WORKMEN'S COMPENSATION—SUBROGATION—LIABILITY OF UNINSURED MOTORIST CARRIER

In *Oelke v. Board of Regents of the University System of Georgia*,[1] the Georgia Supreme Court was faced with a case of first impression involving an unsettled area of Georgia law. The question was whether payments made to an insured under the contractual obligation of uninsured motorist coverage were subject to the statutory subrogation rights of a workmen's compensation carrier. The injuries were incurred while in the course of the insured's employment by the negligence of an uninsured motorist.

Merritt C. Oelke was killed in an automobile accident while riding as a guest passenger in an automobile owned and operated by Fred D. Holt, who carried uninsured motorist coverage with State Farm Mutual Insurance Company. In a suit against one motorist and the legal representative of the estate of another who was killed in the collision, Mrs. Oelke was awarded a judgment of $31,500 for the wrongful death of her husband. She then filed a complaint alleging that the judgment was unpaid, that the tortfeasors were uninsured, and that State Farm was indebted to her in the amount of $10,000 by reason of the uninsured motorist coverage available to her husband under the policy issued to Fred D. Holt. At this point, the Board of Regents moved to intervene as Merritt C. Oelke's employer alleging that his death arose out of and in the course of his employment and pursuant to an agreement approved by the State Board of Workmen's Compensation, it became obligated to make payments to Mrs. Oelke plus medical and funeral expenses for which it was subrogated against her net recovery by means of Ga. Code Ann. § 114-403 (Supp. 1970). The Superior Court of Clarke County refused to allow the intervention but was reversed by the Georgia Court of Appeals.[2] The Georgia Supreme Court unanimously reversed the decision of the Court of Appeals and held that the employer was not entitled to subrogate.

The original Georgia Workmen's Compensation Act,[3] enacted in 1920, made no provision for subrogation;[4] therefore, the injured employee could collect compensation from the employer and also maintain a negligence action against the third-party tortfeasor.[5] A 1922

1. 226 Ga. 310, 174 S.E.2d 920 (1970).
2. 120 Ga. App. 667, 172 S.E.2d 183 (1969).
3. Ga. Laws, 1920, p. 167.
4. Atlantic Ice & Coal Corp. v. Wishard, 30 Ga. App. 730, 119 S.E. 429 (1923).
5. Athens Ry. & Electric Co. v. Kenney, 160 Ga. 1, 127 S.E. 290 (1924).

amendment[6] was added, attempting to give the employer the right of subrogation against the third-party tortfeasor for the amount of compensation paid based on the creation of a "legal liability" in the third-party. But since the recovery was contingent upon a showing of "legal liability," the purpose of the amendment could be defeated by the employee compromising his negligence action without an admission of legal liability on the third-party's part. Thus the employer would not be entitled to a set-off or subrogation and the employee could recover twice.[7]

The Legislature tried to correct the situation in 1937 with another amendment[8] which removed the need to show "legal liability." The act as amended was comprised of two sentences. The first sentence stated that when payment was made to the injured employee by someone other than the employer, the employee or beneficiary could still institute proceedings both against that person to recover damages and against the employer for compensation, but the amount of compensation from the employer to which he was entitled would be reduced by the amount of damages recovered. The second sentence entitled the employer to be subrogated to the employee's right of recovery against the tortfeasor for reimbursement to the extent of the compensation paid by the employer. This amendment was short lived. In 1940 the Georgia Supreme Court held that the part of the first sentence allowing the employee to sue the tortfeasor after having accepted payment from him, permitted the employee to recover from the tortfeasor twice and thus violated the due process clauses of the state and Federal Constitutions.[9] The court also voided the entire second sentence because the employer's subrogation right was against the person making payment to the employee, and under the amended act the payment had to be made before the subrogation right arose. To allow the subrogation would permit recovery on an extinguished cause since the employees right ended with the accepted payment and the employer has no greater right than the employee. Thus the employer's subrogation right ended with the employee's accepted payment.

With the voided parts of the amended act removed, what was left was nonsense. As D. Meade Feild, a recognized authority on Georgia Workmen's Compensation law stated:

> Obviously the remaining language has little to do with subrogation or

6. Ga. Laws, 1922, p. 185; GA. CODE ANN. § 114-403 (Rev. 1956).
7. American Mut. Liab. Ins. Co. v. Wigley, 179 Ga. 764, 177 S.E. 568 (1934).
8. Ga. Laws, 1937, p. 528.
9. Lloyd Adams, Inc. v. Liberty Mut. Ins. Co., 190 Ga. 633, 10 S.E.2d 46 (1940).

> with protecting the employer in anyway whatsoever. This fact, together with the general meaninglessness of the valid language made little effort necessary in order to usher in a decade of doubt.[10]

The right of subrogation was uncertain for the next twelve years until *Liberty Mutual Insurance Co. v. Crist*.[11] There the court held that "the law today is the same as it was prior to the purported amendment contained in the act of 1937."[12] Thus, following *Crist*, subrogation was once again based on a showing of "legal liability."

It was 1963 when the General Assembly next acted, adopting an amendment[13] which gave the employer the right of subrogation whenever the claim against the third-party tortfeasor by the employee was settled by either judgment or compromise. In 1965 the amendment withstood the constitutional attack of due process as the Georgia Supreme Court sidestepped the issue and using the "benefit theory" held that when an employee voluntarily subjects himself to the Workmen's Compensation Act and accepts the benefits of it, he has waived any privilege he may have had to attack its constitutionality and will be estopped from doing so.[14]

> Now, after forty-two years of discouragement, even though it may rest on the thin support of the "benefit theory," we have made a short step toward the proper development of subrogation as a place of workmen's compensation.[15]

With the employer's right of subrogation thus firmly established in Georgia, *Oelke* raised the question of how far such a right extends. Is the employer subrogated to the employee's right of recovery against the third-party tortfeasor based only on the tort of negligence, or does such right of subrogation extend to the employee's claim against an uninsured motorist carrier which has been recognized as a purely contractual recovery?[16]

One of the earlier cases dealing with this question was the New York case of *Commissioners of the State Insurance Fund v. Miller*.[17] In a

10. Feild, *Annual Survey of Workmen's Compensation*, 5 MERCER L. REV. 186, 187 (1953).

11. 86 Ga. App. 584, 71 S.E.2d 910 (1952). *See also* United States Cas. v. Watkins, 211 Ga. 619, 88 S.E.2d 20 (1955).

12. *Id.* at 587, 71 S.E.2d at 912.

13. Ga. Laws, 1963, pp. 141, 145.

14. Senters v. Wright & Lopez, Inc., 220 Ga. 611, 140 S.E.2d 904 (1965).

15. Feild & Feild, *Annual Survey of Workmen's Compensation*, 17 MERCER L. REV. 270, 290 (1965).

16. Thompson v. Milam, 115 Ga. App. 396, 154 S.E.2d 721 (1967).

17. 4 A.D.2d 481, 166 N.Y.S.2d 777 (1957).

similar situation to the present case that court held that the workmen's compensation carrier of the employer was not subrogated to the employee's right of recovery against the uninsured motorist carrier. In so holding, it construed their subrogation statute, which provided for a recovery against "such other," to mean recovery against the tortfeasor. Although it was argued that the uninsured motorist carrier had agreed to stand in the tortfeasor's shoes, the court reasoned that the insurer is not the alter ego of the tortfeasor. It insures the policyholder against loss from the negligence of uninsured motorists, and does not insure the tortfeasor against his liability. The Court also stated that the workmen's compensation carrier could not expect the employee to expend his own money to provide extra protection for himself through uninsured motorist coverage and thereby supplement the workmen's compensation carrier's statutory lien where the liable third-party was uninsured. It is important in this case that the uninsured motorist coverage against which the subrogation was sought, contained an exclusion which stated specifically that the insurance would not inure directly or indirectly to the benefit of any workmen's compensation carrier. While not being controlling, this exclusion was given considerable weight.

In *Horne v. Superior Life Insurance Co.*[18] the Virginia Supreme Court adopted the ideas of *Miller* and held no subrogation for the workmen's compensation carrier. However, it is most important to note that, while the court interpreted their subrogation statute referring to recovery from "any other parties" as applying to tortfeasors, the case turned on the fact that Virginia's uninsured motorist statute states that uninsured motorist coverage cannot be used to protect the employer from liability under any workmen's compensation law.

Thus the *Miller* and *Horne* cases involved either an insurance policy exclusion or a state statute which specifically prohibited the insurance payments from benefiting a workmen's compensation carrier. Subrogation was refused and, in effect the employee was allowed a double recovery.

More recently, *Jones v. Morrison*[19] allowed the workmen's compensation carrier to be subrogated to the employee's contractual right of recovery against the uninsured motorist carrier despite the fact that the coverage contained an exclusion similar to the one in *Miller* which prohibited the payments from inuring to the benefit of a workmen's compensation carrier. The court interpreted the Arkansas subrogation statute, which provided recovery against "any third party,"

18. 203 Va. 282, 123 S.E.2d 401 (1962).
19. 284 F. Supp. 1016 (W.D. Ark. 1968).

as including contractual recoveries when it stated that any recovery is in the nature of compensation regardless from whom received. It also commented that:

> When an injured party recovers *on account of his injuries*, regardless of from which third party, he has been compensated and having already paid, the compensation carrier is entitled to reimbursement to the extent provided in the Act.[20]

This decision was affirmed in *Boehler v. Insurance Company of North America*[21] where it was stated that the Arkansas subrogation statute[22] preserves the common law tort of the employee but does not limit the workmen's compensation carrier's right of subrogation to tort actions against the third-party tortfeasors. It also reaffirmed the previous holding in *Jones* that the uninsured motorist carrier was a "third-party" within the meaning of the subrogation statute.

The Georgia Court of Appeals concluded that these outside authorities turn on language not present in the Georgia Workmen's Compensation Subrogation[23] and Uninsured Motorist statutes,[24] but did find the reasoning of the two Arkansas cases to be "most persuasive." In reaching its decision allowing the subrogation, the court reasoned that the Georgia Workmen's Compensation Subrogation statute is based on another's liability to pay damages and that that liability is not expressly limited to tort liability. Since it was not expressly limited, the court decided subrogation should not be restricted to the non-contractual recovery against the tortfeasor as distinguished from the contractual recovery against the uninsured motorist carrier, despite the fact that the contractual liability of the carrier is dependent on a determination of the legal liability of the uninsured tortfeasor. The court also commented that there is no provision in the Georgia uninsured motorist law which permits limiting the coverage to that over and above compensation received or payable under the workmen's compensation law.

The Georgia Supreme Court in reaching its decision based on "the application of fundamental principles and without resort to outside authority,"[25] reasoned that the employer's subrogation right was dependent upon the liability of the third-party to the employee. In the

20. *Id.* at 1022.
21. 290 F. Supp. 867 (E.D. Ark. 1968).
22. ARK. CODE ANN. § 81-1340 (a, b) (1959).
23. GA. CODE ANN. § 114-403 (Supp. 1970).
24. GA. CODE ANN. § 56-407.1 (Supp. 1970).
25. 226 Ga. at 310, 174 S.E.2d at 921.

previous suits such liability was based in tort and, since the uninsured motorist carrier's liability is based on a contractual obligation it does not stand in the place of the third-party tortfeasor. Therefore, the payments made by it are not payments made by one liable to pay damages to the injured party and do not come within Georgia Code section 114-403 which gives the employer the right of subrogation against one liable to pay damages on account of the employee's injuries. In effect, this allowed the injured employee a double recovery for the same injuries. In so ruling, the court went against what it previously had determined was the purpose of the subrogation statute, by providing a means for the employer to recoup his losses, preventing double recovery by the employee, and accomplishing substantial justice.[26] And it is recognized that occassionally the strong policy of avoiding double recovery is invoked to reach a different result from that thought to be required by a literal or technical interpretation of statutes or insurance policies.[27]

It should be noted also that the Georgia Uninsured Motorist statute was adopted in 1963, the same year that the Workmen's Compensation Subrogation statute was amended, finally establishing subrogation rights on the part of the employer. At that time there was no attempt to prevent workmen's compensation subrogation against the mandatory uninsured motorist coverage. In 1968 the uninsured motorist statute was amended to allow the insurance carriers, in their uninsured motorist coverage, to specifically exclude payments made by any other property or physical damage insurance to the insured for the same injury.[28] While providing for these exclusions, the legislature had ample opportunity to permit the insurance companies to include exclusions and set-offs for the workmen's compensation insurance if it had not desired for the workmen's compensation carrier to be able to subrogate against the uninsured motorist carrier and thus prevent the double recovery now allowed under *Oelke*. The basic philosophy of avoiding double recovery was adopted in the Georgia Workmen's Compensation Act,[29] however, until the present it had been applied only to cases limited to the tort recovery against the third-party tortfeasor and not to cases involving recoveries against insurance carriers. In view of the legislature's ample opportunity and obvious failure to specifically disallow workmen's compensation subrogation in cases like the present, should not this basic

26. S. R.R. v. Overnite Transportation Co., 223 Ga. 825, 830, 158 S.E.2d 387, 391 (1967).
27. 2 LARSON, WORKMEN'S COMPENSATION LAWS, § 71.20 at 169 (1970).
28. GA. CODE ANN. § 56-407.1 (g.1) (Supp. 1970).
29. Travelers Ins. Co. v. Houch, 118 Ga. App. 154, 162 S.E.2d 781, 782 (1968).

underlying philosophy be carried over into this new area until the legislature shows that it intended otherwise?

However, since the Georgia Supreme Court has so ruled, a person may now purchase as much uninsured motorist coverage as he can economically afford; and, should he become injured by the negligence of an uninsured motorist while he is within the course of his employment, his injuries will be compensated twice. If the trend continues, it is reasonably forseeable that a person may be allowed to purchase uninsured motorist, medical, health and disability and any other insurance available to him and simply await his windfall accident, thereby placing himself in a position to recover from as many sources as he has paid premiums.[30] Such could lead to large scale collusion and fraud with the result that insurance premiums would skyrocket beyond the reach of practicability.

SAM B. SIBLEY, JR.

30. *See Travelers Ins. Co. v. Williams*, 119 Ga. App. 414, 167 S.E.2d 174 (1967), where policy provisions against "stacking" of uninsured motorist coverages were held void thus allowing a separate recovery for each policy. *Also see Phillips v. State Farm Mut. Auto. Ins. Co.*, ____ F.2d ____ (No. 29661) (5th Cir., January 25, 1971), where payments made under medical payments coverage were denied a set-off against uninsured motorist coverage in the same policy despite a provision to the contrary, thus allowing a separate recovery for each.