

1962

Lorenzo C. Forsey v. E. Girard Hale : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

LORENZO C. FORSEY,

Plaintiff-Respondent,

—vs.—

E. GIRARD HALE, as Executor of
the Will and Estate of Mabel Bean
Forsey, Deceased,*Defendant-Appellant*FILED
1962
Supreme Court, Utah

Case No. 9585

RESPONDENT'S BRIEF

Appeal from the Judgment of the
3rd District Court for Salt Lake County
Hon. Stewart M. Hanson, *Judge*

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

Respondent agrees with the statement of facts set forth in Appellant's Brief, except as follows :

From the record it is not clear whether the amounts paid by Lincoln National Life Insurance Company were reimbursed to the Respondent, or paid direct to the hospital and doctors, nor is it clear whether such amounts were paid before or after the death of decedent. (R. 10)

The payments made by Lincoln National Life Insurance Company were made pursuant to the terms of a group insurance policy issued to the Plaintiff as an employee of Forsey Furniture Company, under a master policy issued to Utah Furniture Association. Mabel H. Forsey (who is the same person as Mabel Bean Forsey, Deceased) was designated in the policy as the dependent spouse of Lorenzo C. Forsey. (Exhibit-R. 34)

The amount in dispute is the sum of \$1,205.41, together with interest from the time of payment.

ARGUMENT

POINT I

THE DEFENDANT IS OBLIGATED BY STATUTE TO
PAY FUNERAL EXPENSES AND EXPENSES OF LAST
SICKNESS.

Section 75-9-21, Utah Code Annotated 1953, provides as follows:

“The Executor or Administrator, as soon as he has sufficient funds in his hands, *must* pay the funeral expenses and expenses of last sickness *** of the decedent.” (Emphasis added.)

This Section and Section 74-4-6, Section 75-8-1 and Section 75-8-2, Utah Code Annotated 1953, must be construed together. *In re Mower's Estate*, 93 Utah 390, 73 Pac. 2nd 967. Thus the payment of last sickness and funeral expenses are made a mandatory charge against the estate, ahead of the homestead exemption (See *in re Mower's Estate*; also *in re Peterson's Estate*, 69 Utah 484, 256 Pac. 409), and ahead of the family allowance as

specifically stated in Section 75-8-1, Utah Code Annotated 1953, and ahead of summary distribution, as stated in Section 75-8-2, Utah Code Annotated, 1953. Furthermore, this Honorable Court in the case of *in re. Hansen's Estate*, 55 Utah 23, 184 Pac. 197, has held that claims for funeral expenses and expenses of last sickness are not required to be presented as other claims, but may be paid by the Administrator without having been presented and allowed. Furthermore, in the case of *Dunn v. Wallingford*, 47 Utah 491, 155 Pac. 347, this Court has held that when funeral expenses are paid by a third person, and not by a personal representative, they become a legal charge against the estate as the law implies a promise to reimburse.

Therefore, by statute, there is a mandatory prior statutory obligation upon the executor to pay the funeral expenses and expenses of last sickness of the decedent to whoever is entitled to such payment.

POINT II.

THE RESPONDENT IS THE ONE ENTITLED TO SUCH PAYMENT.

In all three points of the argument in Appellant's Brief, Appellant contends in substance that the Respondent did not pay the said last sickness expenses, but that the same were paid by the insurance company, and therefore, that the respondent is not entitled to reimbursement from the executor. This contention is based upon a premise which is wholly and completely false. On Page

6 of Appellant's Brief, Appellant quotes from a letter of transmittal on the inside of the policy (R. 34) as follows"

"*** We urge you to show appreciation of the fact that your employer is paying a substantial portion of your premium."

This statement is no evidence of the fact that the premium was not paid by the Respondent, but if anything is positive evidence of that which is a fact, namely, that the premium for this policy was in fact paid by the Respondent as an employee of Forsey Furniture Company, at least partially in cash and partially as a fringe benefit of his employment.

Nowhere in the record is there any claim that the decedent, Mabel Bean Forsey, paid any part of the premium of this policy. Lorenzo C. Forsey was the insured employee, and as such he designated Mabel Forsey as his dependent, and in his forethought provided for the payment of expenses of illness in her behalf. Thus, these expenses of last illness were paid by the insurance company to Lorenzo C. Forsey, as the insured, or for his account to the doctors and hospital, pursuant to a contractual relationship between the said insurance company and the said Lorenzo C. Forsey, the premium for which insurance was paid by Lorenzo C. Forsey either in whole or in part, directly, and possibly in part by his employer as one of the considerations of his employment.

Who then is entitled to the reimbursement for these expenses of last sickness? The Appellant does not and

can not contend that he, as executor of the estate of Mabel Bean Forsey, is entitled to such payment for there is no claim that Mabel Bean Forsey ever paid any part of these premiums. Surely the Lincoln National Life Insurance Company is not entitled to such reimbursement, for they were under contractual obligation to pay the said expenses in consideration of the premiums which had been paid to them by Lorenzo C. Forsey, or for his account. Lorenzo C. Forsey, the insured, paid these last illness expenses as surely as if he had taken the money out of his own pocket, and this is so even though he was reimbursed therefor by the insurance company pursuant to their contractual obligation.

It is the general rule that compensation or indemnity received by a claimant from a collateral source, wholly independent of the wrongdoer cannot be set up by the latter in mitigation or reduction of damages. 25 C.J.S. Damages, §99, 15 Am. Jur. Damages, §198, 201. See Annotation in 13 A.L.R. 2d 355. Thus in a leading case, *Anheuser-Busch, Inc. v. Starley*, 28 Cal. 2d 362, 170 P.2d 448, 166 A.L.R. 198, an action by an owner of goods partially destroyed while in the possession of a common carrier by the negligent act of the defendant, even though the owner had been paid the amount of his loss by the carrier in the discharge of its statutory liability, the court stated the rule to be as follows

“Where a person suffers personal injury or property damage by reason of the wrongful act of another, an action against the wrongdoer for

the damages suffered is not precluded nor is the amount of the damages reduced by the receipt by him of payment for his loss from a source wholly independent of the wrongdoer.”

And in *Swift & Company v. Gutierrez*, 76 Ida. 82, 277 P. 2d 559, it was held that, to make the defense of payment available as a bar to a tort action, it must be plead and proved that payment to the plaintiff was made by the defendant or from a source connected with the defendant and to which the defendant had contributed.

It has also been held that the above rule applies even though the defendant was not guilty of any wrongdoing or negligence if the law has made him liable for the injury in their absence. *Regan v. New York & N.E.R. Co.*, 60 Conn. 124, 22 A. 503, 25 Am. St. Rep. 306. In that case a statute made railroad companies liable for destruction of property by fire communicated from locomotives regardless of negligence, and the court, in an exhaustive study of the cases in the English and American courts, held that the authorities were in absolute accord that the defendant is not entitled to a reduction of damages to the extent of insurance on the property paid by an insurance company to the plaintiff. The English cases cited in the opinion involved statutes which made communities responsible to inhabitants for damage to their property caused by robbery, riot and other violent crimes. The liability therein was predicated upon the obligation created by statute and not upon negligence, being similar in that respect to the Regan case. This is precisely the situation in the instant case and our own Supreme Court

has spoken eloquently upon the subject in ruling that the receipt of \$500 by an employee for medical treatment from his own accident insurer would not relieve his employer of his statutory obligation to pay the same sum under the Workmen's Compensation Act. *Anderson v. Industrial Commission*, 108 U. 52, 157 P.2d 253. The holding of the court in that case was as follows:

“**** We are asked, in effect, to hold that it (employee's private insurer) paid the sum for the benefit of the employer rather than for the benefit of the insured in order to prevent the unjust enrichment of the latter. But would not such holding, in effect, unjustly enrich appellant? Under the provisions of Sec. 42-1-43 the employee who has suffered a compensable accident is ‘entitled to receive, and shall be paid’ such amount ‘for medical, nurse and hospital services’ as provided by Sec. 42-1-75, U.C.A. 1943. The sum here involved was for services rendered because of the accident arising out of and in the course of Milne's employment. Hence, if the total is reasonable, it is one which the statute says appellant should pay and Milne is entitled to receive.

“The plaintiff apparently concedes that had Milne paid the amount involved assuming that the total was reasonable, appellant, under the statutes, would be required to reimburse him. *But as we view the matter, Milne did, as between him and plaintiff, pay it. He paid the premiums, he purchased the benefits. Milne hence procured the sum to be paid which the plaintiff was obligated to pay. As between plaintiff and him it was his payment. Clearly it was not payment by plaintiff.*” (Emphasis added.)

The above authorities are in unanimous agreement that to hold otherwise would allow the wrongdoer to pay nothing, and yet take all the benefit of a policy of insurance without paying the premium, without any privity between him and the insurance company and without the policy having been obtained for his benefit or upon his request. Thus, in *Campbell v. Sutliff*, 193 Wis. 370, 214 N.W. 374, 53 A.L.R. 771, the court stated:

“The sums paid for such insurance are in the nature of an investment, which like other investments made by the plaintiff, ought not to inure to the benefit of the defendant. The only parties interested in such a contract of insurance are the plaintiff and the insurer.”

And the United States Supreme Court stated as follows in *Phoenix Ins. Co. v. The Atlas*, 93 U.S. 302, 23 L.Ed. 863:

“What the plaintiff recovers under his policy of insurance is not compensation for damages, but payment under a contract independent of the claim against the wrongdoer.”

In the case of *In re. Randle's Estate*, 20 NW 2nd 464, 465 cited by the Appellant, the Iowa Court denied reimbursement to the widow on the grounds that the money was not paid by her, but by the United Mine Workers of America Local Union, the said money having been raised by an assessment of \$1.00 per member of the Union for the purpose of applying on the payment of funeral expenses. This case can be differentiated from the case at bar. In the Randle Case, there was no contractual rela-

tionship between the widow and the Union, but the payment by the Union was a voluntary payment which might entitle them to reimbursement from the estate had the Union made such demand upon the Executor.

The case of *Smith v. Eichner*, (Wash.), 215 Pac. 27, cited by Appellant, does not sustain their position, but holds affirmatively that expenses of last sickness and funeral charges are chargeable against the state, not by reason of a contract express or implied, but by virtue of the statute.

POINT III.

THE DENIAL OF RESPONDENT'S CLAIM WOULD CONSTITUTE UNJUST ENRICHMENT TO THE APPELLANT.

Appellant cites the case of *Straube v. Bowling Green Gas Co.*, 18 A.L.R. 2nd 1335 as authority for his contention that the Appellant would not be unjustly enriched if he failed to pay the expenses of last sickness.

A careful reading of the *Straube* case reveals that it is not in point, but can be differentiated fully. In the *Straube* case the Court quotes from the case of *Hummel v. Hummel*, 133 Ohio St. 520, 14 NE 2nd 923, 927 as follows:

“Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.”

Appellant also quotes this extract from the *Hummel* Case on Page 4 of his brief in support of his contention that the doctrine of unjust enrichment does not apply.

We concur in the statement quoted by the Court in the Hummel Case and contend that this statement sustains our position.

The appellant here has and retains money which in justice and equity belongs to another. The Utah Statute places upon the Appellant, as executor, a mandatory obligation to pay the last sickness expenses of the decedent ahead of other claims, and even without the necessity of the filing of a claim. If the appellant fails to make such payment, unquestionably he is enriched. If that money in justice and equity should be paid to another, and it is not so paid, then the Appellant is enriched unjustly. The Respondent, with proper foresight, obtained and contracted for a group insurance policy to cover his own illnesses and accidents, as well as those of his dependent spouse, and named Mabel Forsey as such dependant and beneficiary, and provided for the payment of the premiums for the said policy. The consideration for the policy was the premiums which he paid either in full, directly, or perhaps in part, indirectly, as one of the conditions of his employment with the Forsey Furniture Company. Thereby, the insurance company was obligated by contract with Forsey to pay illness expenses, and Lorenzo C. Forsey, the Respondent, is the only person entitled to reimbursement from the executor.

CONCLUSION

From the foregoing, we conclude as follows :

1. The Statute fixes upon Executors and Administrators a mandatory charge to pay expenses of last sickness to the one entitled to such payment, and to pay the same ahead of other claims, and even without the necessity of a claim being filed therefor.

2. The one entitled to such payment is the Respondent, and not the Insurance Company, nor the Appellant; the Insurance Company having made reimbursement to Respondent under the contractual liability to the Respondent, for which Respondent paid a consideration.

3. If appellant failed to pay said last sickness expenses to Respondent, the Appellant thereby would be unjustly enriched at the expense of Respondent.

4. All three points of Appellant's brief are based upon the premise that, because the Insurance Company reimbursed Respondent for said last sickness expenses, said expenses were not paid by Respondent. This premise is wholly false, as the evidence is clear and undisputed that Respondent did pay a consideration for said insurance, and therefore he, and no one else is entitled to payment.

Respectfully submitted,

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