage vs. Kernan, and furthermore that the amount due was determined at that time. By reason thereof, Allstate is liable for the interest accruing on said amount from the date of said judgment.

CONCLUSION

Respondent-Ohio Casualty has acted, at all times, timely and in good faith and properly in protecting its interest to reimbursment of PIP benefits paid to its insured. From the beginning, Respondent-Ohio Casualty properly interpreted the applicable statute that set forth its right to recover PIP benefits paid through binding arbitration. Accordingly, it notified its insured

through her attorneys that they need not represent the interests of Ohio Casualty in the liability action. Furthermore, Ohio Casualty acted timely to give notice to Allstate of its subrogation claims and of its intentions to seek redress through direct reimbursement or the arbitration process.

Despite these good faith efforts on the part of Respondent-Ohio Casualty, Allstate joined in a motion with Brundage's attorneys at the conclusion of the trial of Brundage vs. Kernan, that the sums representing Ohio Casualty's PIP payments be paid directly to Mrs. Brundage and her attorneys instead of being remitted from the judgment. Allstate should not now be heard to complain that this payment constitues a double recovery on the part of Mrs. Brundage.

The trial court at the hearing on Respondent-Ohio Casualty's motion to set aside the earlier judgment of dismissal in favor of Allstate, was fully informed relative to the legal and factual issues presented, and properly exercised its discretion in setting aside the judgment of dismissal. Appellant Allstate should now submit to binding arbitration with respect to issues of liability of the respective drivers and the amount of PIP benefits. Furthermore, in the interests of judicial efficiency, this court should determine that Appellant Allstate is presently bound by the Brundage vs. Kernan decision concerning liability of Allstate to Ohio Casualty, and the amounts owed together with statutory interest.

DATED this 15th day of September, 1982.

Respectfully submitted,

BY _____
TAYLOR D. CARR
Attorney for Plaintiff-Respondent
Ohio Casualty Insurance Company

CERTIFICATE OF SERVICE

This is to certify that on this the 15th day of September, 1982, I mailed. postage prepaid, two copies of the foregoing Brief of Plaintiff-Respondent to:

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and that I hand delivered two copies of the foregoing Brief of Plaintiff-Respondent to:

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