1969

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

IN THE SUPREME COUR
OF THE STATE OF UTA

TATE FARM MUTUAL
SURANCE COMPANY,
Plaintiff and Respondent,

— vs. —

ARMERS INSURANCE
XCHANGE,
Defendant and Third-Party
Plaintiff and Appellant.

— vs. —

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

RESPONDENT'S

Appeal From the Judg
Third District Court for Salt
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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

RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action brought by the plaintiff and respondent, State Farm Mutual Insurance Company, to recover from the defendant and appellant, Farmers Insurance Exchange, the sum of $676.18 under the provisions of a subrogation agreement contained in the State Farm's policy with its insured.

DISPOSITION IN LOWER COURT

After the plaintiff's complaint had been filed, defendant filed a motion to dismiss on the ground that the plaintiff's complaint failed to state a claim against defendant upon which relief could be granted asserting that subrogation did not lie for medical pay. This motion was denied by Judge Wilkins in the District Court of Salt Lake County. The plaintiff then filed a motion for summary judgment which was heard by Judge Croft, and the motion for summary judgment was granted for the sum of $676.18, interest and costs of court.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the trial court's judgment affirmed.

Appellant seeks to have the Supreme Court reverse the lower court's summary judgment in plaintiff's favor and to dismiss plaintiff's action on the ground that as a matter of law, there exists no right of subrogation. In the alternative appellant has requested the court to remand the case to the trial court to determine the factual question of whether defendant had notice of plaintiff's right of subrogation.

STATEMENT OF FACTS

Respondent, State Farm Mutual Insurance Company, agrees with the statement of facts as set forth by appellant, Farmers Insurance Exchange, except for the fol-

lowing additional facts which respondent deems important in connection with the proper presentation of the case.

The Record discloses (R. 5) that Farmers Insurance Exchange wrote a letter to State Farm Mutual Insurance Company dated October 19, 1967, advising State Farm Mutual Insurance Company that they were in receipt of the subrogation demand for both medical pay and property damage and enclosed with the letter a check for $727.87 which was the demand of State Farm Mutual Insurance Company for the automobile damage except for the deductible, but denying the medical pay subrogation claim on the basis that subrogation would not lie.

The respondent further alleged in its complaint that notice had been given (R. 3) of the subrogation interest of State Farm Mutual Insurance Company and the payment or anticipated payment of the property damage and the medical bills which was admitted by appellant (R 11) and Farmers Insurance Exchange further admitted the payment to State Farm Mutual Insurance Company of the property damage subrogation claim and the mailing of a letter dated October 19, 1967, attached to respondent's complaint (R. 5).

Notice of the subrogation claim for the property damage and medical pay was given and acknowledged at the same time and in the same communications (Exhibit D-2, R. 5). The insured of State Farm Mutual Insurance Company was also given notice of the subroga-

tion rights of State Farm Mutual Insurance Company and of State Farm Mutual Insurance Company's notice to Farmers Insurance Exchange of State Farm Mutual Insurance Company's subrogation rights. (Exhibit P-1 and D-2).

By letter dated February 19, 1968, appellant's counsel in a letter to Judge Wilkins acknowledged they had received evidence of notice and that it was no longer an issue (R. 54).

ARGUMENT

POINT I

THE LOWER COURT DID NOT COMMIT ERROR IN RULING THAT A RIGHT OF SUBROGATION EXISTS ON BEHALF OF PLAINTIFF, STATE FARM MUTUAL INSURANCE COMPANY, AND IN GRANTING A SUMMARY JUDGMENT TO PLAINTIFF FOR THE MEDICAL BILLS THE PLAINTIFF PAID ON BEHALF OF ITS INSURED.

In No. 4 of Vol. 4, of the Utah Law Review, 1955, there is an article on Assignment of Tort Actions. This article was written before the Survivorship Statute was enacted in 1967, but it indicates the trend of the Utah Court prior to that time. We quote from that article at page 549, as follows:

> Assignment of tort claims has been the subject of very little attention on the part of writers and scholars. There is relatively little case law in this country dealing with such assignments. It is not then very astonishing to learn that Utah has but little law on the subject and that the scattered

cases do not synthesize readily into clear general rules.

However, some few observations which may throw light on the fate of future assignments of tort claims in this state may be made. Foremost among these is the recognition, both generally and in Utah, that the arguments against assignment which seemed overwhelming to the common law judges have lost most of their persuasive force today. Maintenance and champerty are no longer dreaded as the termites which will eat out the foundation of the legal system or flood the courts with torrents of ill-founded and unnecessary litigation.

That torts are "personal" to the parties involved is no longer a weighty idea. The very general trend toward survivorship of tort claims has shown convincingly that most tort claims can be tried between the tort feasor and someone other than the original plaintiff. Perhaps this is the foundation of the general norm which determines whether a claim is assignable by asking whether or not it survives. It has been suggested that the increasing scope of survival statutes will, through operation of this norm, eventually make tort actions as assignable as contract actions are today.

It is interesting to notice that Utah has identified with this norm. It is even more interesting to observe, however, that the Utah court has sustained certain assignments of tort claims without noting the existence of survival statutes which were at least relevant and at most controlling, if that norm is the only one. It appears to this writer that the Utah court wisely has not permitted the survival norm to control its thinking. It is often said that actions which survive have been assigned by operation of law. But it does not fol-

low that every action which survives should ipso facto be assignable; assignment and survival are not convertible terms.

It is some advance to be liberated from the survival test. It is extremely difficult, however, to frame another general standard for determination of assignability. The modern English view that tort claims which have the character of or are akin to property interests are assignable has a good deal of appeal, and the Utah court has evidently been influenced by this notion, notably in the rescission cases discussed above. But the dangers of a raigid "property" test have been demonstrated in the experience of equity's rule that it protects only property interests: Such things as news of daily events and membership in social organizations and religious groups have been called "property" in order to justify obviously necessary intervention of equity courts.

Probably the most that can presently be said is that the scope of assignability is certain to expand further; that the Utah court has been in the trend of expansion, as shown by the fact that no Utah case has refused validity to an assignment of a tort claim, and that none of the Utah cases have reached a wrong or undesirable result. * * *

Utah now has a survival statute pertaining to personal injuries which was enacted by the 1967 Legislature. This is Section 78-11-12 which provides as follows:

Causes of action arising out of physical injury to the person or death, caused by the wrongful act or negligence of another shall not abate upon the death of the wrongdoer or the injured person, and the injured person or the personal representative or heirs of one meeting death as above stated

> shall have a cause of action except for claims relating to pain and suffering against the personal representatives of the wrongdoer; provided, however, that the injured person or the personal representatives or heirs of one meeting death shall not recover judgment except upon some competent satisfactory evidence other than the testimony of said injured person.

Respondent acknowledges a conflict in the authorities in the various states on the right of subrogation in the case of medical bills but takes the position that the modern trend and the weight of authority, particularly of the more recent cases, authorizes subrogation for medical pay claims.

The question as to an insurer's supbrogation rights under a medical payment subrogation clause in an automobile insurance policy may arise in a variety of ways: (1) An insurer who has made medical payments pursuant to the policy may attempt to recover them directly from the tort feasor; (2) An insurer claiming the right to reimbursement may attempt to recover them back from the insured after the latter has settled with or recovered a judgment against the tort feasor; (3) An insured may attempt to recover medical payments from an insurer which refuses to pay them unless and until the insured executes a formal agreement subrogating the insured to the proceeds of any recovery which the insured may obtain; (4) An insured may bring an action to recover medical payments from an insurer which flatly refuses to make them because the insured has already settled with and released the tort feasor and has thereby

prejudiced the insured's subrogation right; and (5) One insurer claiming a right to subrogation may attempt to recover the medical payments made to its insured from the insurer of the tort feasor after the first insurer has given the tort feasor's insurer notice of its subrogation and the tort feasor's insurer thereafter makes settlement with the insured of the first insurer.

The case before this court comes under the fifth group of cases set forth above, but the principles announced in all of the cases are applicable to determine the question as to whether or not subrogation will lie.

In a few cases cited in appellant's brief the courts observing that a claim for personal injuries is not assignable, have held that subrogation of an insurer pursuant to medical payments provision clause will not be allowed where it amounts to an attempted assignment of a claim for personal injuries. Appellant cited cases in the states of Missouri and one in Arizona and also one n California. The California case of *Peller* v. *Liberty Mutual Fire Insurance Co.,* 34 Cal. Rep. 41 (1963) is not applicable because California had a specific statute against assignment at that time.

On the other hand, the courts in several cases and several states have recognized the insured's right to be subrogated pursuant to such a policy provision. Respondent will set forth herein cases in the states of Nevada, New Jersey, Ohio, Florida, Illinois, New York, Pennsylvania, Tennessee, Michigan, North Carolina, Wisconsin and Minnesota which have allowed subroga-

tion of medical payments. In some of these cases the courts have based such a holding on the ground that a claim for personal injuries may properly be assigned. In other cases, however, the courts, although recognizing that a personal injury claim is not assignable, have held that the medical payments subrogation clause in question did not constitute an assignment of a claim for personal injuries, but merely impressed a lien in favor of the insurer to the extent of its payments. 19 ALR 3rd 1055.

In the case of *Davenport, et al.* v. *State Farm Mutual, et al.*, (1965, Nev.), 81 Nev. 361, 404 P.2d 10, State Farm Mutual Insurance Company brought an action against Allstate and their insured to recover the sum of $1,000.00 paid out on medical bills under the medical pay coverage of their policy. The policy of State Farm Mutual in the *Davenport* case contains the same subrogation provision as the policy in the case now before the Utah court.

State Farm Mutual had previously put Allstate Insurance Company, the tort feasor's carrier, on notice of the payment and their subrogation rights. Thereafter Allstate settled with State Farm Mutual's insured for the sum of $8,000.00. Allstate ignored the subrogation letters from State Farm Mutual Insurance Company. The lower court held State Farm Mutual Insurance Company was entitled to recover and the Supreme Court of Nevada affirmed.

Nevada has a statute, Nevada Revised States, 41-100 which provides for survival of causes of action for personal injury. This statute states that a claim may be prosecuted as would a cause of action for damages to personal property no matter whether a plaintiff or defendant died. The Nevada Court said:

> It is now quite generally accepted that assignability of the right to sue in tort for personal injuries is governed by the test of survivorship. That is if the right of action survives the death of the injured person, that right is assignable.

This case is actually on all fours with the case now before the Utah Court.

The Nevada Court stated:

> If the $8,000.00 payment was meant to include the claimant's medical expenses, two drafts should have been issued, one for those expenses payable to the Handleys and State Farm jointly and the other for the balance payable to the Handleys alone. However, our lack of knowledge in this respect is not significant, for one fact is established. Settlement was made without regard to the known subrogation or lien right of State Farm. We hold that, where the medical payment clause of an automobile insurance policy subrogates the company to the extent of the medical payments made by it to the insured, to the proceeds of any settlement that may result from the exercise of any rights of recovery which the injured person receiving such payment may have against any person, the tort feasor or his insurance carrier may not disregard that known subrogation or lien right in settling his liability.

In an action by an insurer against a third party tort feasor to recover the amount of the medical payments that it had paid to the insured where the plaintiff alleged that it was subrogated to medical payments made by it to the insured and that the insured executed a subrogation agreement whereby she assigned the claim against the defendant third party tort feasor to plaintiff, the court in *Travelers Insurance Co.* v. *Lutz* (1964, Ohio), 210 N.E. 2d 755, overruling defendant's demurrer held that the law of Ohio appeared to be relatively clear to the effect that all courts will honor an assignment to a subrogated insurance company of a part of a cause of action arising from a tortious injury, and that, therefore, the subrogation clause in question was valid. The court said that if an insured and an insurance company wish to enter into an agreement, whereby the insurance company is subrogated to said medical payments, it is impossible to see why this is an unfair or an improper result, and if this can be done with reference to property damage payments, which the courts of Ohio construe as splitting a cause of action, it certainly can be done for medical payments, which likewise is splitting a cause of action.

The court further observed that the superintendent of insurance of the State of Ohio has full authority to deny a claim to any companies who fail to comply with his orders and that there was no claim on the part of the defendant that the superintendent had intervened or taken any action to prevent the type of policy set forth in plaintiff's petition. Normally, said the court, parties

are free to contract as they desire, and the court can see nothing against public policy in holding that medical payments can be matters of subrogation as well as property damage payments.

In another Ohio case *Travelers Indemnity Co. v. Godfrey* (1967), 230 N.E. 2d 560, the plaintiff insurer brought an action against defendant for property damages and medical expenses which it claimed to have paid growing out of an automobile accident in which defendant was alleged to have been negligent in the operation of his automobile, which negligence resulted in a collision with an automobile owned by the insured, one Smith. In one cause of action the plaintiff sought to recover for medical expenses paid to the Smiths for injuries received by the daughter, a passenger in the car, and in another cause of action sought to recover for medical expenses paid to a Mr. and Mrs. Sciarini, parents of another minor in the same vehicle. In its petition, plaintiff claimed that under its policy of insurance and by assignment of the parties involved it became subrogated to the rights of its insured to such hospital and medical expenses. There was evidence that the Sciarini girl had brought a separate action against defendant tort feasor and that this action had been settled and dismissed.

Overruling defendant's demurrer, the court said that the present doctrine in Ohio and other jurisdictions seemed to be that a subrogated insurance company is entitled to sue in its own name for the part of a claim for damages arising out of an accident which has been assigned to it under a subrogation agreement, and that

this is true whether it is a subrogated right for property damage or for hospital and medical expenses.

The court also said that Smith, if he had not made an assignment of his rights to the plaintiff, would have a separate cause of action against the defendant for property damage to his automobile and for medical expenses which he was obligated to pay for his minor daughter, independent of other claims, and that Mr. and Mrs. Sciarini, likewise, would have a cause of action against the defendant for medical expenses which they were obligated to pay for their minor daughter, independent of said minor daughter's claim for personal injury, and that the settlement of the daughter's claim could not affect their right to recover for such expenses.

Although recognizing that a claim for personal injuries is not assignable, the courts in some cases have taken the view that the medical payments subrogation clause did not constitute an assignment of a claim for personal injuries, but merely impressed a lien upon the proceeds of any recovery obtained by the insured from the tort feasor. In *De Cespedes* v. *Prudence Mutual Casualty Co.*, (Fla., 1966), 193 So.2d 224, affirmed, 202 So.2d 561, plaintiffs whose automobile was involved in an accident with another automobile owned and operated by a third party tort feasor, not a party to the present action, admitted to having settled their claims against said tort feasor, and to having executed releases, and in the present action sought to recover a second time for their medical expenses under the medical payments provision of their automobile insurance policy. That policy con-

tained a subrogation clause that "in the event of any payment under this policy, the company shall be subrogated to all the insured's rights to recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights." (Same as State Farm Mutual's policy.)

Affirming the trial court, which had granted a summary judgment for the defendant, the court held that an insured was not entitled to a recovery under the medical provision of an automobile policy containing the above subrogation clause after he had settled his claim against a third-party tort feasor and executed a full release. The court rejected plaintiff's argument that the subrogation clause amounted to an attempt to assign a claim for personal injuries, such an assignment being invalid under the common law and not expressly sanctioned by statute. The court said that the concept of subrogation is distinct from that of a mere assignment, and that subrogation is a creature of equity having for its purpose the working out of an equitable adjustment between the parties by securing the ultimate discharge of a debt by the person who in equity and good conscience ought to pay it. Under the doctrine of subrogation, said the court, the insurer is "substituted" by operation of law, to the rights of the insured, whereas, by contrast, an assignment generally refers to or connotes a voluntary act of "transferring" an interest. Subrogation serves to limit the chance of double recovery or windfall to the insured, the court continued, and when exercised, tends

to place the primary liability upon the tort feasor, where it belongs and, concluded, the court, so long as subrogation, as applied to this medical pay provision, serves to bar double recovery, it should be upheld.

This was a Supreme Court decision of Florida. The District Appellate Courts in Florida in the case of *Maryland Casualty Co.* v. *Plant,* (Mar., 1968), C.C.H. Automobile Law Reporter on Insurance, Case No. 5864, at p. 7573 and *Shelby Mutual Insurance Co.* v. *Birch* (Fla., 1967), 196 So.2d 482, 202 So. 2d 561, followed the decision of the *De Cespedes* case.

In the case of *Bernardini* v. *Home and Auto Insurance Co.* (1965, Ill.), 212 N.E.2d 499, an action was filed by the automobile liability insureds to recover reasonable medical expenses incurred by them as a result of an automobile collision. At the time of the collision, plaintiffs were covered by a policy of insurance issued by the defendant which provided for the payment of all reasonable medical expenses incurred within one year from the date of an accident, and which also contained an express medical subrogation clause and a clause requiring the cooperation of the insured in relation thereto. Plaintiffs effected a settlement through the insurer of the third-party tort feasor and executed a general release in favor of the tort feasor, whereupon defendant refused to pay the medical bills incurred by the plaintiff, claiming that the plaintiffs prejudiced the defendant's subrogation rights contained in the policy. The trial court rendered judgment for the plaintiffs on the ground that the medical subrogation clause was an assignment of a personal

tort and thus void as against public policy. Upon appeal the court, reversing, sustained defendant's contentions that the clause granted the well recognized right of subrogation to recovery from a third party tort feasor of payments made to reimburse the insured for medical expenses caused by the tort feasor, that the medical subrogation clause in the insurance contract was not an assignment of a personal tort and that when the insured executed the general release, in favor of the third party tort feasor, the insured was precluded from recovering from the insurance carrier, because he had prejudiced any and all rights which the carrier may have had by virtue of the subrogation provision. Observing that both parties to the controversy recognized that in Illinois causes of action for personal torts are not assignable, the court said that it, nevertheless, agreed with the defendant that in the instant case the record did not show an assignment of a personal tort. The court said that subrogation operates only to secure contribution and indemnity, whereas an assignment transfers the whole claim, and in the instant case the medical subrogation clause did not purport to transfer or assign the entire claim of plaintiffs against the tort feasor, but rather impressed a lien in favor of the insurer, to the extent of its payment, upon any recovery obtained by plaintiffs from the tort feasor, the court observing that subrogation did not deprive the insured of the recovery for pain and suffering.

Again in Illinois where a medical payments insured settled his claim for personal injuries with the tort feasor

and executed a general release, and then brought an action to recover medical payments from the insurer under an automobile liability policy which contained a clause that in the event of any medical payments the insurer would be subrogated to all the rights of recovery which the insured person had against the tort feasor, and provided further that the insured should do nothing after loss to prejudice the insurer's rights, the court in *Damhesel* v. *Hardware Dealers Mutual Fire Insurance Co.* (Ill. 1965), 209 N.E.2d 876, affirming a judgment which granted defendant's motion for judgment on the pleadings, rejected plaintiff's contention that the subrogation clause was void as against public policy because it constituted an assignment of a personal tort and also because it was against public policy to permit subrogation in a non-indemnity type of insurance policy. The court said that it was clear that the subrogation clause of the policy did not constitute an assignment of a personal tort, observing that subrogation presupposes an actual payment and satisfaction of the debt or claim to which the parties subrogated, although the remedy is kept alive in equity for the benefit of the one who made the payment under circumstances entitling him to contribution or indemnity, while an assignment necessarily contemplates the continued existence of the debt or claim assigned. In the case at bar, said the court, the contract of insurance clearly looked to subrogation rather than assignment of a tort; the insurance company would have paid the amount due the plaintiff, thus satisfying his claim, and the insurer would then have sought contribution from the tort feasor, who was ultimately liable. Con-

cluding, the court held that it was clear that the policy in question was one of indemnity and that the amount to be paid under the contract would depend on the amount spent by the insured for the proper care of his injuries.

The subrogation provision of the policy involved in the *Damhesel* case is the same standard provision contained in State Farm Mutual Insurance Company's policy now before the court.

The Tennessee cases of *Wilson* v. *Tennessee Farmers Mutual Insurance Co.* (1966), 411 S.W.2d 699, and *Tennessee Farmers Insurance Co.* v. *Rader,* (1966), 410 S.W.2d 177, followed the same line of reasoning as the Illinois decisions in holding that the medical subrogation clause of an automobile liability policy which did not purport to assign or transfer the entire claim of the policy holder against the tort feasor but which merely secured contribution and indemnity to the extent of the medical payment made to the insured was valid and enforceable and not contrary to the law prohibiting the assignment of a personal injury claim.

In an action to recover under a medical payments policy, where the evidence showed that plaintiff insured was injured, when her automobile collided with another, that she settled her claim against the driver of the other car and gave him a general release, and that she then demanded $3,250.00 from defendant insurer for her medical expenses, but that defendant refused to pay it on the ground that she had recovered the sum from the tort feasor and had destroyed the right of subrogation re-

served to defendant by the policy, the court in *Bush* v. *Home Insurance Co.* (1967, N. J.), 234 A.2d 250, affirming a summary judgment entered in favor of defendant, rejected plaintiff's contention that to allow medical payments subrogation violates the principle against assigning a personal injury claim, and violates a principle against splitting a cause of action. The court said that an assignment is a transfer by action of the transferor whereas subrogation is an equitable right which arises out of the facts and which entitles the subrogee to collect that which he has advanced. The court also said the plaintiff's contention that permitting subrogation for medical payments may cause many practical difficulties, especially where payment is made by the insurer and then the insured makes, or seeks to make, a compromise settlement with the tort feasor, could be answered (1) By pointing out that no such difficulty existed here and (2) By observing that the question of whether a provision for subrogation should not be permitted in a policy because it is impractical or unfair is for the commissioner of banking and insurance to decide.

In *Miller* v. *Liberty Mutual Fire Insurance Co.* (1965, N. Y.), 264 N. Y. Supp.2d 319, plaintiff brought a declaratory judgment action to declare invalid the "subrogation" portion of his automobile insurance policy as it applied to medical payments and to declare invalid two trusts receipts exacted of him by the defendant, his insurance carrier, as a condition of his claim for medical expenses. There was evidence that the automobile liability insurance policy in question contained a medical

payments clause which provided that in the event of any payment the company would be subrogated to all the rights of recovery therefor which the injured person may have against any person causing the injury. The plaintiff incurred medical expenses as a result of injuries sustained in an automobile accident and thereafter executed trust receipts to the defendant after being told that his claim would not be paid unless he did so. Plaintiff subsequently brought an action for personal injuries against the tort feasor, which was afterward settled. Defendant claimed a lien for the medical expenses paid to plaintiff by it and notified the tort feasor's insurance carrier of its claim, but that carrier chose to ignore the claim and paid plaintiff the full settlement. Granting a judgment for defendant, the court declared: (1) The subrogation provision in question was not an assignment of all or a part of a claim for personal injuries; (2) The subrogation provision created an equitable lien by subrogation against any recovery by the assured from a third party; (3) The trust receipts in question were valid and proper and under the terms of the policy their exaction by the insurer as a condition to the payment of the claim to plaintiff for medical expenses was not improper, invalid, or illegal; and (4) The trust receipts were valid and made plaintiff a trustee only to the extent that he received any proceeds of that portion of his claim arising out of medical expenses for which he had received reimbursement from the insurer.

In an action to recover medical payments under an automobile liability policy, where the evidence showed

that plaintiffs had brought suit against the driver of the other automobile involved in the accident and that settlement was reached and both were paid in settlement of their claims, and that although defendant insurer was duly notified of the accident and of the fact that both plaintiffs were injured and would present their claims under the medical payment plan, the defendant insisted that it would not pay until the necessary subrogation instruments were executed as provided for in the policy, the court in *Demery* v. *National Union Fire Insurance Co.* (1967, Pa.) 232 A.2d 21 affirming a judgment on the pleadings for the defendant insurer, held that the subrogation clause and the policy here in question was valid and enforceable and that plaintiff had by their own act made it impossible for them to comply with its terms, and that thus, the plaintiffs being unable to execute the subrogation agreement, judgment must be entered against them and in favor of the defendant. The court reviewed a number of cases which had considered the question as to the validity of such subrogation provisions of medical payment clauses, and said that it believed that the better reasoning was contained in the cases in which the subrogation clause was held to be valid, and that a more equitable result would be reached if it followed this reasoning, the court stating that the reasoning in more modern decisions made a clear distinction between an assignment of a tort claim and subrogation of medical payments under a contract.

In the North Carolina case of *Anderson* v. *Allstate Insurance Co.* (1966), 145 S.E.2d 845, the Allstate Insurance Company issued its automobile policy providing

medical payments coverage subject to a limit of $2,000.00 to Anderson. The National Grange Mutual Insurance Company issued its automobile policy providing medical payments coverage subject to a limit of $1,000.00 to Bernett, and providing that National would be subrogated to all rights of recovery which the injured person might have against others. The Allstate policy had no such subrogation provision but provided that its medical payments coverage with respect to a non-owned automobile was excess of other valid and collectible medical payments insurance.

Anderson was riding as a passenger in Bernett's automobile when it collided with a vehicle driven by Graham, whose negligence caused the collision. Anderson was fatally injured and the funeral expenses were $1,373.25. Anderson's widow, as administratrix of his estate, settled the claim against Graham and then brought action against the Allstate Insurance Company to recover the funeral expenses under the medical payments coverage of the Allstate policy. The Allstate Insurance Company, contending that its coverage was excess of the Nation's policy, filed a cross-action against National. National Insurance Company denied coverage because of the release given to Graham which defeated National's subrogation rights. The trial court held that, at the time of the accident, the National's policy provided medical payments coverage and that the Allstate's policy was excess, so that Allstate was liable only for the amount of the funeral expenses in excess of $1,000.00. The administratrix appealed from the judgment to that effect.

The Supreme Court found no error holding (1) That whether the National policy provided "other valid and collectible insurance" must be determined as of the time of the collision and (2) That the destruction of her claim against National by the administratrix in releasing the negligent driver did not enlarge her rights against Allstate.

In the case of *Michigan Medical Service* v. *Sharpe*, (Mich. 1954), 64 N.W.2d 713, the plaintiff insurance company furnished the defendant insured certificate holders with medical and surgical service under the terms of a certificate which contained an express subrogation clause which provided that the subscriber and his dependents should execute and deliver such assignments of claim or other papers as might be necessary to secure plaintiff's right against the tort feasor. The court held such clause binding on the subscriber and his dependents who accepted benefits under the certificate, the record containing no suggestion that the agreement was induced by mistake, overreaching, fraud, or misrepresentation, and there being no ambiguity between the subrogation clause and the other terms of the certificate, the court said it couldn't agree with the defendant's contention that such clause gave the plaintiff no rights, because to do so would be to read it out of the agreement by rendering it meaningless, which a court may not do. As against further contentions of the defendant, the court stated that enrichment of the plaintiff is not unjust if pursuant to the express agreement of the parties fairly and honestly arrived at before hand, nor is

it unjust, unfair, or inequitable to give effect to an agreement which was not induced by mistake, overreaching, fraud, or misrepresentation.

In *National Union Fire Insurance Co.* v. *Grimes* (Minn., Sept., 1967), 153 N.W.2d 152, the Minnesota Supreme Court held that an insured under the standard provisions of an automobile insurance policy pertaining to medical pay insurance was liable to his insurance company for the amount it had paid to him under the medical pay provisions of the policy after he executed a general release in favor of the tort feasor's insurance carrier who paid him the sum of $3,500.00 in exchange for a general release releasing all claims he had against the tort feasor.

In the case of *Associated Hospital Services, Inc.*, v. *Milwaukee Auto Insurance Company,* (Wisc., 1967), 147 N.W.2d 225, an action was filed by the insured to recover medical payments made to its insured following an accident. The action was against the liability insurer of the tort feasor. The court granted summary judgment for the plaintiff's medical insurer against the defendant liability insurer which was affirmed on appeal. The Supreme Court held that the plaintiff was entitled to subrogation rights under the contract of insurance. In this case the plaintiff was a non-profit organization, Blue Cross. The defendant had settled with plaintiff's insured for all claims and taken a general release. The plaintiff sued the defendant insurance company and obtained a judgment.

In summary, it is clear that the great weight of authority among the various states which have had the question presented to them has held the right of subrogation to be valid and enforceable either on the basis that a personal injury action is assignable or that a subrogation provision does not constitute an assignment of a personal injury action but only a right of agreement and indemnity which has been approved by the banking and insurance commissioner and that there is nothing with respect to public policy that should make the agreement invalid or unenforceable.

Other cases have pointed out that the insurance commissioner approved the provisions for subrogation and that it is presumed that in approving the policy the commissioner has also taken into consideration the fact that the reduced premium may be authorized by reason of the subrogation provisions of the policy. Other courts have stated that subrogation is an equitable right which arises out of the facts and entitles the subrogee to collect that which he has advanced, and the question of whether a provision for subrogation should or should not be permitted in a policy because impractical or unfair is for the commissioner of banking and insurance to decide.

In one case it was stated that subrogation is merely a creature of equity to forestall a windfall for the wrongdoer where the insured has obtained and paid for the expense of procuring insurance for his protection and at the same time serves to limit the chance of double recovery or windfall to the insured. When exercised, it

tends to place the primary liability on the tort feasor where it belongs.

Our state statute contemplates the principle of subrogation insofar as insurance companies are concerned, and we, therefore, submit that in consideration of all the principles involved subrogation should be valid and enforceable.

POINT II

THE COURT DID NOT COMMIT ERROR IN FINDING THAT PLAINTIFF STATE FARM HAD GIVEN ADEQUATE NOTICE TO DEFENDANT FARMERS OF ITS SUBROGATION INTEREST PRIOR TO DEFENDANT'S SETTLEMENT WITH THE INSURED SESSIONS.

The trial court, as a matter of fact, in its findings of fact and conclusions of law found that notice had been given to the defendant, Farmers Insurance Exchange, of plaintiff's subrogation interest prior to the time settlement was made between Farmers Insurance Exchange and the State Farm Mutual insured, Carl R. Sessions and that Farmers had received such notice. The following facts supported the trial court's conclusion in that regard: (1) The letter of August 4, putting Farmers Insurance Exchange on notice of the subrogation interest of State Farm Mutual Insurance Company. This notice was both as to medical pay and property damage subrogation. (2) Farmers Insurance Exchange then went out and settled the claim of State Farm Mutual's insured and

took a general release. (3) Thereafter they paid the property damage subrogation claim of State Farm Mutual's without objection or complaint about lack of notice but with respect to the medical pay subrogation claim merely denied it on the ground that it was not a recoverable item under the laws of the State of Utah. They never did dispute notice until the time of the summary judgment. The notice with respect to medical pay and property damage was all given at the same time, and if they had notice of the property damage claim when they discussed the matter of settlement with State Farm Mutual's insured, then certainly they had notice of the medical pay claim and could have discussed that with him, also. (4) The question of notice was raised at the time of the argument on defendant's motion to dismiss because plaintiff's complaint failed to state a cause of action, and plaintiff's counsel thereafter furnished copies of the letters to defendant's counsel and he apparently made contact with his company and thereafter wrote a letter to the court stating that the matter of notice was no longer an issue.

The letters in evidence plus the admitted conduct of the defendant, Farmers Insurance Exchange, therefore, conclusively established that they had notice of the actual payment of the medical bills as well as the property damage claim at the time they went out and made their settlement. The insured of State Farm Mutual had also been sent a letter notifying him of State Farm's subrogation claim and it appears clear to this writer that the defendant had actual notice of the subrogation interest

of State Farm Mutual on both medical pay and the property damage claim at the time settlement was made.

CONCLUSION

The summary judgment granted by the trial court sustaining subrogation contracts in the state of Utah for medical payments should be sustained and affirmed.

Respectfully submitted,

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