1969

State Farm Mutual Insurance Company v. Farmers Insurance Exchange : Brief of Amicus Curiae

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE FARM MUTUAL INSURANCE COMPANY,
Plaintiff and Respondent,

vs.

FARMERS INSURANCE EXCHANGE,
Defendant and Third-Party Plaintiff and Appellant,

vs.

CARL R. SESSIONS,
Third-Party Defendant and Respondent,

Case No. 11350

BRIEF OF AMICUS CURIAE

Appeal from the Judgment of the
Third District Court for Salt Lake County
Honorable Bryant H. Croft, Judge

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DONN E. CASSITY, EUGENE H. DAVIS, and FORD G. SCALLEY, Attorneys representing numerous clients whose interests coincide with the issue herein, were granted leave by order of the court on November 8, 1968 to appear as Amicus Curiae. For the sake of brevity, the Amicus Curiae accepts statement of the case and the facts as set forth in Respondent's Brief and will limit its discussion to matters which it feels merit consideration to assist the court in determining the issues of whether as a matter of law a right of subrogation of medical pay coverage under the State Farm Mutual Automobile Insurance Company Policy does or does not exist.

ARGUMENT

POINT I

THE LOWER COURT ERRED IN FINDING THAT AS A MATTER OF LAW THE MEDICAL SUBROGATION CLAUSE IN THE STATE FARM INSURANCE COMPANY AUTO POLICY WAS VALID.

The real issues presented by the question of whether the medical subrogation clause in the State Farm Auto Policy should be allowed, have been masked behind the property damage subrogation doctrine. The insurance industry has convinced some of the courts that subrogation is necessary to preclude "double recovery" or any form of unjust enrichment. Such an appeal to emotion should be inspected on its merits by this court and not just accepted. The courts who have allowed medical pay subrogation have failed to push analysis beyond anything but consecrated phrases drafted by the insurance industry and have failed to formulate anew.

In looking at this problem logically and equitably we find no valid reason for allowing medical subrogation "privilege". An interesting analysis of this question which is certainly apropos in this case is found in *Richards, The Law of Insurance,* Vol. 2, Sec. 183, 184, pages 652 through 655:

> "SECTION 183. Subrogation; Nature of the right generally . . .
>
> It has been often stated that subrogation is a creature of equity growing out of natural justice or a desire to work out a fair adjustment between parties by securing the ultimate discharge of a debt. Subroga-

tion is also described as a substitution of another person in the place of the creditor to whose rights he succeeds in relation to the debt, giving substitute all the rights, priorities, remedies, liens and securities of the person for whom he is substituted. Thus, upon payment of loss or damage to the insured, the insurer is entitled to be subrogated pro tanto to any right or action which the insured may have against a third party responsible for the loss or damage sustained by the insured. This equitable right of subrogation is derivative from the legal effect of payment and inures to the insurer without any formal assignment or any express policy stipulation.

However, upon closer examination it is submitted that this equitable right of subrogation is neither "equitable" nor a "right", but constitutes a valuable privilege bestowed upon an insurance company by courts long indifferent to the doctrine of true indemnity in their zeal to respect the literal language of such unilateral contracts of insurance. Courts have mouthed the utterances of astute insurance counsel that subrogation is necessary to preclude double recovery by insured or any form of unjust enrichment gained from the prosecution of claims against both the insurer and the tort-feasor causing the loss of damage. But the same courts, not cognizant of the impracticability of such double recovery by the insured have again overlooked the axiom that it is equally unjust to preclude the insurer from suffering a loss that it had expressly agreed to assume as a risk in return for the payment of premiums. As Professor Patterson has so aptly commented 'Subrogation is a windfall to the insurer.' It plays no part in the rate schedules (or only a minor one), and no reduction is made in insuring interests such as that of the secured creditors, where the subrogation right will obviously be worth something. Hence in such a

case no reason appears for extending it . . . 'The doctrine of subrogation was conceived unilaterally, nurtured unilaterally, and cast on the courts for the unilateral interest of insurers generally. It must be thoroughly re-examined from time to time.'"

"SECTION 184, Subrogation, and the Insurer
This right of subrogation affords the property insurer one of its most valuable privileges, enabling it to recover from a third person as much as it has paid the insured under the policy for loss or damage."

We respectfully submit that the time has come for this court to examine this attempt by the insurance industry to extend the property subrogation doctrine to include the medical payment provision under an auto policy or any other policy with the attendant circumstances of a unilateral insurance contract, the terms of which are out of the control of the insured who has no real bargaining position. We would agree that the sacred right of freedom to contract must not be interfered with as long as both parties to such contracts are on equal footing. In the instant case justice demands that there be some protection for the public when entering into such unilateral contracts. If the insurance industry wants to have this right to subrogate then they should be required to offer to the insured a policy with such subrogation privileges at a somewhat reduced rate, rather than receive the privilege of subrogation for nothing. Then and only then will the principal of freedom of contract be protected.

While the general doctrine of subrogation in property damage cases should be re-evaluated there are at least more convincing public policy considerations applicable to property damage subrogation than there are

to justify subrogation in the area of medical pay coverage. The reasoning in the property damage cases for allowing subrogation is that such allowance discourages carelessness. Such is not the case with medical pay subrogation where one is not likely to injure himself because of the ability to pay. Since we as insureds have paid our company to take the risk of negligent losses then why should the company without consideration be permitted to shift the loss to another.

While there may be many people who might be careless with their property, in our opinion, there would not be many willing to intentionally injure themselves for a few dollars. Those who would argue that there would be many who would run up bills and costs because of injuries for a profit should be aware of the standard clause which states that the company will only be obligated "To pay *reasonable* medical expenses incurred within one year from the date of the accident." See State Farm Auto Policy 9520.6 MS Page 2, Coverage C - Medical Payments. It should also be noted that these same insurance policies state that "As soon as practicable the injured person or someone on his behalf shall give to the company written notice of claim, and upon request shall make medical reports and copies of records available to the company and that the injured person when requested is required to submit to physical examination by a physician selected by the company. See State Farm Auto Policy, 9520.6MS, Page 4 paragraph 12, Notice and Payment of Claim.

The above clauses which are standard in such policies adequately protect the insurance company against fraud. We ask this court to evaluate such public policy considerations instead of falling into the trap nurtured by the in-

surers by finding a public policy reason to justify an end result without specifically analyzing the problem for purposes of intellectual rest. A good example of falling into this trap is found in Traveller's Insurance Company vs. Lutz 210 N.E.2d 755 (1964), a case cited in Respondent's Brief. In that case the court without any examination of the problem whatever stated, in general terms, that it found it impossible to see why it was unfair or an improper result to allow medical subrogation since the parties were free to contract as they desired. The court in Wilson vs. Tennessee Farmers Mutual Ins. Co. 411 S.W. 2d 699 (1966), likewise failed to evaluate the problem and held with sweeping generalizations that no unfairness existed in such contracts.

This court is now faced with the problem of whether or not the insurance industry is going to be permitted to extend the subrogation doctrine to the medical pay clauses in auto policies. Such an extension cannot in logic or equity be justified in light of careful analysis of the public policy considerations. The argument made by the Insurance Industry "that if medical pay subrogation is not allowed the insured will get a double recovery" is nonsense on stilts. The insured is getting from the insurer what he paid a premium for while the company is paying for what it agreed to take the risk for. The consideration for receiving payment from the tort-feasor is that said tort-feasor caused injury. The consideration for receiving from the company the medical payments under the policy is that the insured paid a premium. If medical subrogation is permitted, the "windfall" inures to the Insurance Company where the sum of the premium is added not deducted to the windfall. If subrogation is denied, the

insured is getting what he paid a premium for, and at least his "windfall" or "double recovery" is deducted by the amount of the premium. Just who is really getting the "double recovery"?

Subrogation has been nothing more than a source of windfall to the insurers who have failed to reflect any such anticipated recoveries in the computation of their rates. The medical subrogation clause was first introduced in the State Farm policies in the early sixties. Their new policies currently coming out are taking advantage of the opportunity to extend the concept of subrogation to include medical payments. By that they are creating a "windfall" and escaping an obligation they agreed to assume when they charged their premiums. Their new policy issued September of 1968, Form No. 9520.7, page 13, Section 9, paragraph 2, cleverly provides as follows:

> "Under coverages C and M, if the injured person has other insurance of any type of a medical or surgical reimbursement plan applicable to the payment of such medical expenses, the company shall not be liable for a greater proportion of such loss than the applicable limit of liability bears to the total applicable limit of liability of all collectible insurance against such loss."

For very convenient reasons the insurance industry looks with abhorrence upon the situation where an insured is compensated for a premium he paid and also from an injury he suffered. However, that same industry also for convenient reasons sees nothing so abhorrent when it accepts the full premiums from their insureds and at the same time attempts to escape from the risk it agreed to take. Medical pay subrogation penalizes those

individuals who have been prudent enough to pay for protection by sending in premiums. If subrogation is allowed in this area of third-party tortfeasor liability the person who does not have any insurance will in most instances recover the same amount as the insured who pays the extra premium. The medical pay subrogation clause would penalize those of us who in our attempts to fill the medical cost gap have purchased more than one medical policy in that we would only be able to recover once despite the separate agreements to pay, and then under the new pro-rata clause, even that one recovery would be piece-meal, requiring us to negotiate with all the companies involved in order to collect much less than what we paid for.

Further penalty would enure to the insured who pays a premium for such coverage when he is involved in a personal injury accident who must pay the costs of hiring a lawyer to obtain a settlement or judgment for his pain and suffering and medical expenses, when the costs of such litigation must come out of his gross recovery. Under the medical subrogation clause the insurance company is entitled to the entire amount of the medical pay which it paid out without the insurance company having to pay its fair share of the expense of collecting the same. One need only take time to analyze this situation to conclude that the equities weigh heavily in favor of the insured.

POINT II

THE FUNDAMENTAL ISSUE BEFORE THIS COURT OF WHETHER OR NOT SUBROGATION SHOULD BE EXTENDED TO INCLUDE THE MEDICAL PAYMENT CLAUSE, SHOULD NOT BE DECIDED BY RESORTING TO ASSIGNMENT OF TORT DISTINCTIONS.

The cases cited by both Appellant and Respondent get bogged down on whether the medical pay subrogation provision is or is not an assignment of a personal injury tort action. Such an approach begs any analysis of what we are dealing with. Who cares whether it is or isn't an assignment of a tort. The issue we are really faced with is whether the doctrine of subrogation should be extended to include the medical payment provision under a unilateral contract bargaining situation. SUBROGATION IS AN EQUITABLE PRINCIPLE. Since subrogation is an equitable principle, then we should decide the issue in this case by resorting to what is equitable under the circumstances and not by resorting to "fig-leaf" expressions of law which cover up blind ignorance. The issue in this case should not be decided by resorting to semantics but by what is equitable.

Respondent seems to rely quite heavily on the case of Davenport vs. State Farm Mutual Auto Insurance Company, 81 Nev. 361, 404 P.2d 10 (1965). The court in that case overruled the old common law doctrine of not allowing an assignment of a right to sue in tort for personal injuries and without any more analysis concluded that there was no reason why medical subrogation could not be allowed. The court in that case incorrectly ignores the fact that subrogation is an equitable doctrine and instead relied on the legal right to assign a tort.

The Respondent on page 11 of his brief cites the case of Travelers Insurance Co. vs. Lutz, 210 N.E.2d 755, (1964) and refers to language by that court which implies that as long as the State Insurance Commission has full authority to control companies, and fails to take any action to prevent an invalid policy provision, that such policy provision must therefore be sustained. Such an argument is ridiculous. For instance, the Utah State Insurance Commission failed to outlaw binding arbitration provisions in Uninsured Motorists Insurance. The mere fact some state government employees failed to ban such a provision didn't keep the Utah Supreme Court in Barnhart vs. Civil Service Employees Insurance Co., 4 Utah 2d, 223, 398 P.2d 873 (1965) from concluding that such mandatory provisions were against public policy.

CONCLUSION

There should be no extension of the subrogation doctrine to include medical pay clauses in insurance contracts there being no equitable basis on which to support such an extension.

Respectfully submitted,

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