

2015

**Everett P. Wilson Jr., and Darla Wilson, Plaintiffs/Appellees/
Respondents, and Educators Mutual Insurance Association
Plaintiff/Appellant/Petitioner, vs. Cade M. Krueger Defendant**

Utah Supreme Court

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IN THE UTAH SUPREME COURT

EVERETT P. WILSON JR., and
DARLA WILSON,
Plaintiffs/Appellees/Respondents,

and

EDUCATORS MUTUAL
INSURANCE ASSOCIATION
Plaintiff/Appellant/Petitioner,

vs.

Cade M. Krueger
Defendant.

PUBLIC

Utah Supreme Court
Case No. 20160227-SC

Utah Court of Appeals
Case No. 20150150-CA

Fourth Judicial District Court
Case No. 110400083

BRIEF OF RESPONDENTS

CERTIORARI FROM THE UTAH COURT OF APPEALS' FEBRUARY 25, 2016,
RULING REVERSING THE FINAL DECISION OF
THE HONORABLE SAMUEL D. MCVEY OF THE UTAH FOURTH JUDICIAL
DISTRICT COURT

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I. STATEMENT OF JURISDICTION

Pursuant to Utah Code Ann. § 78A-3-102(5), the Utah Supreme Court granted certiorari to hear this appeal in an order dated July 6, 2016. This was done pursuant to Utah Code Ann. § 78A-3-102(3)(a), which gives this Court appellate jurisdiction over a ruling of the Utah Court of Appeals.

II. GOVERNING CONSTRUCTIONAL PROVISIONS, STATUTES, AND RULES

A. UTAH CODE § 31A-21-108. Subrogation actions.

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

B. UTAH CODE ANN. § 78B-3-107. Survival of action for injury or death to person.

A cause of action arising out of personal injury to a person, or death caused by the wrongful act or negligence of another, does not abate upon the death of the wrongdoer or the injured person. The injured person, or the personal representatives or heirs of the person who died, has a cause of action against the wrongdoer or the personal representatives of the wrongdoer for special and general damages.

C. Rule 17 Utah Rules of Civil Procedure (in relevant part):

(a) Real party in interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's name without joining the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the state of Utah. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or

substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

III. STATEMENT OF THE CASE

Statement of additional facts. Appellee Wilson accepts Appellant Educators Mutual Insurance Association's (hereinafter "EMIA") statement of facts and adds the following facts:

In 2011, Wilsons filed a wrongful death lawsuit as her heirs seeking compensation for their loss of Jessica's companionship and burial expenses. (No Personal Representative was sought or appointed for Jessica's estate.) R. at 478.

In 2013, Wilsons reached a tentative settlement for the \$100,000 limits of Krueger's liability insurance limits, subject to resolution of EMIA's claim of a federal ERISA lien. R at 480.

In January, 2014, EMIA filed its own competing suit against Krueger, the driver of the car which struck Jessica. In its Complaint, EMIA sued Krueger, alleging that his "failure to exercise reasonable care caused his vehicle to strike Jessica Wilson," causing her severe injuries and death. EMIA alleged that Krueger "is liable for all damages arising out of this action, including medical expenses incurred by Jessica Wilson, and claimed its insurance contract with Jessica Wilson gave it a right of reimbursement. R. at 775, attached as Addendum D. EMIA did not pay all of Jessica Wilson's medical expenses. See payments ledger in Addendum D.

Unable to resolve the competing claims, the parties stipulated to consolidation of

the two cases, an assignment of Krueger's defenses against the EMIA claim to Wilsons, and an interpleader of Krueger's \$100,000 liability policy limits. R. at 263.

IV. SUMMARY OF ARGUMENTS

The substance of the holding of the Utah Court of Appeals is that, MIA should have brought its personal injury action in the name of the estate or intervened in the Wilsons' action against Krueger (citation omitted). Instead, it filed an action in its own name, which Utah law does not permit.

Wilson, 2016 UT App 38 at ¶ 12, 368 P.3d 471.

The Court of Appeals correctly rejected the argument of EMIA - that Utah Code Ann. § 31A-21-108, "Subrogation actions may be brought by the insurer in the name of its insured," expressly authorized an insurer to sue in its own name. The court ruled there is "no language" in the statute "*granting* an insurance company the right to bring a subrogation action in its own name." *Wilson*, 2016 UT App 38, ¶ 8 (italics in original). The court also correctly presumed that § 31A-21-108 is not "the exclusive method" to bring a (subrogation) action. *Id.*

EMIA and National Association of Subrogation Professionals (hereinafter "AMICUS") do not argue that the statute is ambiguous. AMICUS, in fact, reads the statute precisely that way the Court of Appeals reads it: "The plain meaning of Section 31A-21-108 is obvious. An insurer may pursue a subrogation action in the insured's name." (AMICUS Brief, p. 9.) However, EMIA and AMICUS fault the court for not seeing that the plain meaning of statute permits the "insurer to sue in its own name." EMIA and AMICUS seem to argue that the statute *must read that way because insurers*

file subrogation cases. However, because the common law did not allow subrogation of injury or death claims, *Johanson v. Cudahy Packing Co.*, 107 Utah 114, 152 P.2d 98, 104 (1944), injury subrogation does not exist except in compliance with § 31A-21-108, “by the insurer in the name of its insured,” *Id.* WILSONS’ exhaustive search of Utah case law shows no reported case in Utah history in which an insurer sued a tortfeasor for injury damages in the name of the insurer.

EMIA has cited to several cases in support of its argument that Utah Code Ann. § 31A-21-108 authorizes an insurer to sue in its own name. None of these cases interprets § 31A-21-108. And, none allows an insurer which has not paid the debt of the wrongdoer in full to sue the wrongdoer in its own name except for workers’ compensation injuries which are governed by statutes which expressly give standing to workers’ compensation insurer. *See Wilson* 2016 UT App 38, fn. 4 (quoting the current workers’ compensation statute).

The Court of Appeals is correct that Utah case law does not give an insurer a right to sue in its own name unless it has fully paid the damages for which the wrongdoer could be liable. This has been the law of Utah for over one hundred years, and is the general rule throughout the United States. In *State Farm Mut. Auto. Ins. Co. v. Nw. Nat’l Ins. Co.*, 912 P2d 983 (Utah 1996) and other cases, the Utah appellate courts have described the conditions which allow an insurer to sue in its own name. EMIA failed to meet the condition which requires that “the entire debt must have been paid,” referring to the debt

owed by the tortfeasor to the injured insured. *Id.* at 986.

The Court of Appeals' opinion in this case does not leave insurers like EMIA and AMICUS without a remedy or protection. Nothing in *Wilson*, 2016 UT App 38, creates new law, and insurers like EMIA and AMICUS have the same rights they have had for decades.

AMICUS misreads the Court of Appeals reading of the plain language of Utah Code Ann. § 31A-21-108 as always requiring the insured to be made whole first. However, § 31A-21-108 does not require the insured to be made whole. The doctrine that an injured party should be made "made whole" before a subrogated insurer can recover on its claim was argued below, *Wilson*, 2016 UT App 38 at ¶ 5, but the issue was never reached because of the Court's ruling on EMIA's standing. *Id.* at ¶ 7. This case is not a test of the made whole doctrine.

EMIA and AMICUS misread Utah Code Ann. § 31A-21-108, as interpreted by the Court of Appeals, as preventing the insurer from protecting its rights by joining in a case. They err. The purpose of § 31A-21-108 is to create "one action," not to prevent an insurer from protecting its rights. Neither § 31A-21-108 nor the Court of Appeals' opinion nor any other Utah case prevents an insurer from also appearing in the case. The Court of Appeals recognized the important right of an insurer to protect its rights by intervening in a case in its own name. *Wilson*, 2016 UT App 38 at ¶ 12. AMICUS has raised some important policy arguments that a property insurer should be able to protect its

subrogation rights in its own name. This essential right to join any case which may involve subrogation issues as an intervening party meets the needs EMIA and AMICUS describe. EMIA's problem in this case is that for more than three years (see Statement of Facts) it ignored its right to intervene in the Wilson wrongful death case and then filed its own competing "action in its own name, which Utah law does not permit." *Wilson*, 2016 UT App 38 at ¶ 12.

The Court of Appeals correctly applied Utah Code Ann. § 78B-3-107, Utah's survival statute for injury and death, which passed Jessica Wilson's cause of action against Krueger on her death to her estate personal representative and heirs. The cause of action included the right to recover Jessica's medical expenses.

Neither EMIA nor AMICUS address the applicability and meaning of § 78B-3-107. Instead, they complain that the Court of Appeals deprived insurers of any rights when their insurer dies. They vaguely argue, without support, that the Court of Appeals should have applied Utah Code Ann. § 31A-21-108 to give the insurer the right to sue in its own name after the death of its insured. Neither EMIA nor AMICUS explain how the general authority to sue in the name of an insurer in § 31A-21-108 should control over the express provisions for survival of injury and death actions in Utah Code Ann. § 78B-3-107. EMIA could have, but did not, protect its rights through participating through Jessica Wilson's estate or by intervening in the wrongful death action. "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.” *Educators Mut. Ins. Ass'n v. Allied Prop. & Cas. Ins. Co.*, 890 P.2d 1029, 1031 (Utah 1995) (quoting *Transamerica Ins. Co. v. Barnes*, 505 P.2d 783, 786 (1972)).

Rule 17 of the Utah Rules of Civil Procedure prevents dismissal of a case without giving a reasonable time for substitution of the real party in interest. This rule does not apply in this case. This is an interpleader case which arose from the settlement and dismissal of the parties’ separate and competing cases against the tortfeasor, Krueger. When the Court of Appeals remanded “with instructions for the trial court to dismiss EMIA's claims and award all of the interpleaded funds to the Wilsons,” the dismissal was because EMIA had lacked standing in the prior case it had filed against Krueger. *Wilson*, 2016 UT App 38 at ¶ 13. Without standing in the prior case, EMIA has no claim on the funds in this interpleader action.

V. ARGUMENT

A. The Court of Appeals correctly interpreted § 31A-21-108. Neither APPELLANT nor AMICUS nor Utah case law offers a different interpretation.

Petitioner EMIA and AMICUS both fault the Utah Court of Appeals for incorrectly interpreting this fourteen word statute: “Subrogation actions may be brought by the insurer in the name of its insured.” Utah Code Ann. § 31A-21-108. (EMIA Brief, pp. 9-10; AMICUS Brief, p. 3.)

The Utah Court of Appeals found “no language” in the statute “...*granting* an

insurance company the right to bring a subrogation action in its own name.” *Wilson*, 2016 UT App 38, ¶ 8 (italics in original). EMIA and AMICUS call this ruling “untenable.” (EMIA Brief, p. 24; AMICUS Brief, p. 4.) AMICUS writes that the Court of Appeals “read words into the statute which simply do not exist,” and the “clear language used in this statute without question should allow for an insurer to file suit in subrogation in its own name. There is simply no other reasonable way to interpret this statute.” (AMICUS brief, p. 3.)

Neither EMIA nor AMICUS argues that the statute is ambiguous, and neither offers a contrary interpretation. AMICUS, in fact, reads the statute precisely the way the Court of Appeals reads it: “The plain meaning of Section 31A-21-108 is obvious. An insurer may pursue a subrogation action in the insured’s name.” (AMICUS brief, p. 9, the agreeable conclusion of a well-researched, five-page argument.)

Neither EMIA nor AMICUS has cited a single Utah case which interprets § 31A-21-108 differently. As the Court of Appeals and AMICUS agree, there is no language in § 31A-21-108 granting an insurer the right to sue in its own name.

EMIA argues for a different interpretation of § 31A-21-108 “because the right for an insurer to subrogate already exists at common law.” (EMIA Brief, p. 9.) This characterization of the common law is only partly correct. Common law allowed subrogation of property claims, but not claims for injury or death. In Utah “...common law there was no right of subrogation in an insurance carrier against a third person for

personal injury or death of an insured.” *Johanson v. Cudahy Packing Co.*, 107 Utah 114, 152 P.2d 98, 104 (1944). This suggests that § 31A-21-108 is the only authority for a subrogated insurer to sue the wrongdoer for personal injuries, and only in compliance with the statute, “by the insurer in the name of its insured.” *Id.* WILSONS’ exhaustive search of Utah case law shows no reported case in Utah history in which an insurer sued a tortfeasor for injury damages in the name of the insurer.

The Court of Appeals assumed, correctly, that § 31-21-108 was not “the exclusive method” to bring a (subrogation) action. *Wilson*, 2016 UT App 38 at ¶ 8. EMIA and AMICUS seem to agree. Their real arguments seem to lay elsewhere - that the law *cannot mean what it says* because an insurer *must* be able to file a subrogation action in its own name. The proper course for bringing a Utah subrogation action is discussed below.

B. The Court of Appeals is correct that Utah case law does not give an insurer a right to sue in its own name unless it has fully paid the damages for which the wrongdoer could be liable.

EMIA’S and AMICUS’ criticism of the Court of Appeals is not supported by Utah case law. Utah law does allow an insurer to sue in its own name, but not in this case.

1. Utah law does allow an insurer to bring a subrogation action in its own name but only under narrow conditions. As early as 1946, the Utah Supreme Court declared rules which will allow a subrogated insurer to sue in its own name. In *Cook v. Cook*, the Plaintiff paid the insurance premiums on a life insurance policy and claimed a

subrogation right to the proceeds. *Cook v. Cook*, 110 Utah 406, 410 174 P. 2d 434 (1946).

In its analysis, the Court identified conditions which entitle a party claiming subrogation to sue in its own name. *Id.* at 410.

The Utah Supreme Court in *State Farm v. Northwestern National* crystalized the factors identified in *Cook* into four elements:

Before a court will grant relief in a subrogation action, a party must meet the following requirements: (1) There must be a debt or obligation for which the subrogee was not primarily liable; (2) the subrogee must have made payment to protect his own rights or interest; (3) the subrogee must not have acted merely as a volunteer; and (4) the entire debt must have been paid. Furthermore, subrogation must not work any injustice to the rights of others.

State Farm Mut. Auto. Ins. Co. v. Nw. Nat'l Ins. Co., 912 P.2d 983, 986 (Utah 1996).

The fourth element of *State Farm v. Northwestern National*, that “the entire debt must have been paid,” supports the Court of Appeals’ opinion in this case as described in the next argument.

2. The Court of Appeals was correct. EMIA did not meet the test for suing in its own name because, inter alia, it had not paid the entire debt of the wrongdoer. EMIA does not dispute that it paid only part (some of the medical expenses) of the debt the tortfeasor, Krueger, owed to Jessica Wilson, the decedent and insured. Jessica’s estate could have asserted “special and general damages” to include: pain and suffering; additional medical expenses; burial and funeral expenses; and pain and suffering under Utah’s survival statute for injury claims, Utah Code Ann. § 78B-3-107. Having paid less than the tortfeasor owed

Jessica's estate, EMIA was not entitled to file the claim in its own name. The Court of Appeals wrote:

Our review of Utah case law convinces us that, with the possible exception of an insurer who has fully indemnified the insured for all damages for which the wrongdoer could be held liable, *see Johanson v. Cudahy Packing Co.*, 107 Utah 114, 152 P.2d 98, 103 (1944), no independent right exists for an insurer to seek subrogated damages in its own name.

Wilson, 2016 UT App 38 at ¶ 8.

While the Court of Appeals did not cite *Johanson* for its holding (see discussion of EMIA'S criticism below), *Johanson* contains a good review of the general law - that an insurer must pay the debt of the wrongdoer in full before the insurer has standing to sue the wrongdoer directly.

As quoted from the *State Farm* case above, "the entire debt must have been paid" by the subrogated insurer before the insurer could sue in its own name. *State Farm*, 912 P2d at 986. Other Utah cases support this rule. *See Cook* discussed above; *Davis County v. Jensen*, 2003 UT App 444, 83 P.3d 405, fn 5; and *Featherstone v. Emerson* 14 Utah 12, 45 Pac. 713 (1896) ("As a general rule, the right of subrogation cannot be enforced until the whole debt is paid or tendered to the creditor."). This has been the general American rule for over one hundred years. *See Payment of entire claim of third person as condition of subrogation*, 9 A.L.R. 1596 (1920).

3. EMIA'S criticism of the Court of Appeals' reliance on *Johanson v. Cudahy Packing Co.* is unfair, and the case does not authorize EMIA's to sue a torfeasor in its own

name. In a lengthy criticism of the Court of Appeals' reliance on *Johanson v. Cudahy Packing Co.*, EMIA tries to persuade this court that the Court of Appeals misapplied the holding in the case and that *Johanson* actually supports EMIA'S position in that it has standing in this case. (EMIA Brief, pp. 16-23.)

EMIA'S criticism of the Court of Appeals is unfair. The Court of Appeals' citation was "see *Johanson v. Cudahy*... ." *Wilson*, 2016 UT App 38 at ¶ 8. The "see" signal indicates that *Johanson* supports the proposition but does not directly state it. It is a signal that the Court was not relying on the holding. See *Colombia Law Review*, *Harvard Law Review*, *University of Pennsylvania Law Review*, and *The Yale Law Journal*, *The Blue Book A Uniform System for Citation*, 6, (Mary M. Prince ed., 19th ed. 2011).

In its analysis of *Johanson*, EMIA missed a critical point: the insurer in *Johanson* had a statutory cause of action to sue in its own name. The additional facts below are necessary to understand *Johanson*.

First, the cited 1944 opinion was the second appeal of the dispute, which had been re-filed between the two opinions. The decision on the first appeal in 1941 states its holding: "What this case decides is: The **statutory cause of action** in favor of the employer or the carrier granted by 42- 1- 58, R.S.U. 1933 may be assigned." *Johanson v. Cudahy Packing Company*, 101 Utah 219, 120 P.2d 281, 282 (1941) (the citation to the Revised Statutes of Utah is to the workers compensation statute) (emphasis added).

Second, EMIA's argument (EMIA Brief, p. 22) that the employer and its insurer in

Johanson (1944) did not have statutory standing is wrong, as shown in the 1941 opinion.

EMIA's misreading may come because the 1944 opinion quotes only portions of the statute which omit the statutory cause of action language. The statutory cause of action in the old Utah statute was similar in substance to the present Utah workers compensation statute quoted in *Wilson*, 2016 UT App 38 at fn 4.

Third, the *Johanson* (1944) court surveyed three primary views in the different states and rejected the view that the insured / injured party was the owner of the claim (EMIA Brief, p. 18) because the Utah workers compensation statute gave statutory standing to the insurer and employer. *Johnson v. Cudahy Packing Co.*, 152 P.2d 98, 104 (Utah 1944). The *Johanson* (1944) survey of cases began with this preface, "Numerous cases from twenty-four jurisdictions are cited. ...But **when this right of subrogation was given by statute as it is in Section 42—1—58 ...**" *Id.* (emphasis added).

The statutory standing of the employer's insurer in *Johanson* (1944) makes the case inapplicable to EMIA's arguments for standing in this case.

4. No Utah case supports the right of an insurer to sue the tortfeasor in the insurers' own name. The cases cited by EMIA do not support the right of an insurer to sue the tortfeasor in the insurers' own name. WILSONS make this bold claim: This case now before the Court, *Wilson*, 2016 UT App 38, 368 P.3d 471, is the first reported case in the history of Utah in which an insurer has sued a tortfeasor in its own name for subrogation of personal injury damages.

The cases cited by EMIA are these:

Property damage case cited EMIA

Nat'l Union Fire Ins. Co. v. Denver & R.G.R. Co., 44 Utah 26, 137 P. 653 (1913), cited by EMIA (EMIA Brief, p. 11, 12, 15, and 19) supports the Court of Appeals opinion in this case, and is no help to EMIA. In that case, a fire insurer paid \$250 of \$600 damage to barn and received assignment of claim against tortfeasor. In 1913 as now, Utah did not allow subrogation of only part of a claim. As the Utah Supreme Court wrote, "In all of the foregoing cases it is substantially held that an assignment of only a part of an entire claim... is not enforceable by the assignee in an action at law." *Id.* at 654. However, the court affirmed a judgment in favor of the plaintiff insurer because the defendant failed to object (special demurrer) to standing in its answer to the partial claim assignment. *Id.* at 658

Workers compensation cases cited by EMIA

Johanson v. Cudahy Packing Co., discussed above.

Baker v. Wycoff, 79 P.2d 77 (1938) cited by EMIA (EMIA Brief, p. 12 and 19) has no precedential value because it was another workers compensation case with the same statutory standing for the employer / insurer reviewed in the discussion of *Johanson* above.

Cases of insurer suing insurer cited by EMIA

EMIA offers five cases to support its claim of standing to sue a tortfeasor in its

own name. These are: *State Farm Mut. Auto. Ins. Co. v. Nw. Nat'l Ins. Co.*, 912 P.2d 983 (Utah 1996) (EMIA Brief, p. 14 and 20); *Sharon Steel Corp. v. Aetna Cas. & Sur. Co.*, 931 P.2d 127 (Utah 1997) (EMIA Brief, p. 15 and 20); *Educators Mut. Ins. Ass'n v. Allied Prop. & Cas. Ins. Co.*, 890 P.2d 1029 (Utah 1995) (EMIA Brief, p. 14); *State Farm Mut. Ins. Co. v. Farmers Ins. Exch.*, 450 P.2d 458 (Utah 1969) (EMIA Brief, p. 13, 14, 20, and 21); and *Nat'l Farmers Union Prop. & Cas. Co. v. Farmers Ins. Exch.*, 377 P.2d 786 (Utah 1963) (EMIA Brief, p. 21).

These cases do not interpret Utah Code Ann. § 31A-21-108, and they are not subrogated injury claims against a tortfeasor. Every one of these cases involve an insurer suing another insurer for contribution or for violation of subrogation liens. None are personal injury subrogation cases and none were filed against the tortfeasor.

These cases exist because the Utah Supreme Court has carved out a special standing rule allowing insurers to sue other insurers. In *State Farm v. Northwestern* the Court wrote:

More significantly, we have extended this principle (equitable subrogation) to an action by an insurer against a second insurance company which is primarily liable to defend or pay any claims on behalf of its insured but which has denied coverage. *National Farmers Union Property & Casualty Co. v. Farmers Ins. Group*, 14 Utah 2d 89, 377 P.2d 786, 787-88 (Utah 1963).

State Farm v. Northwestern, 912 P2d 983 at ¶ 7.

None of these cases apply to EMIA'S standing problem in this case.

Case of insurer suing recipient of its no-fault policy benefits cited by EMIA

Transamerica Insurance Co. v. Barnes, 505 P.2d 783 (Utah 1972) (EMIA Brief, p. 13 and 20). Barnes was a passenger in the car insured by Transamerica who collected medical benefits from Transamerica, not a tortfeasor who owed injury damages to its insured. Barnes settled with the tortfeasor driving another car without reimbursing Transamerica. Transamerica sued, alleging Barnes violated its subrogation rights by settling without notice to Transamerica. The case was remanded to decide if Barnes was made whole. The case does not support EMIA's right to sue a tortfeasor with whom it has no relationship.

5. Serious issues of claim preclusion and res judicata would also arise if an insurer is allowed to sue in its own name on part of the debt. A "single act causing simultaneous injury to the physical person and property of one individual . . . give[s] rise to only one cause of action, and not to separate causes based . . . on the personal injury, and . . . the property loss." *Allen v. Moyer*, 2011 UT 44, ¶ 16, 259 P.3d 1049, quoting *Raymer v. Hi-Line Transp., Inc.*, 15 Utah 2d 427, 394 P.2d 383, 384 (Utah 1964). Thus, adjudication of one the issues in an injury action will bar future actions on the same facts. *Id.* An insurer suing on medical expenses or property damage can prevent the insured from later suing for compensation for injuries.

These issues are eliminated by requiring the insurer to sue in the name of its insured in a single action.

C. The Court of Appeals’ opinion in this case does not leave insurers like EMIA and AMICUS without a remedy or protection.

1. The Court of Appeals did not make new law. Nothing in *Wilson*, 2016 UT App 38 creates new law. The Court interpreted Utah Code Ann. § 31A-21-108 by its plain language. As described above in the discussion of *Featherstone v. Emerson*, the rule against splitting a cause of action by suing on part of the debt owed the insurer goes back more than a hundred years. Utah’s survival statute for personal injury claims, Utah Code Ann. §78B-3-107, is also very old. Nothing about this opinion is surprising.

2. AMICUS misreads § 31A-21-108, as interpreted by the Court of Appeals, as always requiring the insured to be made whole first. AMICUS sees the issue here as “whether an insured must be made whole before that insured’s insurance carrier has a right of subrogation.” (AMICUS Brief, p. 2.)

The doctrine that an injured party should be made “made whole” before a subrogated insurer can recover on its claim was argued below. *Wilson*, 2016 UT App 38 at ¶ 5. However, the issue was never reached because of the Court’s ruling on standing. *Id.* at ¶ 7. This case is not a test of the made whole doctrine.

EMIA and AMICUS raise reasonable policy arguments - that in many property damage actions, requiring an insured to be made whole first would create problems for insurers. The cases cited by AMICUS are good illustrations of the problems facing property insurers. However, the Utah “made whole” requirement can be easily overcome

by property insurers. First, the right of an insured to be made whole can be modified in the insurance contract. *Birch v. Fire Ins. Exch.*, 2005 UT App 395, ¶ 7, 122 P.3d 696. Second, the property insurer can become the assignee of the claim and sue in its own name. *Nat'l Union Fire Ins. Co. v. Denver & R.G.R. Co.*, 137 P. 653, 655 (1913). In cases where the insured is owed a deductible or has small damages, the insured can pay the small deductible or otherwise receive an assignment of the cause of action and have standing in its own right. To prevent the problems of uncooperative insureds, the insured can also modify its insurance contract to provide for a purchase and assignment of the claim under predetermined terms. *See Birch*, 2005 UT App 395 at ¶ 7.

Because the Utah Court of Appeals did not modify the law of subrogation, insurers still have the benefits and protections they have been given in scores of Utah appellate opinions.

3. EMIA and AMICUS misread § 31A-21-108, as interpreted by the Court of Appeals, as preventing the insurer from protecting its rights by joining in a case. The purpose of § 31A-21-108 is to create “one action,” not prevent insurers from protecting their rights.

EMIA and AMICUS argue they should be able to sue in their own name as insurers to protect their rights. As AMICUS writes, “an insurer should have the ability to file suit in its name (and not exclusively in the name of its policy holder) in litigation against responsible third parties.” (AMICUS Brief, p. 2.) They blame their perceived loss

of this ability on the Court of Appeals interpretation of Utah Code Ann. § 31A-21-108.

The short answer to these arguments is that neither the Court of Appeals opinion nor the plain meaning of § 31A-21-108 requires the policy holder to be the exclusive party in a case.

The purpose of § 31A-21-108 is to create “one action,” not prevent the insurer from also becoming a party with its insured. The strong policy § 31A-21-108 is to prevent the splitting of a cause of action, not to exclude an insurer from participating in the case. In *Johanson v. Cudahay* (1944), this court explained the reason for the rule requiring subrogation cases to be brought in the name of the insured.

These cases proceed upon the theory that the insured is the trustee for the insurer and that the third party has a right not to have the cause of action against him split up so that he is compelled to defend two or more actions. This splitting of the cause of action is avoided by having the suit brought in the name of the insured for the benefit of himself and as trustee for the insurance carrier. The principle of law is noted in *Nat'l Union Fire Ins. Co. v. D. & R. G. R. Co.*, *supra*, 44 Utah 26, 137 P. 653.

Johanson, 152 P.2d at 104.

4. Neither § 31A-21-108 nor the Court of Appeals opinion nor any other Utah case prevents an insurer from also appearing in the case.

The Court of Appeals recognized the important right of an insurer to protect its rights by joining in a case its own name. “EMIA should have brought its personal injury action in the name of the estate or intervened in the Wilsons' action against Krueger. Instead, it filed an action in its own name, which Utah law does not permit.” *Wilson*,

2016 UT App 38 at ¶ 12.

AMICUS illustrates its arguments by including its Complaint in *AGCS Marine Ins. Co. v. Adler Hot Oil Serv. Inc.*, No. 150800020 (Utah 8th Dist. Ct. filed Feb. 26, 2015) (AMICUS Brief, p. 15, 27, 29 and Addendum D.)

This case, in which AMICUS is trying to protect itself by appearing in this case, is a property loss case which appears to include all of the insured property owners as well as their insurers as plaintiffs. If so, WILSONS see no issue here. If an insurer can intervene in a case, WILSONS see no reason why the insurer cannot join its insured as an initial plaintiff. The joinder of insureds and insurers protects all, and meets the purpose of Utah Code Ann. § 31A-21-108 by not splitting the cause of action into multiple suits on the same event and facts.

5. The holding of the Court of Appeals was narrow: EMIA could not filed its own separate case and competing case in its own name on the same allegations of negligent driving by Krueger.

The holding of the Court of Appeals was that EMIA had no right to file a separate and competing action against the tortfeasor, Krueger, for negligent driving when a separate action was already pending on the same facts. *Wilson*, 2016 UT App 38 at ¶ 12. (For a more complete description of EMIA's competing injury claim against Krueger see Statement of Facts, and Addendum B.) Although the cases were consolidated for trial, the cases remained separate because EMIA never sought to make itself a party in WILSONS'

case. “Except where provided by statute, a consolidation in equity does not merge the suits and they maintain their separate identity in so far as the parties, issues, and proof are concerned.” *Jensen v. Morgan*, 844 P.2d 287, 291 (Utah 1992), quoting 1A C.J.S. Actions § 217, at 690 (1985).

The path for EMIA to protect its rights was clear.

D. The court of appeals correctly applied § 78B-3-107 in ruling that Jessica Wilson’s cause of action against the tortfeasor passed upon her death to her estate personal representative or heirs.

EMIA writes that the “Court of Appeals has created a requirement that would make it impossible for an insurer to recover in instances where an insured passes away.” (EMIA Brief, p. 24.) No, the Utah Legislature created the requirement decades ago.

1. Actio personalis moritur cum persona: injury causes of action die with the person. Under common law, injury causes of action were personal and did not outlive the injured person. *Mason v. Union Pac. Ry. Co.*, 7 Utah 77, 24 P. 796 (1890). “At common law, personal tort actions abate upon the death of either the claimant or the tortfeasor, while tort claims for property damage or conversion survive.” *Gressman v. State*, 2013 UT 63, ¶ 7, 323 P.3d 998.

2. Without § 78B-3-107, all causes of action for Jessica Wilson’s injury and death would have died with her.

Survival of personal tort actions is strictly under Utah Code Ann. § 78B-3-107

which reads:

A cause of action arising out of personal injury to a person, or death caused by the wrongful act or negligence of another, does not abate upon the death of the wrongdoer or the injured person. The injured person, or the personal representatives or heirs of the person who died, has a cause of action against the wrongdoer or the personal representatives of the wrongdoer for special and general damages.

Utah Code Ann. § 78B-3-107(1)(a) (first enacted as U.C.A. 1953, §78-11-12).

3. The Court of Appeals correctly ruled that the right to recover pre-death medical expenses passes under § 78B-3-107(1)(a) to the heirs and personal representative on death. “After Jessica's death, her cause of action for personal injury passed to her estate by virtue of Utah's survival statute. *See* Utah Code Ann. § 78B–3–107(1)(a). “The survival statute grants the personal representatives or heirs of the injured decedent the right to pursue both “special and general damages” against the wrongdoer. General damages include damages for the insured's pain and suffering... .” *Wilson*, 2016 UT App 38 at ¶ 12. “Pre-death medical expenses are part of an injury claim.” *Morrison v. Perry*, 140 P.2d 772 (Utah 1943).

WILSONS’ wrongful death suit was filed in 2011 (Statement of Facts). The parties in that case reached a tentative settlement in 2013 for a payment of \$100,000. In 2014, EMIA rushed to file its competing Complaint against the tortfeasor, Krueger, for negligent driving on the same allegations which had been pending for three years.

As the Court of Appeals wrote, EMIA had the right to either seek the appointment of a Personal Representative or intervene in the WILSONS case. *Wilson*, 2016 UT App

38 at ¶ 12.

EMIA failed for three years to join the WILSON case when it had a legal right to do so. “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.” *Educators Mut.*, 890 P.2d at 1031 (quoting *Transamerica Ins. Co. v. Barnes*, 505 P.2d 783, 786 (1972)).

4. By its express terms, § 78B-3-107(1)(a) applies only to personal injury, not to property claims. Unlike personal injury claims, property claims survived the death of the insured under common law. *Gressman v. State*, 2013 UT 63, ¶ 7 As described above, a subrogated insurer of a property damage claim can obtain an assignment of the claim, and can pursue legal action as the owner of the claim even after the death of the insured. Even without an assignment, a subrogated insurer of a property claim for which it paid the whole debt could also qualify to sue in its own name, even after the death of the insured, meeting the requirements given in *State Farm Mut. Auto. Ins. Co. v. Nw. Nat’l Ins. Co.*, 912 P2d at 986.

E. URCP 17 has no application. Because of the interpleader nature of this case, there is no ongoing litigation for the real party in interest to pursue.

The pertinent part of Rule 17 of the Utah Rules of Civil Procedure reads:

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or

substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

1. The case in which the Court of Appeals found EMIA to have no standing was the case it filed against Krueger, which was dismissed. That case was settled and dismissed, and the settlement funds were placed in this interpleader case. The Court of Appeals needed to resolve standing in that case to determine the interpleader rights between EMIA and the WILSONS in this case.

EMIA has standing in this interpleader case to litigate its right to the interpleader funds, but the Court of Appeals directed the trial court to dismiss EMIA from the interpleader action because it lacked standing in the case it filed against Krueger.

2. The right to have the real party in interest in the EMIA case belonged to Krueger, the defendant in the EMIA case. The right did not belong to the Plaintiff who lacked the standing. The right to have the real party in interest substituted into an action belongs to the defendant in the action. *Shurtleff v. Jay Tuft and Co.*, 622 P.2d 1168 (Utah 1980). Because the parties settled and dismissed the case against the tortfeasor, Krueger (EMIA, Statement of the Case), there is no ongoing litigation for the real party in interest to pursue and no defendant to protect.

3. EMIA had a reasonable time in its case against Krueger. EMIA had more than “a reasonable time after objection” (*URCP* 17(a)) to substitute the real party in interest in the trial court. In his pre-answer motion to dismiss the case of EMIA v. Krueger. On February 22, 2011, the tortfeasor Krueger first objected to EMIA’s standing. R. at 24.

Standing continued to be contested until the case was dismissed in 2014. *See Order Regarding Allocation*, February 6, 2015; R. at 844.

VI. CONCLUSION

This Court should affirm the ruling of the Utah Court of Appeals.

RESPECTFULLY SUBMITTED this 4th day of November, 2016.

HELGESEN, HOUTZ & JONES, P.C.

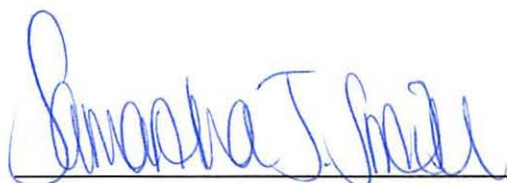


Jack C. Helgesen
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2016, I caused to be served the foregoing BRIEF OF RESPONDENT upon the parties of record in this proceeding set forth below by the method indicated:

Randall R. Smart (2983) Jeffrey A. Callister (9963) SMART, SCHOFIELD, SHORTER & LUNCEFORD 5295 South Commerce, #200 Murray, UT 84107 Telephone: (801) 747-0647 Counsel for Appellant/Petitioner	<input type="checkbox"/> Electronic Filing <input type="checkbox"/> Email <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> U.S. Mail, 1 st Class, Postage Prepaid <input type="checkbox"/> Hand Delivery
Thomas M. Regan, Esq. (9642) Leslie A. Hulburt, Esq. (12089) COZEN O'CONNOR 501 West Broadway, Suite 1610 San Diego, CA 92101 Telephone: (619) 234-1700 Counsel for Amicus Curiae	<input type="checkbox"/> Electronic Filing <input type="checkbox"/> Email <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> U.S. Mail, 1 st Class, Postage Prepaid <input type="checkbox"/> Hand Delivery



Paralegal

ADDENDUM A

FEB 25 2016

THE UTAH COURT OF APPEALS

EVERETT P. WILSON JR. AND DARLA WILSON,
Appellants,

v.

EDUCATORS MUTUAL INSURANCE ASSOCIATION,
Appellee.

Opinion

No. 20150150-CA

Filed February 25, 2016

Fourth District Court, Provo Department
The Honorable Samuel D. McVey
No. 110400083

Jack C. Helgesen and Craig Helgesen, Attorneys
for Appellants

Randall R. Smart and Jeffrey A. Callister, Attorneys
for Appellee

SENIOR JUDGE PAMELA T. GREENWOOD authored this Opinion, in
which JUDGES MICHELE M. CHRISTIANSEN and KATE A. TOOMEY
concurred.¹

GREENWOOD, Senior Judge:

¶1 Everett P. Wilson Jr. and Darla Wilson appeal the trial court's order awarding a portion of interpleaded funds to Educators Mutual Insurance Association (EMIA). We reverse and remand.

1. Senior Judge Pamela T. Greenwood sat by special assignment as authorized by law. *See generally* Utah R. Jud. Admin. 11-201(6).

BACKGROUND

¶2 On September 19, 2010, the Wilsons' daughter, Jessica, was killed after having been struck by a vehicle driven by Cade Krueger. EMIA, Jessica's insurer, paid nearly \$79,000 in medical expenses on her behalf. No personal representative was sought or appointed for Jessica's estate.

¶3 The Wilsons filed a wrongful death claim against Krueger on January 12, 2011, seeking damages for the loss, love, and affection of their daughter and for funeral expenses. After several years of discovery and litigation, the Wilsons reached a tentative settlement with Krueger's insurer for the \$100,000 limit on his insurance policy.

¶4 On January 22, 2014, EMIA filed a "Complaint for Subrogation Claim" against Krueger, seeking reimbursement for medical expenses it had paid on Jessica's behalf, with accrued interest.² EMIA asserted its subrogation claim pursuant to the terms of its insurance contract with Jessica. All parties agreed to consolidate the cases, and Krueger filed an interpleader counterclaim against both the Wilsons and EMIA, in which his insurer agreed to interplead the \$100,000 policy limit with the court. EMIA and the Wilsons agreed to accept the \$100,000 in settlement of their claims against Krueger but disagreed as to how the funds should be distributed. EMIA and the Wilsons agreed to dismiss Krueger from the lawsuit with prejudice. The trial court ordered Krueger's insurer to deposit the \$100,000 with the court and gave the parties the opportunity to file briefs in support of their competing claims to the funds.

2. EMIA had initially asserted a lien against the Wilsons' wrongful death claim but later acknowledged that it could not assert such a lien "against payments to the heirs of a deceased on a wrongful death claim."

Wilson v. Educators Mutual Insurance

¶5 The Wilsons asserted that they were entitled to the entire \$100,000 settlement. They raised a number of arguments in support of this position, including that they have “superior equity” over a subrogated insurer and are therefore entitled to be “made whole” before the insurer is paid, that EMIA had no legal right to pursue a cause of action against Krueger in its own name, and that EMIA’s action was barred by a three-year statute of limitations.

¶6 The trial court ultimately rejected the Wilsons’ arguments and divided the settlement money equally between the Wilsons and EMIA after finding that each party had incurred damages in excess of \$100,000. However, in acknowledgment that the Wilsons’ efforts to obtain the settlement had been disproportionate to those of EMIA, the trial court determined that the Wilsons were entitled to \$25,817.69 of EMIA’s award to reimburse them for a portion of their attorney fees. Accordingly, the trial court awarded \$75,817.69 to the Wilsons and \$24,182.31 to EMIA. The Wilsons now appeal.

ISSUE AND STANDARD OF REVIEW

¶7 The Wilsons raise a number of arguments in support of their assertion that the trial court erred in awarding EMIA a portion of the settlement. Because we agree with the Wilsons that EMIA lacked standing to bring a subrogation action in its own name rather than in the name of Jessica or Jessica’s estate, we do not address the Wilsons’ other arguments. As this question involves the interpretation of a statute, as well as decisional precedents, we review the trial court’s ruling for correctness. *See MacFarlane v. Utah State Tax Comm’n*, 2006 UT 25, ¶ 9, 134 P.3d 1116 (“A matter of statutory interpretation [is] a question of law that we review on appeal for correctness.” (alteration in original) (citation and internal quotation marks omitted)); *In re Adoption of A.F.K.*, 2009 UT App 198, ¶ 16, 216 P.3d 980 (explaining that “issues that require interpretation of

prior decisional precedents” are “questions of law that are reviewed for correctness” (citation and internal quotation marks omitted)).

ANALYSIS

¶8 Utah’s subrogation statute provides, “Subrogation actions may be brought by the insurer in the name of its insured.” Utah Code Ann. § 31A-21-108 (LexisNexis 2014). EMIA asserts that the use of the word “may” implies that the insurer *may* bring the action in the name of the insured but is not required to do so and may instead choose to bring the action in its own name. *See State v. Gallegos*, 967 P.2d 973, 978 (Utah Ct. App. 1998) (“[T]he term ‘may’ is generally construed to be permissive and not mandatory” (citation and internal quotation marks omitted)). We assume, without deciding, that the statute’s use of the permissive “may” allows for the possibility that bringing an action in the name of the insured is not the exclusive manner for an insurer to pursue a subrogation claim.³ Nevertheless, the

3. Though we assume for purposes of our analysis that the permissive “may” applies to the manner in which the insurer brings the action, i.e., in its own name or in the name of another, we recognize that the legislature may have intended the word “may” to grant the insurer discretion only as to whether to bring the action at all. *Cf. Thorpe v. Washington City*, 2010 UT App 297, ¶¶ 23–24, 243 P.3d 500 (rejecting the assertion that language providing that “[a] final action or order of [a municipal employee] appeal board may be appealed to the Court of Appeals” could be interpreted as permitting a party to appeal in another venue, explaining that the language “is not permissive in the sense that the employee may seek review in the court of appeals if he likes but may complain in some other judicial venue if he prefers” but that, “[o]n the contrary, the statute is (continued...)

statute contains no language *granting* an insurance company the right to bring a subrogation action in its own name.⁴ So even assuming that bringing an action in the name of the insured is not, statutorily, the exclusive method for bringing suit, there must be some legal basis, apart from the statute as currently written, authorizing the insurer to bring the action in its own name. Cf. *Dehm v. Dehm*, 545 P.2d 525, 528 (Utah 1976) (providing that permissive language in a statute “does not foreclose the right of a person” to pursue a remedy “by any other means *provided by law*” (emphasis added)). Our review of Utah case law convinces us that, with the possible exception of an insurer who has fully indemnified the insured for all damages for which the wrongdoer could be held liable, see *Johanson v. Cudahy Packing Co.*, 152 P.2d 98, 103 (Utah 1944), no

(...continued)

clear that the only court to which the employee may seek initial recourse . . . is the Utah Court of Appeals” (first alteration in original)).

4. Conversely, the legislature *has* expressly granted insurers seeking reimbursement for the payment of workers’ compensation benefits the authority to bring such actions in their own names:

If compensation is claimed and the employer or insurance carrier becomes obligated to pay compensation, the employer or insurance carrier:

(i) shall become trustee of the cause of action against the third party; and

(ii) may bring and maintain the action *either in its own name or* in the name of the injured employee, or the employee’s heirs or the personal representative of the deceased.

Utah Code Ann. § 34A-2-106(2)(a) (LexisNexis 2011) (emphasis added).

independent right exists for an insurer to seek subrogated damages in its own name.

¶9 First, EMIA does not have a direct cause of action against Krueger. “An insurer’s subrogation right to recover from a responsible third party the amount the insurer paid to or on behalf of its insured derives from the insurance contract between the insurer and the insured,” and its causes of action against that third party are limited “to those rights or causes of action that the insured possesses against the third party.” *Bakowski v. Mountain States Steel, Inc.*, 2002 UT 62, ¶ 23, 52 P.3d 1179. “[E]ven though the insurance company is subrogated to a part of the claim of the plaintiff, against the defendant, that does not create another cause of action and there can only be one suit to recover on that cause of action.” *Cederloff v. Whited*, 169 P.2d 777, 780 (Utah 1946).

¶10 Further, “it has been generally held that a suit at law to enforce [a] right of subrogation must, at common law, be brought in the name of the insured, rather than by the insurance company in its own name and right.” *Johanson*, 152 P.2d at 104 (citation and internal quotation marks omitted); *see also* Utah R. Civ. P. 17(a) (“Every action shall be prosecuted in the name of the real party in interest. . . . [A] party authorized by statute may sue in that person’s name”). “The reason for the rule is that the wrongful act” of the third party being sued “is single and indivisible, and gives rise to but one liability.” *Johanson*, 152 P.2d at 103. Permitting an insurer to sue in its own name, except where it has fully indemnified the insured, could compel the wrongdoer to “defend a multitude of suits” against multiple insurance companies, the insured, and/or the insured’s dependents or heirs. *Id.*

¶11 Furthermore, “[c]onsiderations of reason and policy impel the conclusion that the plaintiff, the one who has suffered the injury and damage, should have basic ownership and control of

his cause of action.” *Lanier v. Pyne*, 508 P.2d 38, 40 (Utah 1973). Even under statutory schemes that give the insurance carrier’s right to reimbursement priority over the injured party’s right to damages,⁵ our supreme court has concluded “that the rights conferred upon the insurance carrier” to pursue an action against a third party “should be regarded as secondary to the plaintiff’s interest” in controlling the cause of action. *Id.* Thus, at least where the insured or the insured’s estate retains some interest in the potential damages, an insurance company cannot pursue a subrogation action in its own name.

¶12 After Jessica’s death, her cause of action for personal injury passed to her estate by virtue of Utah’s survival statute. See Utah Code Ann. § 78B-3-107(1)(a) (LexisNexis Supp. 2015) (“A cause of action arising out of personal injury to a person, or death caused by the wrongful act or negligence of a wrongdoer, does not abate upon the death of the . . . injured person. . . . [T]he personal representatives or heirs of the person who died, [have] a cause of action against the wrongdoer”). The survival statute grants the personal representatives or heirs of the injured decedent the right to pursue both “special and general damages”

5. In subrogation actions where the insurer has paid workers’ compensation benefits, such as in *Johanson v. Cudahy Packing Co.*, 152 P.2d 98 (Utah 1944), and *Lanier v. Pyne*, 508 P.2d 38, 40 (Utah 1973), the Workers’ Compensation Act expressly provides that the insurer is to be reimbursed before the employee or the employee’s heirs. Utah Code Ann. § 34A-2-106(5); see also *Anderson v. United Parcel Serv.*, 2004 UT 57, ¶¶ 8–13, 96 P.3d 903. But in a case such as this, where the expenses paid by the insurer were not connected to a workers’ compensation claim, “in the absence of express terms to the contrary, the insured must be made whole before the insurer is entitled to be reimbursed from a recovery from the third-party tort-feasor.” *Hill v. State Farm Mut. Auto. Ins. Co.*, 765 P.2d 864, 866 (Utah 1988).

against the wrongdoer. *Id.* General damages include damages for the insured's pain and suffering, *Balderas v. Starks*, 2006 UT App 218, ¶ 16 n.5, 138 P.3d 75, which would have been separate from the medical expenses paid by EMIA on Jessica's behalf. Since Jessica's estate would presumably have been entitled to at least some portion of the damages recoverable in a personal injury action, EMIA should have brought its personal injury action in the name of the estate or intervened in the Wilsons' action against Krueger.⁶ Instead, it filed an action in its own name, which Utah law does not permit. Because EMIA lacked standing to pursue a claim against Krueger in its own name, the trial court erred in awarding EMIA a portion of the interpleaded funds.

CONCLUSION

¶13 We conclude that EMIA lacked standing to pursue a subrogation action against Krueger in its own name. Thus, the trial court erred in dividing the Wilsons' settlement with EMIA. Accordingly, we reverse the trial court's order and remand with instructions for the trial court to dismiss EMIA's claims and award all of the interpleaded funds to the Wilsons.

6. EMIA asserts that the correct approach would be to allow the insurer and the heirs to pursue separate claims to recover their respective shares of damages arising from a personal injury claim. Such an approach would unnecessarily subject the defendant to multiple suits for the same conduct, *see Johanson*, 152 P.2d at 103, and potentially compromise the heirs' superior right to recover their share of the personal injury claim, *see Hill*, 765 P.2d at 866. *See Cederloff v. Whited*, 169 P.2d 777, 780 (Utah 1946).

CERTIFICATE OF MAILING

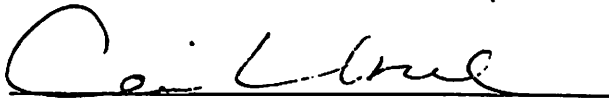
I hereby certify that on the 25th day of February, 2016, a true and correct copy of the attached DECISION was sent by standard or electronic mail to be delivered to:

RANDALL R. SMART
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FOURTH DISTRICT, PROVO DEPT

FOURTH DISTRICT, PROVO DEPT
ATTN: LORI WOFFINDEN
provoinfo@utcourts.gov



Judicial Secretary

TRIAL COURT: FOURTH DISTRICT, PROVO DEPT, 110400083
APPEALS CASE NO.: 20150150-CA

ADDENDUM B

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Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH
125 North 100 West, Provo Utah 84601

EDUCATORS MUTUAL INSURANCE ASSOCIATION, Plaintiff, vs. CADE M. KRUEGER, an individual, and John Does 1 through 100, Defendants.	COMPLAINT FOR SUBROGATION CLAIM Civil No. _____ Judge _____ (Tier two)
--	---

COMES NOW the Plaintiff, Educators Mutual Insurance Association (EMIA), by and through its counsel, Smart, Schofield, Shorter & Luncford, a Professional Corporation, and complains against Defendants, Cade M. Krueger, an individual, and John Does 1-100 as follows:

PARTIES, JURISDICTION AND VENUE

1. This Complaint involves a demand for reimbursement of medical expenses paid by the Plaintiff on behalf of Jessica Wilson, as a result of an automobile/pedestrian accident, which occurred in Provo, Utah County, State of Utah.

2. Plaintiff, Educators Mutual Insurance Association ("Plaintiff"), is a licensed Insurance Company qualified to do business in the State of Utah.

3. Upon information and belief, Defendant Cade M. Krueger, ("Defendant") is a resident of Utah County, State of Utah.

4. The true names and capacities of Defendants John Does 1 through 100, whether individual, corporate, associate or otherwise, are as yet unidentified and unascertained by Plaintiff, who therefore sues said Defendants by such fictitious names, and will ask leave to amend this complaint to show these Defendants' true names and capacities when the same have been identified and ascertained.

5. The Court has jurisdiction pursuant to Utah Code Annotated §78A-5-102.

6. Venue is proper in this Court pursuant to Utah Code Annotated §78B-3-307.

GENERAL ALLEGATIONS AND CAUSE OF ACTION

7. Plaintiff realleges and incorporates herein by reference paragraphs 1-6 above.

8. On or about September 19, 2010, Jessica Wilson was walking in a crosswalk on the campus of Brigham Young University when she was struck by a car driven by the Defendant.

9. Defendant's failure to exercise reasonable care caused his vehicle to strike Jessica Wilson.

10. Jessica Wilson was severely injured as a result of being struck by Defendant's car and later passed away.

11. This accident was the proximate result of Defendant's negligent driving.

12. Defendant is liable for all damages arising out of this action, including medical expense incurred by Jessica Wilson.

13. At the time of the accident Jessica Wilson was insured through Plaintiff for medical expenses.

14. Plaintiff's medical plan, with Jessica Wilson, which was in effect at the time of this accident with Defendant, included, under its subrogation and reimbursement section, the following:

When the Plan Sponsor has advanced payment of benefits to or on behalf of a Covered Person for bodily injury actionable at law or for which the Covered Person may obtain a recovery from a third party, the Plan acquires both the right of Subrogation against the third party and a right of reimbursement against the Covered Person. [emphasis added]. In such situations, the Covered Person has the following obligations:

- The Covered Person must reimburse the Plan, up to the amount of such benefits advanced or paid by the Plan, out of any recovery obtained by the Covered Person from the third party (or such party's liability insurance) by judgment, settlement or otherwise, whether or not the Covered Person is or has been made whole. The Plan is entitled to the first dollar of any recovery by the Covered Person and each dollar thereafter up to the amount of benefits advanced or paid by the Plan for the injuries to the Covered Person that were caused by the third party.
- The Covered Person cannot limit or avoid such reimbursement obligation to the Plan by any agreement with the third party or any assignment or designation of such proceeds.

- The Covered Person must not release or discharge any claims that the Covered Person may have against any potentially responsible parties without written permission from the Plan.
- The Covered Person must fully cooperation with the Plan Sponsor and Educators (including, but not limited to, executing all required instruments and papers), if the Plan chooses to pursue its own right of Subrogation against the third party; the Plan's right of Subrogation is limited to the amount of benefits advanced or paid by the Plan to or on behalf of the Covered Person as a result of the fault of the third party, and the Plan's right to recover such benefits from the third party does not depend upon whether the Covered Person is made whole by any recovery. [emphasis added.]

15. In the medical policy between Plaintiff and Jessica Wilson, Plaintiff is listed as the Plan's sponsor and Jessica Wilson is the Covered Person.

16. As a result of the automobile accident caused by Defendant, Plaintiff has paid medical expenses on behalf of Jessica Wilson in the amount of \$78,692.34. (See payment history, a copy of which is attached hereto and incorporated by reference as Exhibit "A").

17. As a result of the medical payments by Plaintiff on behalf of Jessica Wilson, Plaintiff is entitled to recover from Defendant the amount of \$78,692.34.

WHEREFORE, Plaintiff, Educators Mutual Insurance Association, prays for judgment against Defendant, Cade M. Krueger, for the following:

1. An award of judgment in the amount of \$78,692.34;
2. Interest on special damages, as allowed, both pre-judgment and post-judgment;
3. Costs incurred in connection with the bringing of this action; and
4. Any other relief this Court deems reasonable and proper in this matter.

DATED this 22nd day of January, 2014.

Smart, Schofield, Shorter & Lunceford
A Professional Corporation

A handwritten signature in cursive script, reading "Randall R. Smart", written over a horizontal line.

Randall R. Smart
Jeffrey A. Callister
Attorneys for Plaintiff

Plaintiff's Address:
852 East Arrowhead Lane
Murray, Utah 84107

EXHIBIT A

DEC/27/2013/FRI 02:57 PM Helgeson Waterfall J FAX No. 801 614 0443
 2013-10-01 16:18 EMI HEALTH 801699734 >> 8016130443

P. 005
 P 3/3

EMPLOYEE	JESSICA WILSON				
PATIENT	JESSICA WILSON				
ACCT #	10284R000585				
ACCIDENT DATE	8/19/2010				
ACCIDENT TYPE	AUTO				
EMPLOYER	WASATCH MENTAL HEALTH				
CLAIM NUMBER	PROVIDER NAME	DOS	AMT CHARGED	COPAY/COINS	EMI PAID
210-492148	HOWARD R REICHMAN	09/19/10	\$ 4,784.00	\$ 1,278.46	\$ 1,438.90
210-537973	KRISHNA SUNDAR	08/19/10	\$ 732.00	\$ -	\$ 508.14
212-626654	JOHN S COLLINS	09/19/10	\$ 321.00	\$ -	\$ 161.41
210-825858	JOHN S COLLINS	08/19/10	\$ 369.00	\$ -	\$ 221.06
210-825656	JOHN S COLLINS	08/19/10	\$ 210.50	\$ -	\$ 95.18
210-840528	PROVO AMBULANCE	09/19/10	\$ 1,459.30	\$ -	\$ 1,459.30
210-860808	CHRISTIAN GARAYCOCHEA	09/19/10	\$ 2,378.00	\$ -	\$ 1,795.10
210-629573	UVRMC	09/19/10	\$ 100,850.25	\$ -	\$ 71,460.94
210-504475	BRUCE B HILL	08/20/10	\$ 510.00	\$ -	\$ 280.61
210-625857	JOHN S COLLINS	08/20/10	\$ 28.50	\$ -	\$ 18.84
210-856568	RYAN NIELSEN	09/20/10	\$ 6,207.00	\$ 2,610.42	\$ 908.73
210-825859	RYAN NIELSEN	09/20/10	\$ 557.00	\$ -	\$ 368.15
		TOTAL	\$ 117,214.55	\$ 3,888.88	\$ 78,692.34
	TOTAL MEMBER PAID	\$ 3,888.88			
	TOTAL EMI HEALTH PAID	\$ 78,692.34			

ADDENDUM C

West's Utah Code Annotated Title 31a. Insurance Code Chapter 21. Insurance Contracts in General Part 1. General Rules
--

U.C.A. 1953 § 31A-21-108

§ 31A-21-108. Subrogation actions

Currentness

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

Credits

Laws 1986, c. 204, § 141.

Notes of Decisions (15)

U.C.A. 1953 § 31A-21-108, UT ST § 31A-21-108

Current through 2016 Third Special Session

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West's Utah Code Annotated
Title 78b. Judicial Code
Chapter 3. Actions and Venue
Part 1. Actions--Right to Sue and be Sued

U.C.A. 1953 § 78B-3-107
Formerly cited as UT ST § 78-11-12

§ 78B-3-107. Survival of action for injury or death to person, upon death of
wrongdoer or injured person--Exception and restriction to out-of-pocket expenses

[Currentness](#)

(1)(a) A cause of action arising out of personal injury to a person, or death caused by the wrongful act or negligence of a wrongdoer, does not abate upon the death of the wrongdoer or the injured person. The injured person, or the personal representatives or heirs of the person who died, has a cause of action against the wrongdoer or the personal representatives of the wrongdoer for special and general damages, subject to Subsection (1)(b).

(b) If, prior to judgment or settlement, the injured person dies as a result of a cause other than the injury received as a result of the wrongful act or negligence of the wrongdoer, the personal representatives or heirs of the person have a cause of action against the wrongdoer or personal representatives of the wrongdoer for special and general damages which resulted from the injury caused by the wrongdoer and which occurred prior to death of the injured party from the unrelated cause.

(c) If the death of the injured party from an unrelated cause occurs more than six months after the incident giving rise to the claim for damages, the claim shall be limited to special damages unless, prior to the injured party's death:

(i) written notice of intent to hold the wrongdoer responsible has been mailed to or served upon the wrongdoer or the wrongdoer's insurance carrier or the uninsured motorist carrier of the injured party, and proof of mailing or service can be produced upon request; or

(ii) a claim for damages against the wrongdoer or against the uninsured motorist carrier of the injured party is the subject of ongoing negotiations between the parties or persons representing the parties or their insurers.

(d) A subsequent claim against an underinsured motorist carrier for which the injured party was a covered person is not subject to the notice requirement described in Subsection (1)(c).

(e) In no event shall an award of general damages available under the circumstances described in Subsection (1)(b) or (1)(c) against any wrongdoer or any insurer exceed \$100,000 regardless of available liability, uninsured or underinsured motor vehicle coverage.

(2) Under Subsection (1) neither the injured person nor the personal representatives or heirs of the person who dies may recover judgment except upon competent satisfactory evidence other than the testimony of the injured person.

(3) This section may not be construed to be retroactive.

Credits

Laws 2008, c. 3, § 683, eff. Feb. 7, 2008; Laws 2009, c. 293, § 1, eff. May 12, 2009; Laws 2014, c. 220, § 1, eff. May 13, 2014; Laws 2015, c. 382, § 1, eff. May 12, 2015.

Notes of Decisions (41)

U.C.A. 1953 § 78B-3-107, UT ST § 78B-3-107
Current through 2016 Third Special Session

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West's Utah Code Annotated
 State Court Rules
 Utah Rules of Civil Procedure (Refs & Annos)
 Part IV. Parties

Utah Rules of Civil Procedure, Rule 17

RULE 17. PARTIES PLAINTIFF AND DEFENDANT

Currentness

(a) Real party in interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's name without joining the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the state of Utah. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Minors or incompetent persons. An unemancipated minor or an insane or incompetent person who is a party must appear either by a general guardian or by a guardian ad litem appointed in the particular case by the court in which the action is pending. A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted expedient to represent the minor, insane or incompetent person in the action or proceeding, notwithstanding that the person may have a general guardian and may have appeared by the guardian. In an action in rem it shall not be necessary to appoint a guardian ad litem for any unknown party who might be a minor or an incompetent person.

(c) Guardian ad litem; how appointed. A guardian ad litem appointed by a court must be appointed as follows:

(c)(1) When the minor is plaintiff, upon the application of the minor, if the minor is of the age of fourteen years, or if under that age, upon the application of a relative or friend of the minor.

(c)(2) When the minor is defendant, upon the application of the minor if the minor is of the age of fourteen years and applies within 21 days after the service of the summons, or if under that age or if the minor neglects so to apply, then upon the application of a relative or friend of the minor, or of any other party to the action.

(c)(3) When a minor defendant resides out of this state, the plaintiff, upon motion therefor, shall be entitled to an order designating some suitable person to be guardian ad litem for the minor defendant, unless the defendant or someone in behalf of the defendant within 21 days after service of notice of such motion shall cause to be appointed a guardian for such minor. Service of such notice may be made upon the defendant's general or testamentary guardian located in the defendant's state; if there is none, such notice, together with the summons in the action, shall be served in the manner provided for publication of summons upon such minor, if over fourteen years of age, or, if under fourteen years of age,

by such service on the person with whom the minor resides. The guardian ad litem for such nonresident minor defendant shall have 21 days after appointment in which to plead to the action.

(c)(4) When an insane or incompetent person is a party to an action or proceeding, upon the application of a relative or friend of such insane or incompetent person, or of any other party to the action or proceeding.

(d) **Associates may sue or be sued by common name.** When two or more persons associated in any business either as a joint-stock company, a partnership or other association, not a corporation, transact such business under a common name, whether it comprises the names of such associates or not, they may sue or be sued by such common name. Any judgment obtained against the association shall bind the joint property of all the associates in the same manner as if all had been named parties and had been sued upon their joint liability. The separate property of an individual member of the association may not be bound by the judgment unless the member is named as a party and the court acquires jurisdiction over the member.

(e) **Action against a nonresident doing business in this state.** When a nonresident person is associated in and conducts business within the state of Utah in one or more places in that person's own name or a common trade name, and the business is conducted under the supervision of a manager, superintendent or agent the person may be sued in the person's name in any action arising out of the conduct of the business.

(f) As used in these rules, the term plaintiff shall include a petitioner, and the term defendant shall include a respondent.

Credits

[Amended effective September 1, 1991; April 1, 1998; April 1, 2007; May 1, 2014.]

Editors' Notes

ADVISORY COMMITTEE NOTE

Paragraph (d) has been changed to conform to the holding in *Cottonwood Mall Co. v. Sine*, 767 P.2d 499 (Utah 1988), which allows an unincorporated association to sue in its own name. The rule continues to allow an unincorporated association to be sued in its own name. The final sentence of paragraph (d) was added to confirm that the separate property of an individual member of an association may not be bound by the judgment unless the member is made a party.

Technical changes in all paragraphs of the rule make the terminology gender neutral. In part (c) the word "minor" has replaced the word "infant," in order to maintain consistency with recent changes made in Rule 4(e)(2). In Rule 4 an infant is defined as a person under the age of 14 years, whereas the intent of Rule 17(c) is to include persons under the age of 18 years.

Notes of Decisions (94)

Rules Civ. Proc., Rule 17, UT R RCP Rule 17

Current with amendments received through September 15, 2016.

Certificate of Compliance With Rule 24(f)(1)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because:

- ☒ this brief contains 6,786 [number of] words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B), or
- ☐ this brief uses a monospaced typeface and contains _____ [number of] lines of text, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P.27(b) because:

- ☒ this brief has been prepared in a proportionally spaced typeface using WordPerfect X6 [name and version of word processing program] in Times New Roman [font size and name of types style], or Font Size = 13
- ☐ this brief has been prepared in a monospaced typeface using _____ [name and version of word processing program] with _____ [name of characters per inch and name of type style].



Attorney's or Party's Name

Dated: November 4, 2016