1970

South East Furniture and State Insurance Fund v. Industrial Commission Op Utah and Dean L. Barrett : Brief of Respondents

In the Supreme Court of the State of Utah

SOUTHEAST FURNITURE and
STATE INSURANCE FUND,
Plaintiffs-Appellants,

vs.

INDUSTRIAL COMMISSION OF
UTAH and DEAN L. BARRETT,
Defendants-Respondents.

Case No.
11816

BRIEF OF RESPONDENTS

Appeal from the Order of the Industrial Commission of the State of Utah.

GEORGE H. SPECIALE, of
SUMMERHAYS, KLINGLE &
COHNE
1010 University Club Building
Salt Lake City, Utah 84111
Attorneys for Defendant-Respondent

Dean L. Barrett
VERNON ROMNEY, Attorney
General of the State of Utah
State Capitol Building
Salt Lake City, Utah
Attorney for Defendant-Respondent
Industrial Commission of Utah

ROBERT D. MOORE, of
RAWLINGS, ROBERTS & BLACK
530 Judge Building
Salt Lake City, Utah 84111
Attorneys for Plaintiff-Appellants

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NATURE OF CASE

This action is based upon a claim by defendant, Dean L. Barrett, for compensation for injuries sustained in the course of his employment, pursuant to the provisions of Title 35, Chapter 1, Workmen's Compensation.

DISPOSITION OF THE CASE BY THE INDUSTRIAL COMMISSION

The Industrial Commission concluded that "the applicant [was] entitled to workmen's compensation benefits as a result of an accident arising out of or in the course of his employment by the [Plaintiff South East Furniture Company]."

RELIEF SOUGHT ON APPEAL

The Defendant submits that the ruling of the Industrial Commission should be affirmed.

STATEMENT OF FACTS

On November 10, 1966, defendant Barrett was driving his automobile in the vicinity of Tooele, Utah, pursuant to his employment with plaintiff, South East Furniture. At about the hour of 10:30 o'clock A.M. Barrett's automobile was involved in an accident with another automobile, which accident was determined not to be his fault. (R. 126) As a result of the accident, Barrett suffered extensive neck injuries and abrasion and puncture wounds. (R. 1, R. 75, R. 126)

Barrett subsequently filed a claim for workmen's compensation. (R. 8) The State Insurance Fund, which was the Workmen's Compensation Insurance carrier of Barrett's employer, paid medical expenses in the amount of $271.00 and compensation in the amount of $346.25 (R. 10), but denied additional liability on the ground that Barrett was covered by uninsured motorists' coverage on his private automobile insurance policy. (R. 8)

On December 27, 1967, more than one year subsequent to the date of the accident, and only after denial of additional liability by the State Insurance Fund, and

only after having unavoidably incurred some $1,364.59 in special damages and lost wages of $1,385.79 (R. 82), Barrett settled his claim based upon the uninsured automobile coverage with State Farm Insurance Company. (R. 96)

The neck injury he sustained being a continuing disability, Barrett then, on January 22, 1968, applied for a hearing to settle the industrial accident claim. (R. 8) His application was granted (R. 11), and the hearing was held April 10, 1968. (R. 15)

At the hearing Barrett testified to facts regarding his employment which tended to indicate that he was an employee of plaintiff South East Furniture. (R. 18 to 23) Mr. Barrett further testified to the injuries he sustained, indicating neck, chest and arm injuries. (R. 25) The record shows (R. 26) that Barrett had received no compensation from the other driver for the injuries. (R. 27)

An insurance policy secured and paid for by him (R. 26) included, among other provisions, "Uninsured Automobile Coverage." (R. 89, State Farm Mutual Automobile Policy, at page 5 thereof, Coverage U.)

The Referee held the decision of the commission in abeyance pending submission of various documents, including briefs of counsel, but indicated that "the question of law should be resolved primarily," (R. 71), whether

the applicant could recover Workmen's Compensation benefits in addition to the settlement under the uninsured Automobile Coverage. (R. 76, R. 114, R. 127)

Following submission of Applicant's Brief (R. 75 to 82) on April 10, 1968, and Defendant's Memorandum (R. 113 to 122) on September 24, 1968, the Industrial Commission, on June 3, 1969, entered its Findings of Fact and Conclusions of Law and Judgment. (R. 126 to 129) The Commission concluded "that the Applicant [was] entitled to be compensated for his losses under the compensation act notwithstanding any settlement reached on the insurance in question." (R. 128)

Whereupon, this appeal was taken.

ARGUMENT

POINT I

THE INDUSTRIAL COMMISSION PROPERLY CONCLUDED THAT THE APPLICANT WAS ENTITLED TO WORKMEN'S COMPENSATION BENEFITS NOTWITHSTANDING ANY CONTRACTUAL RECOVERY HE MAY HAVE HAD UNDER THE UNINSURED AUTOMOBILE COVERAGE PROVISION OF HIS PERSONAL AUTOMOBILE INSURANCE POLICY.

The plaintiff State Insurance Fund denied liability beyond the $617.25 originally allowed Barrett on the ground that Barrett's private insurer, State Farm Mutual, stood in the shoes of the tortfeasor whose acts resulted in injury to Barrett. On the basis of this position, the plaintiff concluded that State Farm Mutual was a third-party within the meaning of 35-1-62, Utah Code Annotated, 1953, and therefore a party against whom the plaintiffs became trustees of the cause of action. Since respondent had previously settled with State Farm on the basis of uninsured automobile coverage, plaintiff State Insurance Fund felt that it had been thereby foreclosed from pursuing the action against the thirty party tort feasor.

Plaintiff asserts to this court that Section 41-12-21.1 U.C.A., 1953, as amended, sets forth the *mandatory* requirement that all automobile liability policies must contain uninsured motorist coverage. (Plaintiff's Brief at 6) Plaintiff argues from that point that Barrett is in no different position, and has obtained no "different type of coverage than other drivers on our public highways." (Plaintiff's Brief at 6) Plaintiff's assertion reasonably states the correct language of the provision — so far as it goes. Plaintiff's studied omission of the language of the last sentence of that section cannot escape notice:

> "The named insured shall have the right to reject such coverage, and unless the named insured requests such coverage in writing, such

> coverage need not be provided in a renewal policy or a supplement to it where the named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer." 41-12-21.1 U.C.A., 1953 as amended.

Read with the preceding portion of the statement, this sentence clearly renders the requirement of uninsured motorist coverage permissive — it must be offered, but it need not be accepted. In addition, it need not even be offered "in a renewal policy or a supplement." Mandatory? Barrett freely and knowledgeably contracted and paid for uninsured motorist's coverage. His rights with respect to the policy were *ex contractu*, not *ex delicto*.

Another court has considered the legal relation of an insured and insurer insofar as uninsured motorist coverage is concerned. *In Booth v. Fireman's Fund Ins. Co.*, 253 La. 521, 218 So.2d 580, 28 ALR 3d, 573 (1969), the court discussed such coverage and its interpretation in other jurisdictions:

> "In an effort to afford protection to the innocent victim injured by an uninsured and financially irresponsible motorist, many states have enacted legislation requiring insurance companies to afford coverage, for an additional premium, within the general automobile liability insurance policy for loss to the insured occasioned by the negligence of the operator of an uninsured motor vehicle,"
>
> * * *

> The jurisprudence of other states interpreting similar statutes and the insurance coverage afforded under similar policy provisions has been uniform in concluding that the action by the insured against his insurer for damages suffered as a result of a collision wth an uninsured motorist is cotractual . . ." (Citing: *Hartford Accident & Indemnity Co. v. Mason,* 210 So.2d 475 (Fla.); *Schleif v. Hardware Dealer's Mutual Fire Ins. Co.,* 218 Tn. 489, 404 S.W.2d 490; *DeLuca v. Motor Vehicle Accident Indem. Corp.,* 17 N.Y.2d 76, 268 NY.S. 2d 289, 215 N.E.2d 482; and lesser courts in New York State)

The court said further:

> "The uninsured motorist provision closely resembles the policies of insurance which reimburse an insured for medical expenses or property damage resulting from an automobile accident . . .

The uninsured motorist provision is not insurance or indemnification for the uninsured motorist, *and the insurer does not stand in the shoes of the uninsured motorist who is the tort feasor."* (emphasis added) (Citing: Nationwide Mutual Ins. Co. v. Harleysville Mut. Cas. Co., 125 S.E.2d 840 (Va.); *Horne v. Superior Life Ins. Co.,* 123 SE2d 401 (Va.); *Drewry v. State Farm Mut. Automobile Ins. Co.,* 129 S.E.2d 681 (Va.); *Laird v. Nationwide Ins. Co.,* 134 S.E.2d 206 (So. C.); *Hill v. Seaboard Fire & Marine Ins. Co,* 374 SW.2d 606 (Mo.); *Dominici v. State Farm Mut. Automobile Ins. Co.* 390 P.2d 806 (Mont.); *Kivonac v. Healey,* 181 A.2d 634 (N.H.)

Although the *Booth* case examined the legal status of the uninsured motorist coverage for the purpose of determining which period of limitation of action applied, the cases last cited were noted for their decisions regarding the point in question; whether such coverage is contractual or otherwise.

In *Commissioners of State Ins. Fund v. Miller,* 166 N.Y.S.2d 777 (N.Y. 1957), 79 ALR 2d 1256, the court held "that the compensation carrier had no claim against the insurance proceeds under a statute giving it a lien against recoveries from third persons negligently injuring on employee." The court said the insured did not recover from the tortfeasor but received payment from his insurer, whose liability was contractual although based in part on the contingency of a third party's tort liability. Pointing out that its right to a lien would remain unimpaired if the insurer achieved a recovery from the tortfeasor and that it could pursue him if the employer and his insurer failed to act, the court said the compensation carrier was not entitled to the benefit of any insurance by which the employee chose to provide additional protection at his own expense.

Peterson v. State Farm Mut. Automobile Ins. Co., 393 P.2d 651 (Ore.) examined among other things, "the legislative purpose in creating *compulsory* uninsured motorist coverage," as noted in plaintiffs brief at page 8. (emphasis added) In holding that the Insurance Commissioner had no authority to approve uninsured motor-

ist coverage provisions which reduced the insurer's liability by the amount paid to the insured as workmen's compensation benefits, the court said:

> "The common law is clear that an injured party cannot recover his total damages from each of two or more tortfeasors. . . . But the common law regarding recovery of benefits from more than one source, other than the tortfeasor, is not so clear. In *Cary v. Burris* [citation omitted], we held that the injured plaintiff, a federal employee whose medical expenses had been paid by the United States Employees' Compensation Commission, could recover these same expenses from the defendant tortfeasor. *This holding is in accord with the law in most other jurisdictions.*"

Plaintiff's reliance on a friendly paragraph torn from the context which gives it meaning ignores the conclusion of the court in this case-in-point that an Industrial Commission cannot use uninsured motorist coverage as an excuse for avoiding or reducing payment of workmen's compensation benefits.

Plaintiff cites *Jones V. Morrison*, 284 F. Supp. 1016 (W.D. Ark. 1968), as supporting his contention that payment by an insurer pursuant to uninsured motorist coverage is equivalent to recovery against a third-party tortfeasor. In fact, the primary issue presented to the court was the question of apportionment of liability between two insurance carriers. The employee, who was admittedly covered by his personal policy of insurance,

was involved in an accident with an uninsured motorist while driving his employer's car which also was covered by uninsured motorist coverage. Pursuant to a comparative liability statute, the trial court apportioned liability and found ultimately that the employee was entitled to $15,000.00 which was to be paid by both insurers. Since each carrier had identical provisions limiting recovery under the uninsured motorist coverage to $10,000.00, the question of apportionment was raised to the appellate court. The court noted that each policy contained identical "other insurance" provisions:

> "5. Other Insurance: With respect to bodily injury to an insured while occupying an automobile not owned by a named insured under this endorsement, the insurance hereunder shall apply only as excess insurance over any similar insurance available to such occupant. . . ."

The provision continued with a statement regarding rights under uninsured motorist coverage, providing generally, that the insurer was liable only for any liability in excess of that amount provided by the limits of the "other insurance," including uninsured motorist coverage.

The court cited Appleman, Insurance Law and Practice, Vol. 8 Sec. 4914 pp. 400-402 for the proposition that the vehicle owner's insurer is primarily liable. The court said:

"This statement indicates, and the court agrees, that, as a general rule, the insurance on the vehicle involved is the primary insurance" insofar as there is "other insurance."

* * *

Therefore, it is the opinion of the court that [the employer's] uninsured motorist protection should be exhausted, and [the employee's insurer] should contribute to that extent necessary to satisfy the remainder of the judgment against the uninsured defendants."

The court examined an ancillary issue:

"Another contention which has been advanced subsequent to the earlier opinion and judgment is the statement by [the employer's insurer] in its Motion for Apportionment to the effect that recovery from the insurance companies by the plaintiff should be reduced by . . . the amount paid the plaintiff pursuant to the Workmen's Compensation Act. . . . [The employee's insurer] agrees; the court, however, does not.

The policies of both [insurers] provide that the uninsured motorist protection shall not inure directly or indirectly to the benefit of any workmen's compensation or liability benefits carrier. . . . The court is of the opinion that to give any effect of this provision would be to contravene the laws of the State of Arkansas.

Ark. Stat. Ann. Sec. 81-1340 provides as follows:

> 'Third party liability — (a) Liability unaffected. (1) The making of a claim for compensation against any employee shall not affect the right of the employee, or his dependents, to make a claim or maintain an action in court against any third party for such injury, but the employer or his carrier shall be entitled to reasonable notice and *opportunity to join* in such action. . . .' " (emphasis added)

Compare the Arkansas Statute with Utah's Statute:

> "When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of another person not in the same employment, the injured employee, or in case of death of his dependants, may claim compensation and the injured employee or his heirs or personal representative may 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. . . ." (emphasis added)

The general intent of the Arkansas statute *is not,* as asserted by plaintiff, is not the same as Utah's statute in regard to third party actions.

Utah's legislature has clearly vested an employer or insurance carrier with rights superior to those of the insured by making the compensation carrier *trustee* of

the cause of action. The Arkansas statute is permissive in merely entitling the employer or insurance carrier an "opportunity to join in such action." (Ark. Stat. Ann. Sect. 81-1340(a) (1))

The Jones court went on to say:

> "The judgment for the plaintiff is against the third party tortfeasors and, because they are uninsured against the two insurance companies. The insurance companies are not tortfeasors."

12 Couch on Insurance 2d, Sec. 45-650 at p. 585 was quoted by the court as saying:

> "The right of subrogation 'against any other party' given an employee against whom a claim has been made under the workmen's compensation law does not include the right which an injured employee has against the insurer under an uninsured motorist provision of a liability policy required by statute, and in view of the public policy and welfare aspects of the workmen's compensation law the employer's right of subrogation under such law against the negligent third party is superior to that of the insurer under the uninsured motorist law."

The Court noted that the decisions in *Horne v. Superior Life Ins. Co.*, 123 S.E. 2d 401 (1962 Va.), and *Commissioners of State Ins. Fund v. Miller*, 4 App. Div. 2d 481, 166 N.Y.S.2d 777, were supportive of the fore-

going statement but felt that "part of the opinion [in Horne] is in conflict with the applicable provisions of the [Arkansas] Workmen's Compensation Act."

The result of this case was that a Virginia decision could not be applied to an Arkansas statute to find that workmen's compensation payments should be deducted from the liability of the carriers of the uninsured motorist coverage.

Horne v. Superior Life Ins. Co., supra, is virtually on all fours with the instant case. Horne settled with his insurer under the terms of uninsured motorist coverage and subsequently executed a "Policy Holder's Release and Trust Agreemnt." Horne then filed a claim for workmen's compensation which was denied on the ground that he had destroyed his employer's rights of subrogation. The court, at p. 404, met the question head-on:

> "The question arises as to whether the right of subrogation 'against any other party' given the employer in the [pertinent statute] includes the rights that the employee has against the insurer under the uninsured motorist provision of a liability policy which is required by statute.
>
> The precise issue is one of first impression. It is not the purpose of the uninsured motorist law to provide coverage for the uninsured vehicle, but its object is to afford the insured *additional protection* in event of an accident (emphasis added). Here [the employee's insurer] does not

> stand in the shoes of . . . the uninsured motorist. Its policy does not insure [the uninsured motorist] against liability. It insures Mrs. Horne and others protected under the policy against inadequate compensation. [The insurer's] liability to its insured is contractual, even though it is based upon the contingency of a third party's tort liability, and Horne's employer . . . does not become a third party beneficiary under the insurance contract. . . . Mrs. Horne chose to provide, at her expense, additional protection under the uninsured motorist provision for herself and others protected thereby [sic] and not for the [employer] or its compensation carrier."

Justice Botein concluded similarly, in *Commissioners of the State Insurance Fund v. Miller, supra,* that while "the compensation carrier has a right to expect an injured employee to pursue whatever remedies he may have against a third-party tortfeasor, and if the employee fails to do so, the compensation carrier may protect its lien by pursuing his remedies for him . . . it has no right to expect an employee to supplement his common law remedies and protect the compensation carriers lien, by purchasing his own insurance."

This case, like *Horne, supra,* is substantially identical to the instant case. Miller claimed Workmen's Compensation benefits and attempted to sue the tortfeasor. Upon learning that the tortfeasor was an uninsured

motorist, he made a claim against his insurer pursuant to uninsured motorist coverage. The State Insurance Fund asserted a lien on the proceeds to the extent of the compensation benefits paid.

Meeting the argument of the compensation carrier, the court said:

> "The Fund argues that this makes no difference [that the employee did not recover from the tortfeasor, but received payment from his own insurer], that it has a lien on all tort recoveries, and that the defendant's insurer has agreed to stand in the shoes of the tortfeasor. Defendant's insurer cannot, however, be deemed the *alter-ego* of the tort-feasor. *It does not insure the tort-feasor against liability; it insures its policy holder against the risk of inadequate compensation for his compensable injuries.* (emphasis added). Its liability to defendant is contractual, although premised in part upon the contingency of a third party's tort liability."

The *Horne* and *Miller* cases, supra, deciding the exact question which is before this court, have both concluded that an employee can recover workmen's compensation benefits in addition to uninsured motorist coverage benefits; that the benefits derived from uninsured motorist coverage are a contractual obligation of the insurer; that the insurer does not stand in the shoes of the third party tort feasor; that uninsured motorist coverage does not inure to the benefit of the compensation

carrier; that uninsured motorist coverage is contingent compensation contracted for and paid by the insured to protect himself from the risk of inadequate compensation for compensable injuries.

POINT II

THE INDUSTRIAL COMMISSION PROPERLY CONCLUDED THAT DEFENDANT WAS ENTITLED TO WORKMEN'S COMPENSATION BENEFITS NOTWITHSTANDING THE EXECUTION OF A RELEASE OF CLAIM IN FAVOR OF DEFENDANT'S INSURER ON THE BASIS THAT PLAINTIFF WAS NOT THEREBY DENIED ITS RIGHT OF RECOVERY AGAINST THE THIRD PARTY.

Section 35-1-62, U.C.A., 1953, provides:

> "When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of another person not in the same employment, 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. . . ." (emphasis added)

This court, per Chief Justice Crockett, has recently construed this section in *Worthen v. Shurtleff and Andrews, Inc.*, 19 Utah 2d 80, 426 P. 2d 223. Though the issue was whether the State Insurance Fund was required to bear its proportionate share of expenses in an action brought by an injured employee against a third party, some general language respecting the statute is not inappropriate:

> "The basic purpose of this statute is that of making an equitable arrangement between an injured employee, and an insurer (or employer) who pays him workmen's compensation, with respect to a cause of action against a third party who injures the employee. It preserves the action to the employee, but it prevents him from having double recovery by requiring him to reimburse the insurer. It also gives the insurer the right to bring the action, but allows it only to reimburse itself and then pay any balance to the employee."

In this case, no recovery has been had against the third-party tortfeasor — in fact, neither the plaintiff nor defendant has brought suit against the tortfeasor. Defendant, in any event, has assigned *his own* cause of action to his own insurance carrier. His carrier, State Farm, now stands in exactly the same position as Bar-

rett stood prior to the execution of the "Release and Trust Agreement." According to the language of *Worthen,* supra, either State Farm or the State Insurance Fund, may bring suit against the third party tortfeasor. The statute might also be read more restrictively, to find that since "the employer or insurance carrier *shall* become trustee of the cause of action," (emphasis added)

neither the employee nor his assignee may independently maintain an action against the third party, the employee having once claimed workmen's compensation. The practical result is the same. The State Insurance Fund, in this case, has either the *sole* right to maintain an action, or the right to join in any action against the third party tort feasor based upon the injury to the employee.

The court in *Commissioners of State Insurance Fund v. Miller, supra,* arrived at the same conclusion based upon a statute giving the compensation carrier a lien on the proceeds of any recovery:

> "In the event that [the employee's] insurer, acting in [the employee's] name under the Trust Agreement provisions of the policy, subsequently achieves a recovery from the tortfeasor [the compensation carrier's] rights to a compensation lien thereon remain unimpaired. If [the employee's] insurer fails to act, the cause of action against the tortfeasor passes to [the compensation carrier] by operation of law. Absent any recovery from the alleged wrongdoer, [the compensation carrier]

> can have no lien on the sums received by the [employee pursuant to uninsured motorist coverage]."

Plaintiff's assertion that the State Insurance Fund is estopped, or foreclosed, or otherwise denied its right of suit against the third party tortfeasor "since the carrier knows the injured employee has assigned *all* right ,title and interest to another entity," is plainly erroneous. (emphasis added) Notwithstanding the language of the Release and Trust Agreement that Barrett shall "hold in trust for the benefit of the company all rights of recovery which *he* shall have . . ." (R. 96), it cannot be reasonably presumed that a private contract could foreclose rights statutorily granted by the legislature of the state. (emphasis added)

Having concluded, without support, that defendant is attempting to split his cause of action, plaintiff documents his position with strong authority. Respondent applauds the effort. In fact, there cannot here, be a splitting of the action. If State Farm sues the tortfeasor upon the basis of its assignment from respondent, it must reimburse the State Insurance Fund for Workmen's Compensation payments made to Barrett; if the State Insurance Fund sues the tortfeasor upon the basis of its statutorily granted trusteeship of the cause of action, it will be reimbursed from the proceeds for Workmen's Compensation payments made to Barrett. If one

sues, the other cannot — but in any event, the compensation carrier will be reimbursed, and the tortfeasor will be subjected to one suit only.

The horrifying vision of a "race to the courthouse," which plaintiff conjures up seems the most unlikely of events in such cases as these, in view of the fact that defendant here settled with his insurer only after long months of studied inaction by the compensation carrier.

POINT III

THE ORDER OF THE INDUSTRIAL COMMISSION WAS LAWFUL, PROPER, AND IN ACCORD WITH THE FACTS.

Section 35-1-20, U.C.A., 1953, provides that:

> "All orders of the commission within its jurisdiction shall be presumed reasonable and lawful until they are found otherwise in an action brought for that purpose, or until altered or revoked by the commission."

Justice Ellett recently stated the effect of this statute:

> "Our statute provides that findings of fact made by the Industrial Commission are conclusive and final and not subject to review. We have on many occasions said that if there is substantial

evidence to support the finding, we will not reverse. *Morley v. Industrial Commission*, 459 P.2d 212 (1969 Utah).

CONCLUSION

Respondent respectfully submits that the Industrial Commission correctly determined that Barrett was entitled to receive Workmen's Compensation benefits as well as the proceeds from his contracted-for uninsured motorist coverage; that plaintiff's right of subrogation against the third-party tortfeasor is superior to that of Barrett's insurer; that the Release and Trust did not negate plaintiff's right to bring suit against the third-party tortfeasor; and that Barrett "is entitled to be compensated for his losses under the compensation act notwithstanding any settlement reached on the [uninsured motorist coverage]."

Respectfully submitted,

George H. Speciale

SUMMERHAYS, KLINGLE AND COHNE

Attorneys for Defendants and Respondents