

1983

**D. Dale Williams, Executive Director, Department Of Administrative Services, State of Utah, As Administrator of the Utah State Insurance Fund v. Allstate Insurance Company, William J. Bliss, Vera Bliss and the Second Injury Fund : Brief of Defendant-Appellant**

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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D. DALE WILLIAMS, Executive :  
Director, Department of :  
Administrative Services, :  
State of Utah, as :  
Administrator of the UTAH :  
STATE INSURANCE FUND, : Supreme Court No. 19289  
:  
Plaintiff-Appellant, :  
:  
vs. :  
:  
ALLSTATE INSURANCE COMPANY, :  
WILLIAM J. BLISS, VERA BLISS :  
and THE SECOND INJURY FUND, :  
:  
Defendant-Appellant. :

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BRIEF OF DEFENDANT-APPELLANT

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**FILED**

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BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a partial summary judgment entered on the 5th day of May, 1983, by Judge Judith Billings in the Third District Court in and for the District of Salt Lake County.

DISPOSITION BY THE LOWER COURT

The District Court Judge ruled that the appellee Allstate Insurance Company, was entitled to partial summary judgment on the question of whether or not the State Insurance Fund was entitled to reimbursement of \$18,720.00 paid into the Second Injury Fund upon the death of the appellee William J. Bliss and Veora Bliss, decedent, pursuant to an order of the Industrial Commission and

Utah Code Ann. Section 35-1-68.

RELIEF SOUGHT ON APPEAL

Appellant is asking this court to reverse the parties' summary judgement of the Third District Court and determine that pursuant to Utah Code Ann. Section 35-1-62, the State Insurance Fund is entitled to reimbursement of the \$18,720.00 it paid into the Second Injury Fund pursuant to Utah Code Ann. Section 35-1-68(2)(a).

STATEMENT OF FACTS

On March 30, 1980, Karen V. Bliss was fatally injured in an automobile accident which occurred on the airport road. (R.108) She died the following day at LDS Hospital after extensive measures were taken to save her life. (R.108)

At the time of her accident, Ms. Bliss was in the course of her employment, with the Airport Shuttle Parking, as a shuttle van driver. (R.108) Airport Shuttle Parking was insured by the Utah State Insurance Fund for worker's compensation purposes. (R. 108) As a result of Ms. Bliss' accident, the State Insurance Fund has paid medical and funeral benefits in the sum of \$10,131.45. (R. 108) The Utah State Insurance Fund, pursuant to an order of the Utah Industrial Commission and Utah Code Ann. Section 35-1-68 2(a), has also paid \$18,720.00 into the Second Injury Fund. (R. 109, 117) There is no dispute on this appeal regarding the State Insurance Fund's right to reimbursement on the medical and funeral benefits paid as the parties stipulated to that of the District Court. (R. 167)

In March of 1982, William J. and Veora Bliss filed a complaint for the wrongful death of their daughter, Karen V. Bliss, against the driver of the other vehicle, Sue Ellen Dart. (R. 132) In 1980, prior to the filing of the wrongful death action, the State Insurance Fund notified William J. and Veora Bliss, through their attorney, of the rights of the insurance carrier in a wrongful death cause of action and of the method of disbursement of proceeds recovered pursuant to Utah Code Ann. Section 35-1-63. (R. 120)

#### ARGUMENT

##### POINT I.

UTAH STATUTORY AND CASE LAW MAKE IT CLEAR THAT THE \$18,720.00 WHICH THE STATE INSURANCE FUND HAS PAID TO THE SECOND INJURY FUND IS "COMPENSATION"

When an employee with no dependents is killed in a job related accident, the Worker's Compensation Act requires the employer or its insurance carrier to pay the sum of \$18,720.00 into what is called the Second Injury Fund, which is maintained by the State Treasurer. The State Treasurer is regarded more or less as the banker or custodian of the Second Injury Fund. Wherever the Worker's Compensation Act refers to payments to the State Treasurer in reality, those are payments into the Second Injury Fund.

The Utah Supreme Court in Star v. Industrial Commission, 615 P.2d 436 (1980) defined compensation to include payments made to the Second Injury Fund:

"Compensation," as used in the amendment in the constitution, means the same as it is used and defined in the compensation act, i.e. any payment

required by the act to be paid to a workman or his dependents, or for their benefit, or into the State Treasury, for the special purpose of the compensation act. This includes disability payments death benefits, medical and hospital expenses burial expenses and payment to the State Treasury as provided by the act.  
(Emphasis added)

Id. at 438.

Therefore, the money the State Insurance Fund has paid into the Second Injury Fund was a "payment required by the Act to be made into the State Treasury." The only payments required by the Act to be made to the State Treasury are those payments such as the \$18,720.00 herein involved which an employer or its insurance carrier must pay to the Second Injury Fund. Indeed the Star decision dealt specifically with the provision of the Utah Worker's Compensation Act requiring the employer or its insurance carrier to make payment to the Second Injury Fund upon the death of an employee's wife or dependents, specifically payment of \$18,720.00 is required by Utah Code Ann. Section 35-1-68(2)(a),

(a) If the commission has made a determination that there are no dependents of the deceased, it may, prior to a lapse of one year from the date of death of a deceased employee, issue a temporary order for the employer or insurance carrier to pay into the second injury fund the sum of \$18,720. The \$18,720. shall be reduced by the amount of any weekly compensation payments paid to or due the deceased between the date of the accident and death. Should a dependency claim be filed subsequent to the issuance of such an order and, therefore, a determination of dependency is made by the commission, the award shall first be paid out of the sum deposited for credit to the second injury fund by the employer or insurance carrier before any further claim may be asserted against the employer or insurance carrier. In the event

no dependency claim is filed within one year from the date of death, the commission's temporary order shall become permanent and final. If no temporary order has been issued and no claim for dependency has been filed within one year from the date of death, the commission may issue a permanent order at any time requiring the carrier or employer to pay \$18,720. into the second injury fund. Any claim for compensation by a dependent must be filed with the commission within one year from the date of death of the deceased.

The Utah State Insurance Fund paid the \$18,720.00, which is the subject matter of this litigation, into the Second Injury Fund pursuant to this statute. The Star decision makes it undeniably clear that this \$18,720.00 was compensation payable under the Utah Worker's Compensation Act.

#### POINT II

PURSUANT TO UTAH CODE ANNOTATED SECTION 35-1-62, THE UTAH STATE INSURANCE FUND IS ENTITLED TO FULL REIMBURSEMENT FOR ANY AND ALL COMPENSATION PAID INCLUDING ANY AMOUNT PAID INTO THE SECOND INJURY FUND

The State Insurance Fund is entitled to full reimbursement of the \$18,720.00 it has paid into the Second Injury Fund in reference to Karen Bliss' death. Utah Code Ann. Section 35-1-62, which follows, makes this explicitly clear:

35-1-62. Injuries or death caused by wrongful acts of persons other than employer officer, agent, or employee of said employer-- Rights of employer or insurance carrier in Notice of intention to proceed against third party -- Right to maintain action not involving employee-employer relationship -- Disbursement of proceeds of recovery. When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of a person other than an employer, officer, agent, or employee of said

employer, the injured employee, or in case of death his dependents, may claim compensation and the injured employee or his heirs or personal representative may also have an action for damages against such third person. If compensation is claimed and the employer or insurance carrier becomes obligated to pay compensation, the employer or insurance carrier shall become trustee of the cause of action against the third party and may bring and maintain the action either in its own name or in the name of the injured employee, or his heirs or the personal representative of the deceased, provided the employer or carrier may not settle and release the cause of action without the consent of the commission. Before proceeding against the third party, the injured employee, or, in case of death, his heirs, shall give written notice of such intention to the carrier or other person obligated for the compensation payments, in order to give such person a reasonable opportunity to enter an appearance in the proceeding.

For the purposes of this section and notwithstanding the provisions of section 35-1-42, the injured employee or his heirs or personal representative may also maintain an action for damages against subcontractors, general contractors, independent contractors, property owners or their lessees or assigns, not occupying an employee-employer relationship with the injured or deceased employee at the time of his injury or death.

If any recovery is obtained against such third person it shall be disbursed as follows:

(1) The reasonable expense of the action, including attorneys' fees, shall be paid and charged proportionately against the parties as their interests may appear. Any such fee chargeable to the employer or carrier is to be a credit upon any fee payable by the injured employee or, in the case of death, by the dependents, for any recovery and against the third party.

(2) The person liable for compensation payments shall be reimbursed in full for all payments made less the proportionate share of costs and attorney's fees provided for

in subsection (1).

(3) The balance shall be paid to the injured employee or his heirs in case of death, to be applied to reduce or satisfy in full any obligation thereafter accruing against the person liable for compensation. (underlining added)

This statute, particularly subparagraph 2, clearly and unambiguously mandates reimbursement to the "person liable" for "compensation" in full. Utah Code Ann. Section 35-1-68(2)(a) and Star v. Industrial Commission, 613 P.2d 436, make it clear that the \$18,720.00 is "compensation". In this case, Karen Bliss' employer, through the State Insurance Fund, is the "person liable" for that compensation. Therefore, the Utah State Insurance Fund should be reimbursed in full for the \$18,720.00 which it has paid to the Second Injury Fund in conjunction with Karen Bliss' death. Utah Code Ann. Section 35-1-62 outlines the disbursement order in cases such as this in explicit detail thus that order should be amended only by the legislature if at all and not by Court decisions.

The District Court Judge relied upon Oliveras v. Caribou-Four Corners, Inc., 598 P.2d 1320 (1979). Undoubtedly Oliveras does impact upon third party actions under the Worker's Compensation Act. However, Oliveras does not deny the employer and/or the insurance carrier their statutory rights created by the clear language of Utah Code Ann. Section 35-1-62, to recover compensation expended as a result of the wrongdoing of a tortfeasor. The money that the State Insurance Fund has paid into the Second

Injury Fund constitutes a statutory special damage independent of the damages the heirs may claim on their own behalf. The State Insurance Fund would not have been required to pay the \$18,720.00 but for the wrongful doing of the tortfeasor.

Certainly, Oliveras prohibits the employer and/or the insurance carrier from divesting non dependant heirs of their general damages. However, it would be unreasonable to interpret Oliveras as denying the insurance carrier their statutory rights clearly defined by Utah Code Ann. Section 35-1-62. Those statutory rights are in reality an item of special damages. Such an interpretation of the decision, in essence, would create a cause of action on the one hand while rendering it remediless on the other. In addition, to permit that result would allow the tortfeasor a windfall benefit from his wrongdoing. In this case, the wrongdoing of the tortfeasor has resulted in a loss to the State Insurance Fund of \$18,720.00. This item of special damage is separate from the claims of the non-dependent heirs in this case and the State Insurance Fund's right to reimbursement should not be confused with the heirs' right to recover. The \$18,720.00 which the Utah State Insurance Fund has paid into the Second Injury Fund is a separate item of damage for which the tortfeasor is statutorily obligated to reimburse the Fund.

#### CONCLUSION

The Utah State Insurance Fund in the instant case is entitled to reimbursement for the \$18,720.00 which it has paid to the State Treasurer for deposit in the Second Injury Fund. Su-

payment to the State Treasurer is tantamount to a statutorily created special damage. Oliveras, limited the right of reimbursement only in the sense that the insurance carrier and/or the employer cannot divest non-dependent heirs of their general damages. Oliveras, however, cannot be read to completely eliminate the right of reimbursement of special damages as is clearly delineated in the Worker's Compensation Act. This interpretation of Oliveras insures the rights of the heirs under the wrongful death statute while also protecting the rights of the employers and/or insurance carriers created by the Worker's Compensation Act. Any other interpretation will permit the tortfeasor to escape the full consequences of his wrongdoing and, in reality, nullify Section 35-1-62. To adopt the interpretation of opposing counsel would amend the statute by court ruling rather than by legislative act.

Appellant, the Utah State Insurance Fund respectfully requests this court to reverse the Third Judicial Courts granting of partial summary judgment and enter an order entitling the Utah State Insurance Fund reimbursement from the tortfeasor for the \$18,720.00 which it has paid into the Second Injury Fund.

DATED THIS 13 Day of October, 1983.

BLACK & MOORE

BY James R. Black  
JAMES R. BLACK

BY Susan B. Diana  
SUSAN B. DIANA

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing BRIEF OF DEFENDANT was sent this 13th Day of October, 1983, to the following:

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