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ing time-honored legal concepts of negligence, proximate cause, and jury function to meet special needs in FELA cases.

LUCIUS W. PULLEN

### Parties—Joinder—Partially Subrogated Insurance Companies

The ultimate question decided in the principal case<sup>1</sup> was, "Where the owner of an insured automobile brings an action for damages to his automobile and for injury to his person against the supposed tort-feasor whose negligence allegedly caused the damage and injury, may the court, on motion of the supposed tort-feasor, bring into the case as an additional party an insurance company which has indemnified the owner for *only a part*<sup>2</sup> of the damage to the automobile?"<sup>3</sup> It was answered in the affirmative.

The court had never faced that precise question squarely. This is, at least, partially understood when it is remembered that: "It can very rarely happen that making an additional party will be a serious prejudice, and hence such orders are usually discretionary and not reviewable."<sup>4</sup> unless the exercises of discretion by the court is refused upon the ground that it has no power to grant the motion, in which case the refusal is reviewable.<sup>5</sup> Any understanding thus gained fades, however, with the realization that the party question may properly be included in

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Thus, the workmen's compensation acts cover *all* accidental injuries connected with the employment, but with an unreasonably low ceiling on the amount recoverable, while FELA has no ceiling but does not cover all work-incurred injuries. See *Baker v. Atlantic C. L. R. R.*, 232 N. C. 523, 61 S. E. 2d 621 (1950), *cert. denied*, 340 U. S. 939 (1951) (railroad not liable for death of repairman where the motor car on which he was riding hit a dog and was wrecked); *Moore v. Chesapeake & O. Ry.*, 184 F. 2d 176 (4th Cir. 1950), *affirmed*, 340 U. S. 573 (1951) (railroad not liable where brakeman fell from engine and was killed in an unexplained accident); *A Survey of Statutory Changes in North Carolina in 1951*, 29 N. C. L. Rev. 351, 428 (1951). The suggested federal workmen's compensation act should arise at the equitable point of convergence of the Federal Employer's Act and the state workmen's compensation acts.

<sup>1</sup> *Burgess v. Trevathan*, 236 N. C. 157, —S. E. 2d— (1952).

<sup>2</sup> Italics author's.

<sup>3</sup> *Burgess v. Trevathan*, 236 N. C. 157, 159, —S. E. 2d— (1952).

<sup>4</sup> *Bernard v. Shemwell*, 139 N. C. 446, 447, 52 S. E. 64 (1905). The inference is that the court did not consider premature and fragmentary an appeal from an order making a new party where such order was on its face prejudicial. See also: *Raleigh v. Edwards*, 234 N. C. 528, 67 S. E. 2d 349 (1951); *Service Fire Ins. Co. v. Horton Motor Lines Inc.*, 225 N. C. 588, 35 S. E. 2d 879 (1945); *Home Loan and Ins. Co. v. Locker*, 214 N. C. 1, 197 S. E. 555 (1938); *Morgan v. Turnage Co., Inc.*, 213 N. C. 425, 196 S. E. 307 (1938); *Choate Rental Co. v. Justice*, 212 N. C. 523, 193 S. E. 817 (1937); *Wilmington v. Board of Education*, 210 N. C. 197, 185 S. E. 767 (1936); *Goins v. Sargent*, 196 N. C. 478, 146 S. E. 131 (1929); N. C. GEN. STAT. §§ 1-163, 173 (1943).

<sup>5</sup> *Gilchrist v. Kitchen*, 86 N. C. 20 (1882). See also: *Guy v. Baer*, 234 N. C. 276, 67 S. E. 2d 47 (1951); *Smith v. New York Life Insurance Co.*, 208 N. C. 99, 179 S. E. 457 (1935); *Life Ins. Co of Va. v. Edgerton*, 206 N. C. 402, 174 S. E. 96 (1934).

an appeal after judgment.<sup>6</sup> In the principal case the court dismissed the appeal from an order making the insurer a party, but, nevertheless, exercised its discretionary power to express an opinion<sup>7</sup> on the question of substance.<sup>8</sup> In its simplest form that question becomes, is an insurer, in such a case, a proper party? Perhaps by analogy to our court's view of the liability insurance cases, in which "evidence that a defendant carried indemnity insurance is incompetent,"<sup>9</sup> some attorneys and, perhaps, some trial judges have reasoned or assumed a negative answer.

This concept could not have stemmed from statutory construction. On the contrary, our statutes provide in express terms that "all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, either jointly, severally, or in the alternative,"<sup>10</sup> and that "all persons may be made defendants, jointly, severally, or in the alternative, who have, or claim, an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the question involved."<sup>11</sup>

Our statute which specifies that "every action must be prosecuted in the name of the real party in interest"<sup>12</sup> is, by its language, pertinent only in that it requires the presence of an insurer where subrogation is complete<sup>13</sup> or where the insured has relinquished all his beneficial interest.<sup>14</sup> It does not, on its face, preclude joinder of an insurer as a proper party.

Nor do the cases support this apparent misconception of the law.

In *Powell v. Water Co.*<sup>15</sup> the following principles were said to be established: (1) The right of action to recover damages from the tort-feasor is in the insured, and this action is indivisible. (2) Upon payment of the insurance the insurer is subrogated<sup>16</sup> to the rights of the insured as against the tort-feasor to the extent of such payment. (3) Full payment of the loss by the insurer results in an equitable assignment of the

<sup>6</sup> *Raleigh v. Edwards*, 234 N. C. 529, 67 S. E. 2d 349 (1951); *Service Fire Ins. Co. v. Horton Motor Lines, Inc.*, 225 N. C. 588, 35 S. E. 2d 879 (1945); *Wilmington v. Board of Education*, 210 N. C. 197, 185 S. E. 767 (1936); *Bernard v. Shemwell*, 139 N. C. 446, 52 S. E. 2d 64 (1905).

<sup>7</sup> *Cement Co. v. Phillips*, 182 N. C. 437, 109 S. E. 257 (1921); *Milling Co. v. Finlay*, 110 N. C. 412, 15 S. E. 4 (1892).

<sup>8</sup> See text at note 3.

<sup>9</sup> *Bell v. Panel Co.*, 210 N. C. 813, 814, 188 S. E. 621 (1936). For an interesting discussion of the underlying rationale of this view see, Baer, *The Relative Roles of Legal Rules and Non-Legal Factors in Accident Litigation*, 31 N. C. L. REV. 46, 55 (1952).

<sup>10</sup> N. C. GEN. STAT. § 1-68 (1943).

<sup>11</sup> N. C. GEN. STAT. § 1-69 (1943).

<sup>12</sup> N. C. GEN. STAT. § 1-57 (1943).

<sup>13</sup> *Cunningham v. Seaboard R. R.*, 139 N. C. 437, 51 S. E. 1029 (1905).

<sup>14</sup> *Powell v. Water Co.*, 171 N. C. 290, 88 S. E. 426 (1916); *Underwood v. Dooley*, 197 N. C. 100, 147 S. E. 646 (1929).

<sup>15</sup> 171 N. C. 290, 88 S. E. 426 (1916).

<sup>16</sup> *Id.* at 296, 88 S. E. at 429, for a discussion of the rationale underlying subrogation in regard to insurance contracts. See also *Lumberman's Ins. Co. v. Southern Ry.*, 179 N. C. 255, 102 S. E. 417 (1920).

whole claim, which may thereafter be prosecuted in the name of the insurer. (4) Partial payment of the loss by the insurer results in a partial assignment only, and as the action is indivisible, it must be brought in the name of the insured. (5) A release by the insured does not extinguish the right of subrogation.

From these principles the court concluded that where the insured settles with the tort-feasor for that portion of the loss not paid him by the insurer, the cause of action would be in the insurer, for the reason that the insured has parted with all his beneficial interest in the right of action. Thus, the insurer became the real party in interest, a necessary party to the action.

In *Underwood v. Dooley*,<sup>17</sup> the plaintiff sued for personal injuries sustained in an automobile accident. The defendant moved for dismissal on the grounds (1) that there was, at the date of the commencement of this suit, pending against him in another court of competent jurisdiction a suit for damages occasioned by the same accident and to an automobile belonging to the plaintiff, said suit having been brought by an insurer who had paid the plaintiff in full for damages to his automobile, and (2) that, since the commencement of this action, a final judgment had been rendered in said action against the defendant, which he has paid and fully satisfied. The motion was denied, and on appeal, the court, recognizing the principle that two actions on the same cause and between the same parties will not lie,<sup>18</sup> affirmed the order denying the motion. The court necessarily adopted the rule that an indivisible cause of action may be divided by acts of the parties.<sup>19</sup>

In *Service Fire Ins. Co. v. Horton Motor Lines, Inc.*,<sup>20</sup> an insurer which had paid the insured in part only for damages to his automobile,<sup>21</sup> without alleging affirmatively that it had fully paid the insured's claim, brought suit to recover from the wrong-doer. The defendant demurred on the ground that the action was indivisible and could not be brought by the

<sup>17</sup> 197 N. C. 100, 147 S. E. (1929).

<sup>18</sup> "Where an action is instituted, and it appears to the court by plea, answer or demurrer that there is another action pending between the same parties, and substantially on the same subject matter, and that all material questions and rights can be determined therein, such action will be dismissed." *Alexander v. Norwood*, 118 N. C. 381, 382, 24 S. E. 119 (1896). See also: *Cameron v. Cameron*, 235 N. C. 82, 68 S. E. 2d 796 (1951); *Dwiggins v. Bus Co.*, 230 N. C. 234, 52 S. E. 2d 892 (1949).

<sup>19</sup> In cases not involving insurance, personal injuries and property damages sustained by the same individual in the same accident give rise to a single and indivisible cause of action. *Underwood v. Dooley*, 197 N. C. 100, 147 S. E. 646 (1929); *Barcliff v. Southern R. R.*, 176 N. C. 39, 96 S. E. 644 (1918); *Eller v. Norfolk C. and N. W. R. R.*, 140 N. C. 140, 52 S. E. 305 (1905).

<sup>20</sup> 225 N. C. 588, 35 S. E. 2d 879 (1945).

<sup>21</sup> The complaint alleged that before and after the collision the automobile was worth \$600 and \$136.50 respectively. It follows that the damage was \$463.50. The insurer paid the owner \$413.50, thereby indicating a "\$50 deductible" situation; however, the court did not recognize this as conclusive that the cause had been split and, therefore, not maintainable.

insurer, whereupon, and before a ruling on the demurrer, the insurer moved that the insured be made a party. On appeal from an order allowing the motion, the court affirmed. Here, by implication at least, the court sanctions the joinder of insurer and insured in a *partial subrogation* situation.<sup>22</sup>

From these cases<sup>23</sup> and the pertinent statutes<sup>24</sup> it becomes apparent that there has been no valid basis for 'doubting a trial judge's discretionary power to grant a motion to join insurer and insured in cases of the nature presented by the principal case. It should be noted that such joinder is still within the discretion of the trial judge. The insurer is a proper party, but not a necessary party. However, in the principal case the court seems to recommend, as well as authorize, such joinders.<sup>25</sup>

While apparently holding that a partially subrogated insurer may be joined as either plaintiff or defendant at the instance of either the wrongdoer or the insured, the court observed that the most effective procedure in such a situation would be to move that the insurer "be made an additional party defendant and required to answer, setting up its claim arising through subrogation."<sup>26</sup>

Also, the court said that "the insured may be properly joined as a party defendant under G. S. 1-69 even in an action where the insurance company sues the tort-feasor to enforce subrogation on the theory that the insured has been indemnified by it for the full amount of the loss."<sup>27</sup> Quoting from a Wisconsin case,<sup>28</sup> the court said this was true because "it frequently is not ascertainable until the verdict establishes the amount of the damages whether insurer is sole or partial owner of the cause of action, since, if the amount of damages set by the jury is less than the insurance paid, insurer is the sole owner, whereas, if the amount is greater, insurer is only a partial owner."<sup>29</sup> Such joinder will, no doubt, expedite the trial and final settlement; however, if the insured has, in fact, accepted settlement in full, the reason adopted by the court is, in the opinion of the author, unsound. It is inconsistent with the theory upon which such a suit is brought, that is, that the insurer has paid the in-

<sup>22</sup> For an identical result see *Lumberman's Ins. Co. v. Southern Ry.*, 179 N. C. 255, 102 S. E. 417 (1920). For comment approving such joinder see *McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES* § 218 (1929).

<sup>23</sup> *Supra* at notes 15, 17 and 20.

<sup>24</sup> *Supra* at notes 10, 11 and 12.

<sup>25</sup> The court cited *Equitable Life Assurance Society v. Basnight*, 234 N. C. 347, 67 S. E. 2d 390 (1951) as authority for the proposition that the insurer had a direct and appreciable interest in the subject matter of the action, and by reason thereof was a proper party to the action. In that case the court strongly recommended the joinder of parties who were not necessary parties but who had an ascertainable interest in the subject matter of the controversy.

<sup>26</sup> *Burgess v. Trevathan*, 236 N. C. 157, 162, —S. E. 2d— (1952).

<sup>27</sup> *Id.*

<sup>28</sup> *Patitucci v. Gerhardt*, 206 Wis. 358, 240 N. W. 385 (1932).

<sup>29</sup> *Id.* at 363, 240 N. W. at 386.

sured *in full* for the amount of the loss. Furthermore, the probability is remote that the insurer, in such a case, would pray for 'damages in excess of the amount paid the insured. To do so would, it seems, admit partial subrogation only. And, it is even harder to conceive a jury verdict in excess of the amount the insured had accepted as full payment of his claim against the wrong-doer. The verdict is more likely to be less.<sup>30</sup>

The question remains whether a partially subrogated insurer can avoid joinder in a suit by the insured simply by failing, under agreement with the insured or otherwise, to indemnify the insured to any degree. The general language of the cases indicates that it can do so. *Actual payment*<sup>31</sup> is regarded by our court as the necessary basis for subrogation. It would seem, then, that a mere obligation to pay would not give rise to a claim in the insurer, and that, consequently, joinder of an insurer who had made no payment to the insured is at odds with the principles of subrogation.

It is submitted, however, that, other things being equal, there is little practical difference in a paid and non-paid situation. In either case the insurer has a very distinct interest in the subject matter of the suit.

It seems entirely possible that if an insurer makes partial settlement after the insured has brought the action, but before trial, the insurer could at that time properly be made a party.

D. STEPHEN JONES

### Real Property—Powers of Attorney—Wife's Conveyance of Her Realty By Virtue of Husband's Power of Attorney

*W*, a married woman, owns real estate in North Carolina. Her husband, *H*, is in the armed forces. Before departing for a tour of duty in Korea *H* executes, in proper form, a power of attorney<sup>1</sup> authorizing *W* to assent in his behalf to conveyances of her separate realty. Three months later, while *H* is overseas, *W* conveys a house and lot to *X*, executing the deed both for herself and on behalf of *H* by virtue of his power of attorney. Shortly thereafter *W* dies and *H* is killed in action.

<sup>30</sup> Baer, *The Relative Roles of Legal Rules And Non-Legal Factors In Accident Litigation*, 31 N. C. L. Rev. 46, 55 (1952).

<sup>31</sup> An advancement by the insurer to the insured "pending collection from the carrier or other bailee" was said to be actual payment. *Cunningham v. Seaboard R. R.*, 139 N. C. 427, 433, 51 S. E. 1029, 1030 (1905).

<sup>1</sup> It should be noted at the outset that the power under discussion here is not the general type whereby *H* authorizes *W* to convey *his* land, but is a special power granted to *W* by *H* to join on his behalf in conveyances of *her separate* realty. See *Toulmin v. Heidelberg*, 32 Miss. 268 (1856) where it was held that a power to execute conveyances of *H's* land was not the same as a power to join with the wife in a conveyance of her land. For a general discussion with respect to scope of powers of attorney, see 2 C. J. S. Agency §§ 98 and 99 (1936).