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National Farmers Union Property and Casualty Co. v. Farmers Insurance Group and Farmers Insurance Exchange : Brief of Appellant

Utah Supreme Court

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Hanson & Garrett; Don J. Hanson; Attorneys for Defendants and Respondents;

Kipp & Charlier; D. Gary Christian; Attorney for Plaintiff and Appellant;

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IN THE SUPREME COURT OF THE STATE OF UTAH

NATIONAL FARMERS UNION
PROPERTY AND CASUALTY
COMPANY,

Plaintiff and Appellant,

— vs. —

FARMERS INSURANCE GROUP
and FARMERS INSURANCE
EXCHANGE,

Defendants and Respondents.

Case
No. 9625

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH
Honorable A. H. Ellett, District Judge

KIPP AND CHARLIER

D. GARY CHRISTIAN, Esq.

*Attorney for Plaintiff
and Appellant*

516 Boston Building
Salt Lake City, Utah

DON J. HANSON, Esq.

623 Continental Bank Building
Salt Lake City, Utah

Attorney for Defendants and Respondents

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IN THE SUPREME COURT OF THE STATE OF UTAH

NATIONAL FARMERS UNION
PROPERTY AND CASUALTY
COMPANY,

Plaintiff and Appellant,

— vs. —

FARMERS INSURANCE GROUP
and FARMERS INSURANCE
EXCHANGE,

Defendants and Respondents.

Case
No. 9625

APPELLANT'S BRIEF

NATURE OF CASE

The case on appeal and set forth herein involves the problem and presents the question of whether or not plaintiff, an excess liability insurance carrier, can recover attorneys' fees and court costs from defendants, the primary liability insurance carrier, when the latter has failed, refused and neglected to defend an insured under the terms of its policy, who is also the named insured under the policy providing excess coverage, when the insured was being sued by a third party for an amount

within the limits of coverage provided by the primary carrier, and when upon its refusal to defend said insured, the excess carrier incurred attorneys' fees in a reasonable amount and court costs in successfully defending the insured party.

DISPOSITION IN LOWER COURT

The Third Judicial Court (Judge A. H. Ellett) held that an excess liability insurance carrier cannot recover attorneys' fees and court costs from a primary insurance carrier which fees and costs were incurred in defending a party who was an insured under the policy providing primary coverage and who was the named insured under the policy providing excess coverage when the insured was being sued for an amount within the policy limits provided by the primary carrier.

RELIEF SOUGHT

The relief sought on this appeal is as follows:

A. Reversal of the lower Court's decision.

B. Order directing judgment to be entered in favor of plaintiff and against defendants for the amount stipulated to by counsel at trial.

STATEMENT OF FACTS

John H. Morgan, Jr., was the named insured under a policy of liability insurance issued to him by National

Farmers Union Property and Casualty Company and providing coverage on a 1958 Mercury automobile in the amount of \$10,000 per person and \$20,000 per occurrence for bodily injury and \$5,000 for property damage (TR 2, 7).

Raymond Earl Thomas was the named insured under a policy of liability insurance issued to him by Farmers Insurance Exchange and providing coverage on his automobile in the amount of \$10,000 per person and \$20,000 per occurrence for bodily injury and \$5,000 for property damage (TR 2, 7).

Mr. Morgan had purchased his vehicle at Bountiful Motor Sales (then known as J. Golden Barton Motor Company) where Mr. Thomas was employed as a car salesman; however, Morgan did not purchase his car from Thomas (TR 2). While Mr. Morgan was vacationing in Yellowstone Park in August, 1958, his vehicle was involved in an automobile accident. He brought the damaged automobile to Bountiful Motor Sales, Bountiful, Utah, for repairs. In the course of the discussion between Mr. Morgan and Kay Browning, Service Manager of Bountiful Motor Sales, a request was made by the customer for the use of a service automobile while his car was being repaired. Mr. Browning advised that no such vehicle was available and obtained the use of the automobile owned by Raymond Earl Thomas for Mr. Morgan (TR. 3). The borrowed automobile was owned by Mr. Thomas, and was insured under a policy issued to him by Farmers Insurance Exchange, which he had obtained on his own behalf (TR 3). Upon receiving the car

from its owner, Mr. Morgan drove to his home, parked it on an incline nearby and went into his house. Shortly thereafter Mr. Morgan's young daughter entered the parked car, released the brake and sent it crashing into the home of Daniel T. Wolfe, damaging the house in the amount of \$1,896.31 (TR. 3, 4). Demand was made upon Mr. Morgan by the owner of the house for the damages thereto, and Morgan immediately contacted his insurance carrier, appellant herein. He was advised that the coverage of National Farmers Union Property and Casualty Company was excess in this situation and that he ought to look to Farmers Insurance Group, the insurer of the automobile causing the damage, for protection. This was done and Mr. Morgan was advised that no coverage was afforded by Farmers Insurance Exchange in this situation because its coverage was excess and in any event coverage was excluded because the loaned vehicle was being used in the automobile business at the time and place of the accident.

In the meantime, legal action was instituted against Mr. Morgan by Mr. Wolfe for the damages to his house; Morgan thereupon again sought protection from appellant herein, who undertook the defense of the matter only after the defense had been tendered to both Farmers Insurance Exchange and Bountiful Motor Sales and refused by both. Thereupon appellant herein, plaintiff in the lower Court, proceeded with the defense of the lawsuit against Mr. Morgan, was successful in that endeavor, but in so doing incurred court costs and attorneys' fees in the amount of \$506.00 (TR. 4, 5, 6)

An action was subsequently commenced in the Third Judicial District Court by appellant against respondents to recover the attorneys' fees and court costs incurred by it in defending the lawsuit described. The lower court disposed of the matter as previously indicated in this brief (Tr. 4).

ARGUMENT

POINT I.

THE COURT ERRED IN HOLDING THAT IN ACCEPTING THE DEFENSE OF THE INSURED, UPON DEFENDANTS' REFUSAL TO DO SO, PLAINTIFF WAS A VOLUNTEER AND THEREFORE PRECLUDED FROM RECOVERING ATTORNEY FEES AND COURT COSTS INCURRED IN DEFENDING THE INSURED.

At the outset it may be well to indicate that in denying recovery against defendants by plaintiff, the lower court did not use the word volunteer. However, an examination of the language used by the court in describing plaintiff's conduct in handling the matter or in indicating what plaintiff should or could have done, it is evident that the court held that plaintiff was a volunteer (Tr. 10, 11). Generally speaking the party making payment is a volunteer if in so doing he has no right or interest of his own to protect and acts without obligation, moral or legal, and without being requested by anyone liable on the obligation. Where the person paying the debt has an interest to protect he is not a stranger (50 Am. Jur., 698, Section 22).

The problem involved in this appeal presents a case of first impression in Utah but which has been dealt with recently in several other states.

Aetna Casualty & Surety Company v. Buckeye Union Casualty Company, 157 Ohio St. 385, 105 N. E. 2d 568 (1952) discussed the volunteer aspect of a claim on facts similar to those in the instant case. However, in the Ohio case, Aetna, the secondary liability insurer, settled an action for an amount within policy limits brought against the insured party and sought to recover from Buckeye, the primary insurer, the amount of the settlement and costs in the sum of \$2,660.81. The primary carrier had disclaimed coverage refusing to defend or participate in the settlement of the action. It should be noted at this time that both the Aetna and Buckeye policies contained Temporary Use of Substitute Automobile, Other Insurance, Subrogation, and Defense provisions the same or similar to those contained in the policy of the parties to this appeal. (See exhibits P-1 and D-2). The Ohio Supreme Court held that Aetna, as the secondary carrier, which was forced to make settlement and pay to protect itself, was entitled to recover from Buckeye, the primary carrier. In allowing recovery, the Court had this to say:

Therefore, applying the principles of equity and natural justice, Aetna has the equitable right to recover from Buckeye and it also has the right to recover by way of subrogation under the policy.

The Aetna case is distinguishable from *Farm Bureau Mutual Insurance Company v. Buckeye Union Casualty Company*, 147 Ohio St. 79, 67 N.E. 2d 906, on which Buckeye

relied to avoid liability in the former case because in the *Farm Bureau* case both companies admitted coverage and the liabilities of their insured for some amount of damages on the claim asserted. No action was instituted against the insured and the Farm Bureau made full settlement without being forced to do so by court action. Furthermore, the case did not involve primary and secondary coverage problems. Under those circumstances the court held that there was no legal liability requiring the settling company to make payment and consequently that it was a volunteer.

A very recent Illinois case, *Fireman's Fund Indemnity Company v. Freeport Insurance Company*, 30 Ill. App. 2d 69, 173 N.E. 2d 543 (1961) involved another primary-secondary insurance coverage dispute. There, Gail Saraniecki, the girl friend of the son of the named insured drove the insured car at the time of the accident with implied permission of the insured. The girl's father had a policy of insurance providing coverage upon himself and members of his family while driving other vehicles. A \$100,000.00 suit was filed against the girl for injuries arising out of the accident. She notified Freeport Insurance Company, the liability carrier on the automobile she was driving, but it denied liability under the policy and refused to defend. She also notified Fireman's Fund, her father's insurance carrier, and it defended the action upon Freeport's refusal to do so. Fireman's Fund brought a declaratory judgment action for reimbursement of expenses incurred in defending the girl up to that time. In holding that the primary carrier must reim-

burse the secondary or excess carrier for expenses incurred in defending the driver the court said :

Since Freeport's policy does cover Gail Saraniecki and is therefore primary, we hold that Freeport is also primarily responsible for the defense of this suit. While it is true that Fireman's policy also obligates them to defend, we think the policy must be read as a whole, (*Fogelmark v. Western Casualty and Surety Company*, 11 Ill. App. 2d 551, 137 N.E. 2d 879) and this obligation viewed in light of its position as an excess carrier in this particular situation. (173 N.E. 2d 543, 546.)

The court further stated on the same page in adopting the words of the court in *American Surety Company of New York v. Canal Insurance Company*, 4 Cir., 258 F. 2d 934 :

Losses should not fall irrevocably upon that insurer which first recognizes its obligations, while one neglectful of its duty is allowed to escape.

In the *American Surety Company case* as cited in the preceding paragraph, an excess insurer had investigated and defended a tort action against its insured after the primary insurer had been tendered the defense and had refused it, and the insured was held liable for an amount in excess of the primary insurance which the excess insurer paid. There the court allowed the excess insurer to recover from the primary insurer the limits of the primary policy as well as all costs, expenses, and attorneys' fees incurred in the investigation and defense of the tort claim.

The primary insurer was also held primarily responsible for defending its insured in *McFarland v. Chicago Exp.*, 7 Cir., 200 F. 2d 5 (1952), *Oil Base, Inc. v. Transport Indemnity Company*, 143 Cal. App. 2d 453, 299 P. 2d 952 (1956).

Other cases involving the problem of recovery of attorney fees and costs by an excess insurance carrier against a primary insurance carrier are as follows: *Continental Casualty Company v. American Fidelity and Casualty Company*, 275 F. 2d 381. Each company claimed to be the excess carrier. The court awarded plaintiff who was established as the excess carrier in the action the amount of the judgment against the insured plus attorney fees for defending the action.

Allstate Insurance Company v. Hartford Accident and Indemnity Company, 311 S.W. 2d 41 (Mo., 1958). Excess carrier was awarded judgment it paid in behalf of the insured plus part of the attorney fees incurred in defending the action. It excluded that part of the attorney fees incurred by the excess carrier in attempting to get the primary carrier to defend the tort action. The attorney fees were separable, the total amount being \$1,300.00 of which \$600.00 was spent to implead defendant primary carrier. This \$600.00 was disallowed but plaintiff was allowed to recover the \$700.00 spent in defending the tort action.

In *Cosmopolitan Mutual Insurance Company v. Continental Casualty Company*, 147 A. 2d 529 (N. J. 1959) the court found neither party to be the primary insurance

carrier and on that basis required the companies to split the cost of settlement and fees incurred in disposing of the claim against the insured.

In view of the facts involved in the case on appeal herein and the cases cited in this brief, appellant contends that as long as Farmers Insurance Exchange disclaimed coverage and refused to participate in any way in either negotiating settlement or defending the action against John H. Morgan, Jr., there was no admitted or established "other valid and collectible insurance" available to protect the insured and National Farmers Union was, therefore, forced to defend and pay any resulting judgment, if unsuccessful in its efforts, or to settle the case. National Farmers Union could not abandon Morgan merely because Farmers Insurance Exchange chose to deny coverage and gamble on future exoneration. *Aetna Casualty v. Buckeye Union Casualty*, *supra*. National Farmers Union had an interest to protect and in defending the insured in the original action was not a volunteer.

Appellant relies heavily on the case of *Fireman's Fund Indemnity Company v. Freeport Insurance Company* (*supra*) and asserts that it should not be penalized for recognizing its obligation to one of its named insureds when the insurance carrier with the primary obligation to protect the insured refused to do so. That appellant was successful in its defense of Mr. Morgan should not be to its detriment. There can be no question that upon the principles of equity and natural justice, and upon the law, that National Farmers Union has the right to recover the attorney fees and court costs incurred by it in

successfully defending the insured party. Farmers Insurance Exchange should not be permitted to escape ultimate liability costs and expenses incurred in defending the insured merely by denying coverage and refusing to defend the action. The Exchange should not be immunized from such payments by its own breach of contract. See *Klaustermeyer v. Cleveland Trust Company*, Assignee, 89 Ohio St. 142, 105 N.E. 278.

POINT II.

THE COURT ERRED IN REFUSING TO ALLOW PLAINTIFF RECOVERY OF ATTORNEY FEES AND COURT COSTS INCURRED IN DEFENDING THE INSURED ON THE THEORY OF SUBROGATION.

It is well settled that one secondarily liable, who is forced to pay because of the refusal or failure after demand, of the one primarily liable to discharge the obligation, has the right of indemnity from the one primarily liable. *Globe Indemnity Company v. Schmitt*, 142 Ohio St. 595, 53 N.E. 2d 790, *Maryland Casualty Company v. Frederick Company*, 142 Ohio St. 605, 53 N.E. 2d 795, *Losito v. Kruse, Jr.*, 136 Ohio St. 183, 24 N.E. 2d 705, 126 ALR 1194, *Herron v. City of Youngstown*, 136 Ohio St. 190, 24 N.E. 2d 708, 31 A.L.R. 2d 1324 et seq.

However, the doctrine of subrogation, which is a device for the protection of a surety or indemnifier, is because of its very nature inapplicable where the one seeking subrogation is himself primarily liable. *Builders and Manufacturers' Mutual Casualty Company v. Preferred*

Auto Insurance Company (1941 C.A. 6th Ohio) 118 F. 2d 118. By the same token, the doctrine is inapplicable if the one against whom subrogation is sought is not found to be the primary insurer. *Michigan Alkali Company v. Bankers Indemnity Company* (1939, C.A. 2d NY) 103 F. 2d 345. And it has been held not to apply where the effect of the respective policies was to establish equal liability. *Kenner v. Century Indemnity Company*, 320 Mass. 6, 67 N.E. 2d 769, 165 ALR. 1463.

The District Court per Judge Ellett in the instant case held that National Farmers Property and Casualty Company, appellant herein, was the excess carrier and that Farmers Insurance Exchange, respondent herein, was the primary carrier, but refused to allow recovery of defense costs and court costs under the theory of subrogation on the ground that such a theory is inapplicable where no payment has been made under the policy, i.e., where the insured did not incur any defense costs or court costs and since the company did not make any such payments for its insured then the insurance company could not subrogate for the costs and the expenses incurred by it.

Appellant urges that the approach of the trial court to the subrogation attempt is academic. That the insured actually incurred no costs and expenses in defending the lawsuit because National Farmers Union undertook the defense of the action, engaged and paid its own attorneys for so doing is not to the point. It is true that appellant could have abandoned Mr. Morgan as did respondent, let the insured employ his own attorney, and actually incur

all costs and expenses in defending himself. The insured could then have paid for his defense and sought reimbursement from his insurance carrier; appellant might then have reimbursed him as per the policy defenses provision and then sought recovery against the primary insurer. Or, appellant might have undertaken the defense of the insured but handled the matter in such a slothful manner that judgment was sure to be entered against Mr. Morgan. Then the excess carrier could have paid said judgment and sought recovery by subrogating against the primary carrier for the amount paid on the judgment plus costs and expenses incurred in defending. Such an approach may please the theorizing purist of the legal profession, but is an approach which we think the excess carrier need not, should not and could not pursue, nor is it one which the insured need put up with. The effect of refusing to allow the appellant to recover expenses and costs on this ground is to penalize it for realizing its obligation in defending the insured when respondent abandoned him and then for its efficient and successful handling of the lawsuit against him.

The problem of subrogation against a judgment creditor for costs expended by an insurance company in successfully defending its insured was discussed in *Munch Brewery, Inc., v. Grief*, 6 N. Y. S. 2d 989, 169 Mis. 382 (1928) and on appeal in 11 N. Y. S. 2d 126 (1939). That matter involved a motion to vacate and set aside a subpoena for examination in supplemental proceedings of judgment debtor, Abraham Grief. In an action that resulted in the judgment against Grief,

judgment-debtors, plaintiffs, had instituted an action against Munch Brewery and South Brooklyn Railway Company for personal injuries. Zurich General Accident and Liability Insurance Company, the insurance carrier of judgment-creditor, Munch Brewery, Inc., defended the action and was successful in getting a no cause of action plus costs judgment for its insured. The costs of \$133.00 had been incurred by the insurance company and not by the insured. It was in an attempt to recover these costs on the theory of subrogation that the insurance carrier had instituted the supplemental proceedings. The policy issued by Zurich to Munch Brewery contained standard provisions for legal liability for bodily injuries or death, expenses for defenses and subrogation.

The trial court indicated that the subrogation clause of the policy comes into play only where the insurance company has had to pay a loss for damages. In 6 NYS 2d 989, 992, the court said:

If a judgment had been obtained against the Munch Brewery, Inc., and was paid by the insurance carrier, in that event the carrier would by virtue of the subrogation clause have a right of action against the driver of the truck owned by the insured or against co-defendant whose contributory negligence might have resulted in the injury sustained.

The court further asserted that subrogation applies to a right in the insurance company only in the event of a payment under the policy. There must be payment by

the company for and on behalf of its insured and until the insurance carrier paid a claim or judgment it could not bring an action as subrogee because its rights as subrogee does not accrue until then.

Defendant's motion to vacate the subpoena for examination in supplemental proceedings was granted.

On appeal to the appellate division of the Supreme Court, 11 N.Y.S. 2d 126, the lower court was reversed. At page 127, relating to the subrogation question, the court said that pursuant to the policy the insurance company undertook to pay, in addition to damages, all expenses incurred by the company for investigation, negotiation or defense. The Court then went on to say:

The insurance company is entitled to be subrogated to the rights of the assured against the judgment-debtor "as respects any payment made under this policy," for it had borne the expenses which the judgment for costs was designed to compensate. For the purpose of determining the rightful claimant of the judgment for costs, the insurance company was the actual defendant, and Munch Brewery, Inc., was simply the nominal defendant. *McGregor v. Comstock*, 28 N.Y. 237.

There are few other cases in point, but those that are indicate that a liability carrier providing secondary insurance, and compelled to pay a claim on behalf of an insured for whose benefit primary insurance affording coverage is subsisting, will be permitted to be subrogated to the rights of the insured against the latter insurer, both on the ground of general equitable principles and by vir-

tue of any subrogation clause which may be contained within the policy issued by the secondary insurer.

In *Bennett v. Preferred Accident Insurance Company* (1951, CA 10th Okla.) 192 F. 2d 748, the court based its decision upon an equitable doctrine of subrogation described as a device designed to compel, where justified by the facts and circumstances of the particular case, the ultimate discharge of a debt or obligation by him who in good conscience ought to pay it.

In the case on appeal herein appellant incurred attorney fees and court costs in defending the insured and payment for same was made under the policy issued by National Farmers Union to John Morgan. Pursuant to the *Grief and Bennet cases*, appellant should be permitted to recover the expenses and costs on the basis of subrogation. It is true that Daniel T. Wolfe was the judgment-debtor in the action against appellant's insured, but Farmers Insurance Group was defendant in the action brought by National Farmers Union. Since the sum sought to be recovered was expended by and for respondents' insured by the terms of appellants' policy and which amounts should rightly have been paid by respondents in accordance with the terms of its policy, it is submitted that National Farmers Union is entitled to and should be permitted to recover, on the theory of subrogation, the expenses and costs incurred by it in defending the insured individual.

See also *Standard Surety and Casualty Company v. Metropolitan Casualty Company*, 45 Ohio L. Abs. 428, 67

N.E. 2d 634 (1945), *Maryland Casualty Company v. Hubbard* (1938, D. C. Calif.), 22 F. Supp. 697, *National Mutual Insurance Company v. Liberty Mutual Insurance Company* (1952) 90 App. D.C. 362, 196 F. 2d 597.

POINT III.

THE COURT ERRED IN DISMISSING PLAINTIFF'S COMPLAINT AND FAILING TO GRANT JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT.

On the basis of the law and argument set forth under Point I and Point II herein which appellant incorporates and makes a part of its argument under this Point, appellant urges that the action of the trial court in dismissing plaintiff's Complaint and failing to grant it judgment against defendant was in error.

Appellant contends under the cases decided in the jurisdictions mentioned coupled with the principles of equity, and natural justice, that it should be permitted to recover the attorney fees and court costs incurred in defending the insured of both parties to this appeal.

POINT IV.

THE COURT ERRED IN REFUSING TO AMEND THE FINDINGS OF FACT AND CONCLUSIONS OF LAW TO PROPERLY REFLECT WHAT WAS FOUND AS FACTS BY THE COURT.

Appellant objected to the Findings of Fact and Conclusions of Law as entered by the trial court and made a

motion to have same modified. The trial court refused to modify the Findings or Conclusions. The error claimed by appellant in the trial court's action is as follows :

- a. that the judgment entered is based on findings of fact and conclusions of law not in accordance with the record and should, therefore, be reversed.
- b. that the record does not and will not support the judgment entered and it should, therefore, be reversed; and
- c. that the findings of fact are not in accordance with the record and are not sufficient to support the judgment entered and the court should, therefore, have amended same.

CONCLUSION

Based on the foregoing argument and authorities, it appears clear that this court should reverse the decision and judgment of the District Court and should find the issues in favor of the plaintiff and should direct the lower court to enter judgment in favor of plaintiff and against defendants.

Respectfully submitted,

KIPP AND CHARLIER

D. GARY CHRISTIAN

*Attorneys for Plaintiff
and Appellant.*