1982

The Ohio Casualty Insurance Company v. Barbara Brundage et al : Brief of Defendants-Respondents

Utah Supreme Court

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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 DEFENDANTS-RESPONDENTS

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

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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 DEFENDANT-RESPONDENT

STATEMENT OF THE CASE

This is an insurance arbitration action construing Section 31-41-11, U.C.A. 1953. Respondent Barbara Brundage brought a personal injury action against an insured of appellant Allstate Insurance Company, hereinafter Allstate, which was reduced to judgment in a prior case. Respondents Ivie and Morgan, were Mrs. Brundages attorneys in that earlier action. Respondent The Ohio Casualty Insurance Company, hereinafter Ohio Casualty, was Mrs. Brundage's no-fault insurer.

DISPOSITION IN LOWER COURT

The issue presented on appeal has been decided on at least four different occasions, in two different divisions of the Fourth Judicial District Court. On September 15, 1977, in the case of Brundage vs. Kernan (Civil No. 44997), Judge J. Robert Bullock ordered that the check representing special damages be made payable solely to respondent Brundage and her attorneys.

On November 18, 1980, in the case of The Ohio Casualty Insurance Company vs. Barbara Brundage, et al (Civil No. 47361), Judge George E. Ballif granted respondent Brundage and her attorneys summary judgment against respondent Ohio Casualty, claiming that Ohio's sole remedy was in arbitration with appellant Allstate Insurance Company.

On January 20, 1982, Judge Bullock denied a Rule 60(b) motion by appellant Allstate to amend the original verdict pursuant to a motion for relief from judgment in the prior action (Civil No. 44997). This decision was based on res judicata, and a construction of Rule 60(b).

Appellant Allstate then cross-claimed against Brundage and her attorneys in Civil No. 47361. This action was dismissed by Judge Ballif on the 18th day of January, 1982.

Although respondent Brundage and her attorneys were no longer before the Court, further motions of Allstate required Judge Ballif to reiterate the dismissal (in Civil No. 47361) on the 27th day of January, 1982.

No error has been assigned in Civil No. 44997, except as presented in Civil No. 47361.

RELIEF SOUGHT ON APPEAL

Respondents Brundage, Ivie and Morgan would request the Court to dismiss Allstate's appeal as being untimely, governed by res judicata and collateral estoppel, and as an impermissible collateral attack. Respondent would also seek a denial of Allstate's alternative relief, seeking reversal of the Court's order setting aside the dismissal of Ohio Casualty's complaint, in that Ohio

Casualty, the real party in interest, never perfected an appeal on that order.

Respondent Brundage and her attorneys, would further ask that the Court uphold the orders of the Fourth Judicial District Court, as being proper constructions of Section 31-41-11, U.C.A. 1953.

STATEMENT OF THE FACTS

In the present action, appellant Allstate seeks relief from respondents Brundage, Ivie and Morgan, stemming from a judgment in the case of Brundage vs. Kernan, on the 15th day of September, 1977. (R 20)

In that action, Allstate represented the liability carrier in a personal injury action. After a verdict had been rendered in favor of plaintiff Brundage, the following dialogue took place between Mr. Ray Harding Ivie, Mrs. Brundage's attorney, and Mr. D. Gary Christian, an attorney for Allstate Insurance Company representing the tortfeasor, and the Court:

> "MR. IVIE: Your Honor, I would like to make a motion to the Court at this time. There has been some question about subrogation, and I would like you to order the defendant in this case, the insurance company, to make the draft only to my client and myself.
>
> THE COURT: Any objection to that, Mr. Christian?
>
> MR. CHRISTIAN: Well, your Honor, I think that Mr. Ivie is entitled to that. I don't think that if I had any objection, it would be valid.

THE COURT: Well, then if I've got the authority to do so, that's what I'm going to do.

MR. CHRISTIAN: Well, Mrs. Brundage has a judgment against Mrs. Kernan.

THE COURT: I guess if I don't have the authority, somebody upstairs can tell me.

MR. CHRISTIAN: I think she's entitled to have a draft made payable to her attorney without any other individual or company being names thereon. I'd like to have the Court order me to do it that way, however.

THE COURT: That's the order.

MR. CHRISTIAN: Thank you.

THE COURT: And so I say, Mrs. Lambert will prepare the judgment on the verdict.

MR. CHRISTIAN: Can it be recited in the judgments that the defendant is so order to pay that judgment?

THE COURT: Yes.

MR. CHRISTIAN: Thank you."

(Emphasis added)
(R 232-234)

As the foregoing dialogue indicates, Allstate, through their attorney Mr. Christian, actually joined in the request for the ruling which Allstate now attempts to dispute. No error was ever assigned to this ruling, and Allstate made no action to attack it until over three years later, on the 9th day of February, 1981. On that date Allstate filed a cross-claim (R 121-122) in the instant action to hold Mrs. Brundage and her attorneys liable for those

funds which Mr. Christian specifically requested be delivered to respondent at the conclusion of the original tort action. Also on February 9th, 1981, Allstate attempted to amend that original verdict with a motion for relief from judgment under Rule 60(b), in Civil No. 44997. This latter attempt to attack the prior judgment was rejected by the original trial court on the 20th day of January, 1982, and no appeal was ever attempted or taken. Therefore, that ruling is not properly before the Court.

In addition, several facts are critical to the question of personal jurisdiction. The record indicates that on the 22nd day of December, 1980, respondents Brundage, Ivie and Morgan were granted a summary judgment against respondent and plaintiff below, Ohio Casualty, stating no cause for action. (R 104) The record will indicate that at this time, appellant Allstate had asserted no claims against respondents Brundage, Ivie and Morgan.

Thereafter, Allstate filed a "cross-claim" against Brundage and her attorneys on the 9th day of February, 1981 (R 121). This claim for relief was mailed to the dismissed parties, and was never personally served. (R 123).

Thereafter, no answer to the cross-claim, nor any further participation in the suit was made by respondent Brundage and her attorneys.

ARGUMENT

POINT I

ALLSTATE LACKS PERSONAL JURISDICTION OVER RESPONDENTS BRUNDAGE, IVIE AND MORGAN

The instant suit was initiated by respondent Ohio Casualty,

against respondent Brundage. Thereafter, the original Complaint was amended to include Mrs. Brundage's attorneys Ivie and Morgan, as well as Allstate, the appellant herein.

On the 22nd day of December, 1980, the Court below issued a judgment, dismissing respondents Brundage, Ivie and Morgan, pursuant to a motion for summary judgment. The judgment recited that Ohio Casualty had "no cause for action."

At the time of that judgment, appellant Allstate had asserted no claims against respondent Brundage and her attorneys. Thereafter, on the 9th day of February, 1981, Allstate asserted a "cross-claim" against Mrs. Brundage and her attorneys, who had previously been dismissed from the suit. This cross-claim was not personally served upon Mrs. Brundage or her attorneys. Rather, the record will indicate by the attached mailing certificate to the cross-claim that the new claim was merely mailed to an attorney for Mrs. Brundage, by a secretary in the offices of appellant's attorney.

The record further indicates that thereafter, respondents Brundage, Ivie and Morgan refused to participate in the proceedings. No answer to the cross-claim was ever filed. No memorandum was ever issued. Indeed, respondents at all times following their initial dismissal on Summary Judgment, considered themselves non-parties to the suit, in that once they had been dismissed, personal jurisdiction had never been acquired to mandate their further participation.

A. <u>The Requirement for Personal Jurisdiction</u>

Respondents Brundage, Ivie and Morgan would contend that

upon the granting of their summary judgment and the subsequent dismissal from this suit, they became strangers to the action. In effect, the granting of summary judgment disposed of all claim which has been asserted against the respondents.

Rule 14(a) U.R.C.P. 1953 provides the appropriate guidelines for third-party practice. That rule provides:

> "At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." (Emphasis added)

Therefore, once Mrs. Brundage and her attorneys were dismissed from the suit, and thus were no longer parties, the proper procedure for the assertion of new claims against them would have been in the form of a third-party complaint. Conversely, a cross-claim is only appropriate against a co-party to the suit. Rule 13(f) indicates:

> "A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action."

It is respondents' conclusion that jurisdiction was never acquired by Allstate to present the claims which they currently bring upon appeal. Mrs. Brundage and her attorneys became a non-party to the action upon their dismissal, and the original claimant, Ohio Casualty, made no attempt to appeal the order. Thereafter, the attempt to assert a claim against Mrs.

Brundage, by merely mailing a copy of the cross-claim to her attorneys, was inadequate to gain jurisdiction for the purposes of Allstate's claim.

The inadequacy of Allstate's service of process, is indicated in Rule 4(f) (2), requiring a court order for service by mail. That section provides:

> "...if the party desiring service of summons shall file a verified petition stating the facts from which the court determines that service by mail is just as likely to give actual notice as service by publication, the court may order that service of summons shall be given by the clerk mailing a copy of the summons and complaint to the party to be served at his address, or his last known address. Service shall be complete ten days after such mailing."

The record displays that proper service was never attempted on respondents following their dismissal from the suit. Therefore, respondents would respectfully urge the Court to base their decision in the current case on that lack of personal jurisdiction.

B. Appellant is precluded from contesting the Order of Summary Judgment Dismissing Respondents Brundage, Ivie and Morgan.

The preceeding analysis relates to appellant's procedural actions following the summary judgment dismissing respondents from the instant case. However, the record also indicates that appellant Allstate filed a notice of intent to appeal the decision granting Mrs. Brundage's Motion for Summary Judgment against Ohio Casualty. It is respondents' contention that Allstate is precluded on alternat grounds from appealing this judgment.

Initially, it must be noted that the only claims before the Court at the time of the judgment of dismissal were those of respondent Ohio Casualty. The judgment merely recited that Ohio Casualty had no cause of action against Mrs. Brundage and her attorneys. At that time, no claim had been asserted by Allstate. Therefore, it would appear that Allstate has no standing to contest the dismissal of another parties' claim. In Redwood Gym v. Salt Lake County Commission, 624 P.2d 1138, 1145, (Utah 1981), the Court stated:

> "This Court does not engage in the rendering of advisory opinions. absent some overriding consideration of public policy, a party must demonstrate standing to raise an issue in order to secure a ruling thereon."

It appears clear that Allstate does not have standing to contest the order of Summary Judgment. No notice of intent to appeal was ever filed by the party whose claim was dismissed. Allstate's present request for a declaration of this Court that Ohio Casualty did have a valid claim against Mrs. Brundage, is to allow a party to do indirectly what they could not do themselves. Thus, Allstate's alternate relief for a declaratory judgment would merely serve to avoid the strict requirements of appellate practice. Ohio Casualty accepted the dismissal of their claim without ever attempting to perfect their appeal, and thus, the summary judgment in favor of respondents Brundage, Ivie and Morgan should be considered res judicata.

However, even if the Court upholds the practice of appealing the dismissal of another parties' claim, an independent

reason exists for disallowing the appeal under the current circumstances. Respondents would contend that the relief requested is in the nature of a compulsory counterclaim. Appellant, not having raised that claim at the time of their initial pleading, nor seeking leave of Court to amend their responsive pleading, are now barred from requesting such relief.

Rule 13(a) U.R.C.P. states:

> "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13."

Respondent interprets the foregoing language as requiring Allstate's current claims to be asserted as a compulsory counterclaim under the statute. The claims asserted clearly arise out of the same transaction or occurrence that is the subject matter of the initial Complaint against Allstate. The claims also do not require the presence of third-parties of whom the Court cannot acquire jurisdiction for full adjudication. Furthermore, at the time the action was commenced, the claim was not the subject of any other pending action, except possibly the original action against the tortfeasor, which respondents assert infra., was res judicata.

Therefore, the only question remaining is whether respondents were an opposing party at the time of Allstate's initial responsive pleading. Respondents believe that the issues raised by Allstate on this appeal are ample evidence of the opposing interests of Allstate and Brundage. Both prongs of Allstate's alternate request for relief are aimed at Brundage. Following Allstate's initial pleading, a "cross-claim" was later asserted against Brundage. It is obvious that the interests of appellant and the respondent were adverse.

It is a well settled rule of law that the initial caption of a case, or the alignment of the parties by the plaintiff, is not conclusive as to their opposing interest. See Swanson v. Traer, 354 U.S. 114. For instance, in Federal practice, for the purpose of determining diversity jurisdiction, it is common for the Courts to realign the parties to reflect their opposing interests. See Pac. Railroad Co. of Missouri v. Ketchum, 101 U.S. 289.

It is evident from the pleadings on file herein, that Allstate considered itself, even prior to the inception of this action, to be an opposing party with adverse interests from those of respondent Brundage.

Respondents conclude therefore, that no jurisdiction was had on Mrs. Brundage following her dismissal from the action, and that Allstate should be precluded from appealing the dismissal of a claim in which they took no part. Respondents therefore consider their presence in the appellate Court a form of special appearance, and the remainder of their argument on appeal as

being merely an attempt to protect themselves under all eventualities, including the possibility that the Court may find personal jurisdiction has attached.

POINT II

ALLSTATE'S APPEAL IS PROCEDURALLY IMPROPER

In Point II, respondents contend that the relief sought by Allstate is barred by the doctrines of res judicata, collateral estoppel, timeliness for bringing an appeal, as an impermissible attempt to utilize divisions of the same Court to overrule decisions of fellow judges of the Court, and for mootness.

It should be noted at the outset of this discussion that respondents have already presented underlying facts in the argument in the form of a "Motion to Dismiss the Appeal," on the grounds of timeliness. That motion was denied by the Court on the 7th day of September, 1982, without discussion. Respondents once again assert the question of timeliness in Part D of this argument. If the Court is of the opinion that the issue of timeliness is foreclosed by the prior ruling on the motion, that section should be disregarded. However, in Parts A, B and C of the present analysis, respondents address the questions of res judicata and collateral estoppel, the propriety of asking one division of a Court to overrule another, and mootness of the appeal. While these additional arguments are based on the same foundational facts as respondents' earlier motion, they present independent procedural rationales for rejecting the present appeal.

A. Res Judicata and Collateral Estoppel

As the facts on appeal indicate, the present controversy arises from an order of Judge Bullock in the case of Kernan vs. Brundage, (Civil No. 44997), on the 15th day of September, 1977. That order was never appealed from and the issues remained dormant for over three years, until the 9th day of February, 1981. At that time, Allstate brought a Motion to Amend the Original Judgment, as well as a cross-claim against respondent Brundage and her attorneys in a collateral action filed before Judge Ballif. That latter action is currently before the Court on appeal.

Respondent would contend that the present appeal stems from an impermissible collateral attack on the judgment rendered by the trial court in the initial case of Kernan vs. Brundage. To this extent, respondent believes that the related doctrines of res judicata and collateral estoppel preclude Allstate from relitigating questions which were decided in the earlier suit.

The distinction between these related doctrines was discussed in the case of Searle Brothers vs. Searle, 588 P.2d 689 (Utah 1978). There it was stated at page 690:

> "In order for res judicata to apply, both suits must involve the same parties or their privies and also the same cause of action; and this precludes the relitigation of all issues that could have been litigated as well as those that were, in fact, litigated in the prior action. If the subsequent suit involves different parties, those parties cannot be bound by the prior judgment.
>
> Collateral estoppel, on the other hand, arises from a different cause of action and prevents parties and their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit. This means that the plea of collateral estoppel can be asserted only against a party in the subsequent suit who was also a party or in privity with a party in the prior suit."

As the foregoing language indicates, a threshold question is presented where either res judicata or collateral estoppel is asserted. That question requires a finding that the party against whom the claim is asserted was either a party, or in privity with a party, in the prior action. See Nielson vs. Droubay, Supreme Court No. 17385 Utah, Filed July 20, 1982.

Respondent would urge that Allstate should be bound by the rulings of the trial court in the initial action against their insured, on the grounds that they were at all times in privity with their insured. It must first be noted that Allstate retained complete control of the litigation in the earlier action. They selected the attorney who represented their insured from inception to conclusion of the action. They were bound by contract to represent their insured, and to pay all sums which the Court ordered, up to their policy limit. Furthermore, when the motion was presented to make the check representing special damages payable only to Mrs. Brundage and her attorneys, the motion was addressed not to the insured but to the insurance company. (By reiteration, respondent Ivie requested of the Court at R-232: "There has been some question about subrogation. And I would like you to order the defendant in this case, the insurance company, to make the draft only to my client and myself

In addition, respondent would content that special considerations unique to insurance cases demand that the insurer be held in privity with the insured in such situations. It is a well accepted principle of trial practice that an insurance company will not be named as a party to an action, despite the fact that they are ultimately responsible for the loss, and that they will control the

litigation from its inception. This principle is applied, despite the traditional rights given to a third-party beneficiary to a contract, in order to protect insurance companies from the potential prejudicial effects which their presence in an action may have upon a jury. It would be a highly unjust and inequitable result, should an insurer be allowed to use this limited protection as a means of escaping responsibility for their actions in conducting the litigation.

In 46 C.J.S. Insurance 1252, the principle is articulated:

> "Where an insurer was notified of a pending action against the insured on an injury or liability covered by the policy, a judgment against the insured in such action is conclusive on the insurer as to all questions determined therein and material in an action against it on the policy; and the insured is also concluded as to matters established in such action."

In Utah, several specific tests have been established to determine privity for purposes of res judicata and collateral estoppel. The Court in Tanner vs. Bacon, 136 P.2d 957, 960 (Utah 1943) stated that privity means "one whose interests has been legally represented at the time." In Searle Brothers vs. Searle, supra, the Court stated:

> "The legal definition of a person in privity with another, is a person so identified in interest with another that he represents the same legal right."

Respondent would content that under the definitions and principles outlined above, Allstate must be held to be in privity with their insured in the present situation. Certainly, Allstate being responsible for any potential judgment, represented the same legal right as their insured in the action. Their contractual right to retain the attorney of their choice in defense of the insured

would obviously indicate that their interest had been legally represented. See also Campbell vs. Stagg, 596 P.2d 1037, 1040 (Utah 1979).

Once Allstate's privity to their insured has been established, it is then necessary to apply the rules governing res judicata and collateral estoppel. The elements of res judicata were articulated by the Utah Court in the case of Olsen vs. Board of Education of the Granite School District, 571 P.2d 1336 (Utah 1977). The Court indicated:

> "The parties thereto are concluded as to all matters that were put in issue, or might have been put in issue, or were necessarily implied in the decision...The doctrine renders a final judgment, on the merits, by a court of competent jurisdiction, conclusive upon the parties and is a bar to subsequent litigation of the same issues.
>
> The general rule of law is that a judgment may not be drawn in question in a collateral proceeding and an attack upon a judgment is regarded as collateral if made when the judgment is offered as the basis of a claim in a subsequent proceeding.
>
> The Restatement of Judgments (1942) Section 11, Comment A, defines a collateral attack as follows:
>
> > Where a judgment is attacked in other ways than by proceedings in the original action to have it vacated or revised or modified or by a proceeding in equity to prevent its enforcement, the attack is a "Collateral Attack."

Applying the foregoing language to the facts at hand, respondents conclude (1) that the issue currently presented not only might have been put in issue, but was in fact; (2) the trial court's decision in the original action against the insured became a final judgment, on the merits, by a Court of competent jurisdiction; (3) that the present action is a collateral attack, within

the meaning of Olsen, supra, in that it was attacked in other ways than by proceedings in the original action to have it vacated or revised. Furthermore, it is critical as to this latter point to note that Allstate also attacked the judgment in the original action, to have it vacated or revised.

The doctrine of collateral estoppel is likewise applicable to the case at hand. The Utah Supreme Court has recently upheld the requirement that collateral estoppel cannot be used as a sword against a party who was not present in the earlier litigation. See Nielson vs. Droubay, supra, However, privity dictates that this defense would only be available to Ohio Casualty, and not Allstate. Furthermore, Ohio Casualty initially filed an action against respondent Brundage and her attorneys, but upon losing on Summary Judgment, failed to take any of the steps necessary to perfect an appeal. Therefore, collateral estoppel should be applicable in the instant case, regardless of the fact that a stranger to the proceedings is present. Allstate's privity in the earlier action is sufficient.

The essential elements of collateral estoppel are indicated in Searle Brothers vs. Searle, supra, wherein the Court proposes three tests as being determinative:

> (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with the party to the prior adjudication?"

Respondent would maintain that the answer to all three of the above questions should be answered "yes". The latter question has been addressed earlier in this point. The first question is answered by examining the transcript of the original tort action,

where respondent Ivie identified the question as being subrogation, and moving for the exact relief which Allstate claims as error in th current action. Question (2) has never been disputed by appellant or any other party.

Finally, the Searle Court proposed a fourth test in applyi collateral estoppel. The final question remaining is:

> "Was the issue in the first case competently, fully, and fairly litigated?"

Respondent believes that the answer is yes. The record will indicate that respondent Ivie clearly identified the issue presented by the motion as being one of subrogation. Thereafter, the Court left no doubts that it was willing to entertain any objections which Allstate's attorney, Mr. Christian, might choose to assert. Instead of objecting, Mr. Christian actively joined in the request. Respondents conclude that the only inference which may be drawn from the motion in the earlier tort action, is that the Court provided every opportunity for Allstate to have a competent, full, and fair determination of the matter of which they now seek to contest five years later.

Respondent believes therefore, that the doctrines of collateral estoppel and res judicata clearly apply to bar the present action.

B. The Functioning of Divisions Within the Court

Respondent also believes that Allstate has improperly attempted to have one division of the Fourth Judicial District Court overrule another. In Point III of appellant's brief they

claim that:

> "In the event that trial court did not err in setting aside the judgment of dismissal in favor of Allstate, the court erred in not amending the personal injury judgment to reduce it by the amount of PIP payments."

It is important to reiterate at this time that Allstate's assault on the original personal injury judgment occurred in two forms of the Fourth Judicial District Court. Allstate brought an action before the original judgment pursuant to Rule 60(b). Allstate also filed a cross-claim in the present action against Brundage, Ivie and Morgan, who had already been dismissed from that suit.

In the first action, Judge Bullock refused to amend the judgment, on the grounds that it was not a clerical mistake, but a mistake of law, and therefore was not subject to modification at that late date. Allstate made no attempt to appeal this order, and indeed the record will indicate a complete vacuum as it relates to the attempt to amend the judgment before the original trial court.

An examination of the cross-claim will also indicate that no attempt was made to amend the judgment there. Rather, the cross-claim states:

1. First cause of action:

> "Since the Court wrongfully ordered Allstate, through its insured Kerman, to pay Brundage and her attorneys for damages wnich Brundage had, heretofore, received no-fault benefits, and Allstate accordingly complied, cross-defendants Brundage and her attorneys are liable to Allstate in the amount of $6,651.04..."

2. Second cause of action:

> "Cross-defendants Brundage and her attorneys have been unjustly enriched..."

3. Third cause of action:

> "Cross-claimant seeks declaratory relief from the Court as to its rights under the law to be protected from paying twice for the same damage..."

Obviously, none of the relief prayed for in the cross-claim requested the original trial court to amend the judgment. Rather, as the first cause of action clearly indicates, Allstate attempted to collect damages, by using Judge Ballif's Court to appeal the prior ruling of Judge Bullock. Nowhere is the request presented to amend the judgment itself.

Two conclusions may be drawn from the foregoing analysis. First, the refusal of the Court to amend the personal injury judgment by the amount of PIP payments is not properly before the Court. At no time did Allstate indicate their intention of appealing this matter. Second, Allstate's actions constitute an impermissible attempt to induce one division of the Fourth Judicial District to overrule another.

The respondents would contend that Judge Ballif's deference to the earlier rulings of the Fourth Judicial District Court, sitting in its different divisions, was a necessary and proper application of judicial procedure. Initially, it must be noted, that divisions of the Court are established for the purposes of judicial convenience and efficiency, and are not so divided for the purposes of forum shopping or forum hopping. In 21 C.J.S. Courts, 137, 210, it is stated:

> "A court which is divided into divisions or departments remains a unit notwithstanding; actions brought in any of the departments are in effect in the same court, and decisions and judgments therein are rendered by the same tribunal."

The citation continues at 211, to indicate:

> "The court remains a unit notwithstanding such a division; and where the constitution vests the power in the court and not in departments, which are merely for convenience, the judges hold but one and the same court whether sitting separately or together. Actions brought in any of such departments are in effect in the same court, and decisions and judgments therein are rendered by the same tribunal..."

Furthermore, the fact that an action is heard before different divisions of the same court, does not affect the prior decisions of a different judge. At 21 C.J.S. Courts, 137, 213 it is stated:

> "A case originally assigned to one division or department may be transferred to another...but such transfer does not affect previous orders in the case made in the department to which it then belonged..."

The reasons for the rules outlined above is readily apparent. The constitution of this state, as well as our sister jurisdictions, provides for effective methods of appellate review. However, where a party attempts to relitigate the same issues in different divisions of a single district court, the ultimate result is a complete breakdown of finality, clarity, and consistency in trial court determinations.

Respondentswould urge that Judge Ballif's rulings be upheld to the extent that they reflect a refusal to overrule a different division of the Fourth District Court.

C. Allstate has Waived its Right to Appeal by Voluntary Payment of the Judgment

Respondents would further contend that Allstate's

voluntary payment of the judgment in the initial action against their insured tortfeasor, constitutes a waiver of their right to appeal. It is important to note at the outset, that respondent relies on the same considerations of an insurer's privity with their insured, that were argued under the res judicata analysis, above. Once that fact is established, Allstate's voluntary payment of funds representing special damages, serves as a waiver of th right to appeal the order of the Court which mandated the payment of those damages.

This rule of law is rooted in several different legal foundations. In 39 ALR 2nd 157, it is stated:

> "In determining whether payment of, or compliance with, a judgment deprieves the defeated party of the right to appeal, the Courts proceed on various theories. They ascertain whether payment or performance of the judgment constitutes a waiver or estoppel, these terms sometimes being used interchangeably, or a release of errors, or an acquiessence in the judgment, or whether payment or performance renders the controversy moot."

The Utah Supreme Court has adopted the general rule of law that payment of a judgment bars the right to appeal, founding their decision on the principle of mootness. In Hollingsworth vs. Farmers Insurance Company, et al, Supreme Court No. 17828, Utah, filed September 7, 1982, the Court stated:

> "Generally, when a judgment creditor accepts payment and executes a satisfaction of judgment the controversy becomes moot and the right of appeal is barred."

See also Merhish vs. H. A. Folsom & Associates, Utah 646 P.2d 731 (1982); Clive vs. Mason, Utah 605 P.2d 763 (1980); and

Jensen v. Eddy, Utah 514 P.2d 1142 (1973).

In addition, while Hollingsworth would indicate that mootness is the touchstone of the doctrine, a parties' actions as constituting a waiver, also are significant. The decision stated:

> "Any intention IDS may have had to preserve the right of appeal is wholly inconsistent with its action. (in satisfying the judgment)."

Therefore, respondent believes that the actions of Allstate's attorney in soliciting the ruling of Judge Bullock in the original tort action, should serve as a waiver of their right to appeal.

However, the Hollingsworth case also states:

> "The general rule does not necessarily prevent an appeal as to separate and independent claims if it is shown that a controversy remains in regard thereto."

The nature of the claims in Hollingsworth, involved money damages, as well as the rights to real property. Appellant accepted the award of money damages, while later choosing to appeal the question as to property rights. The Court there held that these questions were not divisible, and thus review was moot.

In stating that a judgment may become divisible, and thus subject to appeal despite partial satisfaction, the Hollingsworth Court cited the case of Jensen v. Eddy, Utah 514 P.2d 1142 (1973). In that case the Court indicated:

> "We are in agreement with the general rule that if a judgment is voluntarily paid, which is accepted,

> and a judgment satisfied, the controversy has become moot and the right to appeal is waived. This is based upon the reasoning that when a controversy has come to rest the litigation should cease. But pertinent to the problem here is an ancient aphorism: 'If the reason for the rule is not present, the rule does not apply.' Therefore, the general rule just stated does not usually prevent an appeal as to separate and independent claims where the controversy has not so come to rest. If a judgment is entered as to one part of a controversy which is separate and distinct from another part, and the disposition of the latter cannot affect the disposition of the former, a party may accept the money or property to which he is entitled, and not be deemed to waive his right to appeal as to other independent claims which the court refused to grant."

Applying the above language to the instant facts, it becomes apparent that a division of the issues here would be inappropriate. First, it should be noted that Allstate did not pay some of the amount of damages, while preserving their right to appeal on others. Rather, they paid the entire judgment reflecting special and general damages. This occurred in full light of the language of respondent Ivie's motion, that a question as to subrogation existed. Further, the controversy here had come to rest. After Mrs. Brundage had received the compensation for her injuries, Allstate waited three years before relitigating the issue.

Respondents would respectfully contend that the reasoning of Jensen v. Eddy, supra, is controlling; "That when a controversy has come to rest litigation should cease."

It is sincerely believed that when viewed through the spectacles of the private individual who might be compelled to produce a large fund, stemming from a controversy which a reasonable

person would believe had become final, that the reason for the rule is undoubtedly present.

D. Timeliness of the Appeal

Respondents have earlier made a motion to dismiss the appeal on the grounds that it is untimely. This motion was denied by the Court without comment. Because respondents are uncertain as to the reason the motion was denied, the question is presented at this time, so that the Court may have the benefit of further consideration of the matter. However, should the Court be of the opinion that the denial of the motion is conclusive as to the issue, this portion of respondents' brief may be disregarded.

In summary, the facts upon which this argument is based are identical to the facts considered above. Respondents' contention is that the issue presented by Allstate on appeal is identical to the question presented to the original trial Court in the action against Allstate's insured.

It is respondents' position that if Allstate disagreed with the ruling in the original tort action, they should have appealed from that holding instead of waiting three years and attempting a collateral attack.

Rule 73(a) U.R.C.P. 1953, requires:

> "When an appeal is permitted from a district court to the Supreme Court, the time within which an appeal may be taken shall be one month from from the entry of the judgment or order appealed from unless a shorter time is provided by law, except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding

one month from the expiration of the original time herein prescribed."

Respondents believe that the failure of Allstate to satisfy the Rule 73 time limitations for appealing to this Court is evident from the face of the record.

POINT III

APPELLANT ALLSTATE'S EXCLUSIVE REMEDY IS THROUGH ARBITRATION.

The issue which appellant Allstate seeks to litigate in the current appeal, is one which has been extensively before the Utah Court; i.e. an insurers right to subrogation under the Utah No-Fault Insurance Act.

In order to properly evaluate the issue presented, it is necessary to put the facts of this case in a time frame of the judicial pronouncements of the Utah Supreme Court. It must be noted that the initial trial against the tortfeasor as well as the subsequent payment to Mrs. Brundage of the damages assigned by the jury, occurred prior to the case of Allstate v. Ivie, Utah 606 P.2d 1197 (1980), and the subsequent decisions of the Court.

However, it is of critical importance to note that all events which are the subject of this appeal occurred years after the case of Transamerica Insurance Company v. Barnes, 505 P.2d 783 (Utah, 1972).

A. The Law Prior to Allstate vs. Ivie

The Barnes case established the universal practice in cases of insurance subrogation, until the Ivie decision of 1980.

The Barnes case articulated:

> "If the settlement were intended to include plaintiff's prior medical expenses, two drafts should have been issued, one to (insurer) and (person receiving benefits) jointly and one to (that person), alone." (Modified)

The procedure of issuing two separate checks in satisfaction of a personal injury claim, was utilized by virtually every liability insurer in the State of Utah. Indeed, this practice produced the precise controversy in Allstate v. Ivie, supra. Yet, as the records will indicate, Allstate readily agreed at the trial at the original tort action to issue a check to the insured alone, ignoring the rights of her no-fault insurer. This occurred even though Mrs. Brundage's attorney prefaced his motion with the statement that a subrogation issue existed.

This latter fact is critical when viewed through the spectacles of Transamerica v. Barnes, supra. The Barnes case made it clear that where the liability insurer has notice of a subrogation interest, and yet fails to issue the two separate drafts, they are guilty of a fraud upon the subrogated insurer and are liable to that insurer despite any payment to the injured plaintiff. The Barnes decision states:

> "If the settlement were made with knowledge, actual or constructive, of plaintiff's subrogation right, such settlement and release is a fraud on the insurer and will not affect the insurer's right of subrogation as against the tort-feasor or his insurance carrier. (Emphasis added)

At first blush, the language in Barnes which requires the liability insurer to make a double payment appears quite harsh. However, earlier in the decision Chief Justice Callister provides

the touch stone that justifies holding the liability insurer and not the injured plaintiff liable for this sum. The Chief Justice states:

> "Subrogation is not permitted where it will work any injustice to others. To entitle one to subrogation, the equities of one's case must be strong, as equity will, in general, relieve only those who could not have relieved themselves."

In the instant case, it is clear that Allstate could have objected to the motion proposed by Mrs. Brundage's attorney, and therefore have protected their interest. Rather, they acquiessed in the motion and even requested that the Court make such an order. It is beyond cavil that Allstate, through proper objections, could have relieved themselves by obtaining the same pragmatic remedy as they now seek five years after the fact.

In his ciriticsm of the majorities opinion in Ivie, supra, Justice Crockett found this exact interpretation of Barnes, supra, to be controlling. The Justice stated:

> "In treating a similar situation in the case of Transamerica Ins. Co. v. Barnes, this Court stated that 'if the settlement were intended to include plaintiff's prior medical expenses, two drafts should have been issued. One to plaintiff and defendant jointly and one to defendant alone.' That is the exact procedure followed by (the liability carrier) in this instance."

Thus, it would appear that an even more compelling reason exists in the present situation than existed in Ivie, supra, where two checks were issued.

However, an interpretation of the above quoted language still presents the question of whether or not Mrs. Brundage would suffer a greater injustice than Allstate under these facts.

It is respectfully submitted that Allstate, having an extensive nationwide network of professionals who deal exclusively in the area of insurance law, was in a far better situation to protect their interests. Furthermore, it is the inherent nature of the insurance industry to spread risks of monetary losses.

Conversely, Mrs. Brundage is a single individual. Here sole connection to the insurance industry is being the unfortunate victim of a tortious driver. Her ability to spread the risk of loss extends from her purse to the cookie jar.

Allstate may articulate the injustice of double liability. However, their argument must be tempered by the injustice to the human condition which Allstate attempts to inflict. It is respectfully submitted that to require Mrs. Brundage, more than five years after leaving the Court of law, to produce the fund of thousands of dollars solely due to Allstate's failure to object, is repugnant to the very foundation of equity. Mrs. Brundage is left only to echo the words of Barnes, supra: "Subrogation is not permitted where it will work any injustice to others."

B. Allstate v. Ivie Applied

The law of insurance subrogation in the State of Utah was rewritten by the adoption of the Utah No-Fault Insurance Act. The Bar of the State of Utah underwent seven years of adjustment, during which time Mrs. Brundage's judgment was rendered, until 1980 when the Utah Supreme Court delivered its opinion in Allstate v. Ivie, supra.

The Ivie case mirrors the current situation, with two important distinctions. First, making the check payable jointly to Mrs. Ivie and her no-fault carrier, was the unilateral act of the liability insurer, and not pursuant to Court order. Second, Mrs. Ivie's claim concluded with a settlement rather than a judgment of the Court.

The initial distinction goes to the issue of res judicata and collateral estoppel, which is treated elsewhere in this brief. However, Allstate places great reliance in the second factual distinction. According to Allstate, the fact that special damages are easily discernable from an examination of the judgment supports their right to reinbursement. Allstate maintains that the Court's decision in Ivie, supra, was due solely to the Court's inability to discern what items the settlement was intended to include.

Initially, Mrs. Brundage would suggest that this distinction is a double-edged sword. The judgment of the Court in the instant case is not only apparent to the Justices of this Court, it was undoubtedly crystal clear to Allstate's attorney at the trial against the tort-feasor. Thus, Allstate cannot claim as it is argued in Ivie, supra, that the ambiguity surrounding the payment of the claim contemplated satisfying the subrogation right of the no-fault insurer. Allstate's failure to object once again raises the spector of fundamental principles of equity discussed in Barnes, supra.

Furthermore, Mrs. Brundage would maintain that the Court in Ivie, supra, did in fact recognize the payment of special

damages to the tort victim, but resolved the equities against the liability carrier, who is in the best position to prevent the situation which occurred. The Court stated:

> "Thus the tort victim's recovery from the liability insurer cannot be reduced by the PIP payments. If the victim's recovery be reduced by the amount of the PIP payments by granting his no-fault insurer a right of subrogation, it is the no-fault insurer who receives double recovery. This is so because the insurer receives a premium for the benefits, and then receives full reimbursement, while the liability insurance available to recompense the victim is depleted by payments for which the liability insurer is not responsible to the victim."

Respondents do not mean to suggest that the Ivie case didn't provide that the tort victim should not seek to be compensated for special damages already paid by the PIP carrier. Had Mrs. Brundage's trial occurred three years later, after the decision in Ivie, supra, was announced, no such recovery would have been contemplated. However, it is respectfully submitted that the Court in Ivie, supra, chose to resolve the equities in favor of the private citizen and against the liability insurer, who was charged by statute to satisfy the myriad requirements of the Utah No Fault Insurance Act as a condition precedent to doing business in this jurisdiction.

That the Ivie Court was aware that the sum obtained by the tort victim included special damages, is clearly evidenced by the vigorous dissent of now Chief Justice Hall. Justice Hall stated at page 1205:

> "The pure and simple facts of this case are wholly supportive of the summary judgment appealed from. Ivie chose to compromise her claim against

> the tortfeasor by accepting the sum of $44,000 in full settlement thereof. Prior to the settlement, (the liability insurer) duly advised Ivie of its intention to include (the no-fault carrier) on its settlement draft and thereby satisfy its statutory obligation to reimburse (the no-fault carrier) for its advance of $7,394 in PIP payments. Indeed, at the time of settlement, it issued a separate draft for the exact sum of said PIP payments ($7,394), payable jointly to Ivie and (the no-fault carrier)." (Modified)

In referring to the dissent of Chief Justice Hall, respondent is well aware that thoughtful and well reasoned arguments exist in support of appellant's claim. However, in the event that the present Court wishes to lay down a new rule of law, respondent would respectfully request the Court to examine several important considerations.

Initially, it should be noted that the tort victim in both Ivie, supra, and the present case, acted without the benefit of the Court's post-1980 pronouncements. Respondents would contend that to treat two similarly situated litigants in a disparate fashion, would be an unfortunate inconsistency. It is respectfully contended that should the Court choose to reexamine Ivie, supra, a better case would be presented by a post Ivie, supra, litigant.

Furthermore, respondents believe that the liability insurer in the present case, is far less deserving of relief than the liability carrier in Ivie, supra. As the Hall dissent indicates, the liability insurer there attempted to satisfy the rights of the no-fault's carrier by including it on the check that represented special damages. In the instant case, Allstate actively avoided such a method.

Finally, if the above reasons are not persuasive, we would urge that the Court treat Mrs. Brundage in the same fashion which Justice Hall urged the majority in Ivie, supra, to give to the liability carrier. Justice Hall concluded his dissent by stating:

> "...applying the new rule of law in the present case causes me considerable concern for it effects a highly unjust and harsh result. The majority would be better advised to abide by the so-called "Sunburst Doctrine" and thereby make the change in the law prospective only." (Emphasis in the original).

C. The Allstate vs. Ivie Progeny

Respondent is also of the opinion that the pronouncements of the Utah Supreme Court following the Ivie decision, continue to support its position maintained on appeal.

In Allstate Insurance Company vs. Anderson, 608 P.2d 235 (Utah 1980), an almost identical situation was presented. The insured received $2,000.00 in PIP benefits from its insurer, Allstate. The insured then brought an action against the tortfeasor which resulted in a $10,000.00 settlement with the tortfeasor's insurer. $2,000.00 of the $10,000.00 settlement was made payable jointly to Allstate and the insured as reimbursement for the PIP benefits paid by Allstate. The insured refused to deliver the draft to Allstate, and Allstate then sued for its recovery. The Court summarily granted judgment in favor of the insurer holding that Ivie, supra, was dispositive of the case.

The same result should be reached in the present action. Barbara Brundage received PIP benefits from the plaintiff of approximately $8313.80. She then received a judgment against the tortfeasor, Jacklyn L. Kernan, in an amount of $21,600.00. In essence,

Ivie and Anderson hold that while an insured tort victim should not sue the tortfeasor for PIP payments already received, any judgment or award which is given to the insured tort victim is not recoverable by the victims insurer. Thus, while Ivie received $7,394.00 in PIP payments from her insurer and her settlement with the tortfeasor's insurer was only $44,000.00, she was also granted judgment for the $7,394.00 paid jointly to her and her insurer, even though that amount was meant to be reimbursement for the PIP benefits paid by her insurer. The same result followed in Anderson where the insured tort victim was awarded $2,000.00 meant to be PIP reimbursement to the insurer.

Finally, the additional consideration of attorney's fees becomes relevant should the Court rule adversely to Mrs. Brundage. In Street vs. Farmers Insurance Exchange, 609 P.2d 1343 (Utah 1980), the Court held:

> "The general rule is that a subrogation insurance carrier must pay its fair share of attorney's fees and costs if it has given notice and does nothing to assist in the prosecution of the claim."

Therefore, should the Court choose to distinguish or overrule the Ivie decision, the ruling against respondents Ivie and Morgan would be subject to remand, in order to determine the benefit conferred on the no-fault carrier. See also Guaranty National Insurance Company vs. Morris, 611 P.2d 725, 737, (Utah 1980). (This latter issue may be controlled by the case of Laub vs. State Farm Insurance Company now pending before the Court. The Laub case was argued before the Court on the 14th day of June, 1982.)

CONCLUSION

The threshold consideration presented in this appeal is whether respondents Brundage, Ivie and Morgan are properly before the Court. Respondents are of the opinion that personal jurisdiction was never obtained after their dismissal from the suit. Therefore, the errors assigned by Allstate following the dismissal of Ohio Casualty's claim should have no effect on Mrs. Brundage and her attorneys. Furthermore, the errors assigned by Allstate prior to their dismissal involve only the rights of Ohio Casualty, which have been waived. Thus, respondents conclude that the current appeal is not properly before the Court. This argument is considered as being a form of special appearance, and the remainder of respondent's brief is provided only to protect Mrs. Brundage under all eventualities.

In addition, respondents are of the belief that the issue presented here was conclusively determined at the conclusion of the original action against the tortfeasor. Respondents believe that the appeal presented here is barred by the doctrines of res judicata, collateral estoppel, timeliness, mootness, and as an impermissible attempt to have one division of the Fourth District Court overrule another.

Furthermore, respondents conclude that controlling case law in the State of Utah on the question of insurance arbitration and subrogation, would indicate that the appellant has no equitable rights of reimbursement against Mrs. Brundage or her attorneys.

Finally, should the Court conclude that the present case is ripe for a decision on the merits, and that modification of Allstate vs. Ivie, supra, is in order, respondents would respectfully request that the Court apply the Sunburst Doctrine, and make the change in the law prospective only.

Respectfully submitted this 4th day of October, 1982.

RAY PHILLIPS IVIE

CERTIFICATE OF SERVICE

This is to certify that on this 4th day of October, 1982, I mailed, postage prepaid, two copies of the foregoing Brief of Defendants-Respondents to:

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