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SUBROGATION: PROPER PARTY PLAINTIFF IN ACTION AGAINST TORT-FEASOR

INTRODUCTION

"Subrogation" is the substitution of one person in place of another who possesses a rightful claim, so that the person substituted succeeds to the rights of the other in relation to the claim.[1] The doctrine of subrogation has its origin in the general principles of equity, and should be applied in accordance with the dictates of equity and good conscience.[2] Justice Cothran, writing the opinion in the South Carolina case of *Dunn v. Chapman*,[3] stated the four elements which must be met before the right of subrogation is gained:

> (1) that the party claiming it has paid the debt; (2) that he was not a volunteer, but had a direct interest in the discharge of the debt or lien; (3) that he was secondarily liable for the debt or for the discharge of the lien; (4) that no injustice will be done to the other party by the allowance of the equity.

With reference to insurers, the general rule is that on payment of a loss covered by insurance, the insurer is subrogated to all the rights which the insured would have against any other person responsible for the loss, whether or not such right of subrogation was stipulated in the contract.[4] It is not necessary that the insurance company specifically reserve the right of subrogation within the insurance policy, but most policies will be found to contain such a provision.[5] Subrogation is peculiar to contracts of indemnity, such as fire and theft, and liability insurance as distinguished from life insurance.

When the insurer has complied with all of the elements of subrogation, the question as to who should bring an action against the tort-feasor becomes one of major importance.

RULE AT COMMON LAW

When an insurer has paid to the insured the amount required by the policy, and has thereby become subrogated to the rights of the

1. BLACK'S LAW DICTIONARY 1595 (4th ed. 1951).
2. Prudential Investment Co. v. Connor, 120 S.C. 42, 112 S.E. 539 (1920).
3. 149 S.C. 163, 170, 146 S.E. 818 (1928).
4. Pelzer Manuf. Co. v. Sun Fire Office, 36 S.C. 213, 15 S.E. 562 (1891).
5. Typical of such provisions are lines 162 to 165 of the 1948 New York Standard Fire Policy which reads: "Subrogation — This company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this company."

insured against the person or corporation by whose tortious act the loss has been caused, the proper mode of enforcing such right of subrogation, would, at common law, be by an action in the name of the insured for the benefit of such insurance company.[6] Thus, when property was destroyed by a fire caused by the negligent emission of sparks from a locomotive, it was held that even after the insurer had indemnified the insured and become subrogated to his rights, the proper party plaintiff in an action against the tort-feasor, was the insured.[7] The rule that actions against the tort-feasor must be brought in the name of the insured may be explained by at least two theories. One theory is that since the wrongful act was single and indivisible, it gave rise to but one liability which must be enforced in a single action.[8] Another theory is that where there is an injury to property, the proper party plaintiff was the holder of the strict legal title. The common law did not recognize the beneficial or equitable interest of the subrogee.[9] The right of action remained in the insured whether or not the insured had been fully paid for his loss or the loss exceeded the insurance carried.[10]

When the insurer has become subrogated to the rights of the insured by payment of the loss, the insured becomes a trustee of the insurer to the extent of the payment and is bound to assign to the insurer the claim against the tort-feasor; if the insured fails to do so, the insurer as cestui que trust, may sue in the name of the insured as trustee.[11]

UNDER REAL PARTY IN INTEREST STATUTES: WHERE LOSS DOES NOT EXCEED INSURANCE PAID

One of the prime motives that prompted the various states to include "Real Party in Interest" statutes in their codes was the

6. Mobile Ins. Co. v. Columbia and G. Ry. Co., 41 S.C. 408, 22 S.E. 414, 44 Am. St. Rep. 725 (1894).
7. Home Mut. Ins. Co. v. Oregon Ry. and Nav. Co., 20 Or. 569, 26 Pac. 857, 23 Am. St. Rep. 151 (1891).
8. Hanton v. New Orleans and C. R. Light and P. Co., 124 La. 562, 50 So. 544 (1909); Kansas City M. and O. Ry. Co. v. Shutt, 24 Okla. 96, 104 Pac. 51, 138 Am. St. Rep. 870, 20 Ann. Cas. 255 (1909).
9. Mobile Ins. Co. v. Columbia and G. Ry. Co., 41 S.C. 408, 22 S.E. 414, 44 Am. St. Rep. 725 (1894); Pittsburgh C. C. and St. L. Ry. Co. v. Home Ins. Co., 183 Ind. 355, 108 N.E. 525 (1915).
10. Long v. Kansas City M. and O. Ry. Co., 170 Ala. 635, 54 So. 62 (1910); Anderson v. Miller, 96 Tenn. 35, 33 S.W. 615, 31 L.R.A. 604, 54 Am. St. Rep. 812 (1896) stated that the fact that the insured had been fully paid by the insurer was no defense to a tort-feasor in action by insured; Louisville and N. Ry. Co. v. Morse, 143 Ga. App. 110, 84 S.E. 428 (1915) held that the action should be by the insured for the use and benefit of the insurer.
11. Mobile Ins. Co. v. Columbia G. Ry. Co., 41 S.C. 408, 22 S.E. 414, 44 Am. St. Rep. 725 (1894); Sullivan et ux. v. Naiman et al., 130 N.J.L. 278, 32 A. 2d 589 (1943).

desire to abolish the common law rule which recognized as plaintiff only the person whose legal right had been infringed upon by the defendant. With the adoption of Real Party in Interest statutes, the equity rule which allowed the party with the beneficial interest to sue, became the prevailing law.[12] In *Globe and Rutgers Fire Ins. Co. v. Foil,*[13] where insurance paid covered the whole loss, Mr. Justice Fishburne stated:

> An action may be brought by the insurer against the third party causing the loss without taking an assignment of the owners claim or being formally subrogated to his rights; and it is immaterial whether such right of subrogation was stipulated in the contract or not.

In the leading North Carolina case of *Cunningham v. S.A.L. Ry. Co.,*[14] it was held that when the insured had been paid in full for the loss sustained, he could not sue the tort-feasor since he was not the real party in interest. This probably is the majority view and appears to rest upon the theory that when the insured has been paid the full amount of his loss, he no longer retains any interest in the cause of action and is therefore not a necessary party. In the South Carolina case of *Lucas v. Garret,*[15] even though the insured had been fully covered by insurance, he was allowed to bring the action against the tort-feasor as trustee for the use and benefit of the insurer. The suit was brought with the consent of the insurer. This method is permitted in several other jurisdictions. But this appears to be the only South Carolina case to allow such an action. The reasoning followed in one such case was stated by the court:

> It is really no concern of the tort-feasor in whose name the action is brought, just so he will not be compelled to pay twice for the same loss.[17]

Where the insured has been completely indemnified, the insurer may

12. Clark and Hutchins, *The Real Party in Interest*, 34 YALE L. J. 259 (1925) wherein it was said: "The aim of the codifiers was a unified system of law and equity."
13. 189 S.C. 91, 99, 200 S.E. 97 (1938).
14. 139 N.C. 427, 51 S.E. 1029 (1905).
15. 208 S.C. 292, 38 S.E. 2d 18 (1st Appeal); 209 S.C. 521, 41 S.E. 2d 212, 169 A.L.R. 660 (1947).
16. Cushman and Rankin Co. v. Boston and M. R. Ry. Co., 82 Vt. 309, 72 Atl. 1073, 18 Ann. Cas. 708 (1909); Humve v. McGinnis, 156 Kan. 300, 133 P. 2d 162 (1943).
17. Humve v. McGinnis, 156 Kan. 300, 133 P. 2d 162 (1943).

bring the action against the tort-feasor, and it is not necessary that he join any other, for he has the beneficial interest.[18]

Insurance companies which were bringing suits against the tort-feasor in their own names often found that juries were unduly sympathetic with the defendant and accordingly rendered small verdicts or none at all.[19] As a result of this treatment it became a common practice among insurers to advance to the insured his loss on the signing of an agreement to repay from proceeds of recovery from the tort-feasor.[20] This device is called a "loan receipt."[21] Mr. Justice Brandeis, writing an opinion upholding the validity of such an agreement, stated:

> It is credible to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice.[22]

In a recent South Carolina case in which the insured had been "loaned" the amount of its loss in an automobile accident and was bringing an action against the company responsible for the loss, it was held that the defendant could not have the insurer joined with plaintiff as a necessary party.[23] The defendant, in an action for injury to property, cannot introduce evidence at trial that the plaintiff has been compensated in part or in whole for his loss by insurance, if his answer did not raise the point that the action was not prosecuted by the real party in interest.[24]

UNDER REAL PARTY IN INTEREST STATUTE: WHERE LOSS EXCEEDS INSURANCE PAID

The general rule, which is adhered to in South Carolina, is stated to be:

> Under statutes providing that every action must be prosecuted in the name of the real party in interest, it is generally held

18. Aetna Ins. Co. v. Charleston and W. C. Ry. Co., 76 S.C. 101, 56 S.E. 788 (1906).
19. 2 RICHARDS, INSURANCE 694 (5th ed. 1952).
20. Phillips v. Clifton Manuf. Co., 204 S.C. 496, 30 S.E. 2d 146 (1944); See 6 S.C.L.Q. 112 (1953).
21. "A loan receipt is a device which permits insurers to speedily pay insured and yet press in court to recoup its losses from wrongdoer without insurer appearing by name, thereby avoiding some of the consequences of subrogation." Merrimack Manuf. Co. v. Lowell Trucking Corp., 46 N.Y. 2d 736, 182 Misc. 947 (1944).
22. Luchenback v. N. J. McCahan Sugar Ref. Co., 248 U.S. 139, 39 S. Ct. 53, 63 L. Ed. 170, 1 A.L.R. 1522 (1918). Quoted with approval in Phillips v. Clifton Manuf. Co., 204 S.C. 496, 30 S.E. 2d 146 (1944).
23. Phillips v. Clifton Manuf. Co., 204 S. C. 496, 30 S.E. 2d 146 (1944).
24. Brown v. Smith, 210 S.C. 405, 42 S.E. 2d 883 (1947); Jeffords v. Florence County, 165 S.C. 15, 162 S.E. 574 (1932).

> that if the insurance paid by an insurer covers only a portion of the loss, . . . the right of action against the wrongdoer who caused the loss remains in the insured for the entire loss, and the action must be brought by him in his own name.[25]

The reason for this rule has been declared by the South Carolina Supreme Court to rest upon the theory that the cause of action should not be split so that the defendant will be compelled to defend two actions for the same tort.[26] The position taken by South Carolina has not met with complete approval. One text writer questions the propriety of allowing the insured to maintain the action alone and seems to feel that the action should be brought by either the insured or insurer, on the joining of the other as plaintiff or defendant.[27]

In *Pringle v. Atlantic Coast Line Ry. Co.*,[28] the insured received partial compensation for his loss from his insurance carrier and then brought an action in his own name against the tort-feasor. The tort-feasor asserted by way of defense that the insured was not the proper party plaintiff, but rather the insurer was. The court, holding that the insurance company was not a necessary party, said:

> The right of an insurance company to proceed in its own name is a right which it alone can assert, and which cannot be asserted by the defendant tort-feasor.

Decisions are found that allow the insurer to bring the action in his own name even though the loss exceeds the insurance paid, but such cases allow this only where the insurer has paid part of the loss and the wrongdoer has paid the balance; then the insurer may maintain an action for the amount of his payment in his own name and for his own benefit against the tort-feasor.[29]

If the insured institutes an action against the tort-feasor to recover the difference between the amount paid by the insurer and the amount of the loss, the insurer should assert its claim to subrogation by a motion to be made a party and to have the complaint amended to state a cause of action in its favor.[30] Another method

25. 29 AM. JUR. 1016, approved in Pringle v. A.C.L. Ry. Co., 212 S.C. 303, 47 S.E. 2d 722 (1948).
26. Pringle v. A.C.L. Ry. Co., 212 S.C. 303, 47 S.E. 2d 722 (1948).
27. CLARK, CODE PLEADING 177 (2d ed. 1947).
28. 212 S.C. 303, 47 S.E. 2d 722 (1948).
29. Aetna Ins. Co. v. Charleston and W. C. Ry. Co., 76 S.C. 101, 56 S.E. 788 (1907); Powell and Powell v. Wake Water Co., 171 N.C. 290, 88 S.E. 426, Ann. Cas. 1917A, 1302 (1916).
30. Ex parte Insurance Co. v. Southern Ry. Co., 86 S.C. 52, 68 S.E. 21 (1910). However, if the insurer fails to make such a motion it seems that he

of bringing the action when the loss exceeds the amount of insurance paid is to allow the insurer and the insured to join together as party plaintiffs.[31] In *Farmers Mercantile Co. v. S.A.L. Ry. Co.*,[32] three insurance companies paid a total of $4,000, the amount of their policies, to the insured who sustained a $6,500 loss. It was held that the insurers were properly joined with the insured in a suit against the wrongdoer for the total loss.

In the South Carolina case of *Jeff Hunt Machinery Co. v. South Carolina Highway Dept.*,[33] plaintiff sustained damage to some road machinery due to a defect in ferry maintained as a part of the State highway system. After being compensated for its loss by insurance, plaintiff brought an action against the Highway Department under Section 5887 of the 1942 *Code of Laws of South Carolina* (Provision now contained in Section 33-229 through 33-235 of the 1952 *Code of Laws of South Carolina*). The court overruled defendant's contention that plaintiff was not the real party in interest, holding that the "Real Party in Interest" statute has absolutely no application to suits brought under Section 5887. In effect the court has held, that in actions under Section 5887 of the 1942 Code, the common law rule that actions must be brought in the name of the party who sustained the loss, will apply.

UNDER WORKMEN'S COMPENSATION ACT

South Carolina's Workmen's Compensation Act allows the employer or his insurance carrier to be subrogated to the rights of an injured employee, or to the rights of his dependents in case of death, when an award for injuries has been paid. The action may be maintained in the name of the employer's insurer, the injured party, or, in case of death, his dependents. The damages recoverable in such a case may exceed the award by the Industrial Commission; but when the amount recovered is in excess of the award, the excess

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will not be precluded from later maintaining a separate action against the tort-feasor to recover the insurer's portion of the loss. The tort-feasor could have compelled the joinder of the insurer with the insured in the action by the insured, but not having done so, the tort-feasor can not now complain that the cause of action has been split. Mobile Inv. Co. v. Columbia and G. Ry. Co., 41 S.C. 408, 22 S.E. 414, 44 Am. St. Rep. 725 (1894).

31. Mobile Ins. Co. v. Columbia and G. Ry. Co., 41 S.C. 408, 22 S.E. 414, 44 Am. St. Rep. 725 (1909).

32. 102 S.C. 348, 86 S.E. 678 (1915).

33. 217 S.C. 423, 60 S.E. 2d 859 (1950); See U. S. Casualty Co. v. State Highway Department of South Carolina, 155 S.C. 77, 151 S.E. 887 (1930).

is for the benefit of the employee, or, in case of death, his dependents.[34]

CONCLUSION

For the most part our decisions in South Carolina have established and followed a general rule as to the proper party plaintiff under the "Real Party in Interest" statute. But when the facts were peculiarly suited to a different or broadened rule, our court has not adhered to an "iron clad" rule. The *Lucas* and *Farmers Mercantile* cases are examples of such broadening. The recent South Carolina case of *Pringle v. A.C.L. Ry.*[35] offers a comprehensible review of the South Carolina law and undoubtedly will be helpful in deciding future cases.

FORREST K. ABBOTT.

34. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 72-124, 72-125, and 72-422; See Dawson v. Southern Ry. Co., 196 S.C. 34, 11 S.E. 2d 453 (1940); Elliott v. Armour and Co., 30 F. Supp. 367 (E.D. S.C. 1939).
35. 212 S.C. 303, 47 S.E. 2d 722 (1948).