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Civil Procedure -- Contribution Among Joint-Tortfeasors -- Rights of Insurers

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NOTES AND COMMENTS

Civil Procedure—Contribution Among Joint-Tortfeasors—Rights of Insurers

At the close of its 1965 Spring Term the North Carolina Supreme Court took a significant step in relaxing its previously adamant stand denying contribution to an insurance company that has paid a judgment rendered against its insured as a joint tortfeasor. The decision in *Safeco Ins. Co. of America v. Nationwide Mut. Ins. Co.*[1] arose out of a prior action by plaintiff Phillips to recover for personal injuries he received when struck by a 1954 Ford.[2] The Ford had been parked on the pavement without lights and was struck from the rear by an automobile driven by defendant Parnell. On motion of Parnell, Elliot, the owner, and Blue, the operator of the Ford, were made additional defendants as joint tortfeasors under section 1-240 of the North Carolina General Statutes.[3] The court found Phillips had been injured by the concurring negligence of Parnell, Blue, and Elliot, and Phillips recovered from Parnell a judgment of 3,500 dollars. Upon payment "by or on behalf of"[4] Parnell of 3,500 dollars in satisfaction of this judgment, Parnell was to recover from additional defendants Blue and Elliot 1,750 dollars and one-half the court costs. Parnell's insurance company, Safeco Insurance Company of America, made full payment of the judgment.

Prior to the accident Nationwide Mutual Insurance Company had issued an automobile liability insurance policy to Elliot. Elliot, as owner, and Blue, as operator, were each an "insured" under the terms of the policy, and Nationwide was obligated to pay on behalf of an insured all sums which the insured became legally obligated to pay as a result of any accident arising out of ownership, maintenance, or use of the car.[5]

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[1] 264 N.C. 749, 142 S.E.2d 694 (1965).

[2] Phillips v. Parnell, 261 N.C. 410, 134 S.E.2d 676 (1964).

[3] N.C. GEN. STAT. § 1-240 (1953).

[4] Safeco Ins. Co. of America v. Nationwide Mut. Ins. Co., 264 N.C. 749, 750, 142 S.E.2d 694, 695 (1965).

[5] The terms of the provision provided that the insurance company was obligated:

> To pay on behalf of the insured [Blue and Elliot] all sums which the insured shall become legally obligated to pay as damages because

Parnell caused execution to be issued on the judgment against Blue and Elliot. The execution was returned unsatisfied, and Parnell then sued Nationwide for the amount of the contribution judgment.[6] In the superior court, Nationwide pleaded as an affirmative defense allegations that Safeco rather than Parnell had made full payment of the Phillips' judgment in discharge of its liability under Parnell's insurance policy. On Parnell's motion the affirmative defense was stricken on the grounds that the facts alleged did not constitute a defense. Nationwide appealed, and the North Carolina Supreme Court reversed, stating that the allegations that Safeco rather than Parnell had made payment meant Parnell was not the real party in interest and could not maintain the suit.[7]

Safeco then sued Nationwide. The superior court sustained defendant's demurrer to the complaint for failure to state a cause of action. On appeal, the North Carolina Supreme Court reversed,[8] basing its decision on Nationwide's policy provision, reasoning that since Safeco had discharged Parnell's liability it had become by operation of law an equitable assignee of Parnell, succeeding to his rights, and that as such it could compel Nationwide to perform its policy obligation.[9] Since this provision is standard in North Carolina in all automobile liability insurance policies, the decision in practical effect amounts to a reversal of the court's prior rulings in this field.

The rule against contribution among joint tort-feasors was first

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of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance, or use of the automobile.

Id. at 751, 142 S.E.2d at 696.

[6] The provision further provided:

No action shall lie against the company, unless as a condition precedent thereto, the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant, and the company.

Any person or organization or legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy.

Id. at 752, 142 S.E.2d 696.

[7] Parnell v. Nationwide Mut. Ins. Co., 263 N.C. 445, 139 S.E.2d 723 (1965).

[8] Safeco Ins. Co. of America v. Nationwide Mut. Ins. Co., 264 N.C. 749, 142 S.E.2d 694 (1965).

[9] For the text of the policy see notes 5 and 6 *supra.*

announced in England in 1799.[10] The English rule, however, was abolished by Parliament in 1935.[11] The policies behind the theory seem to have centered on the proposition that there should be no recovery where one's wrongful conduct has contributed to the injury. Since the original English case dealt with intentional rather than negligent conduct, the policy of deterring such intentional action by not allowing contribution is clearly evident. In this country, many jurisdictions have modified the common law rule by judicial decisions[12] and statutes,[13] but a majority of jurisdictions in which the

[10] Merryweather v. Nixan, 8 T.R. 186, 101 Eng. Rep. 1337 (K.B. 1799). Although the case involved wilful not negligent tort-feasors, it was generally adopted by American courts as pertaining to both. See Reath, *Contribution Between Persons Jointly Charged For Negligence—Merryweather v. Nixan,* 12 HARV. L. REV. 176 (1899).

[11] Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 GEO. 5, c. 30, § 6(1)(e). This act provided that any tort-feasor may recover contribution from any other tort-feasor who was, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise.

[12] Only seven jurisdictions have allowed contribution between joint tort-feasors without any form of legislation: District of Columbia, Knell v. Feltman, 174 F.2d 662 (D.C. Cir. 1949); Iowa, Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23 (1956); Maine, Bedell v. Reagen, 159 Me. 292, 192 A.2d 24 (1963); Minnesota, Hendrickson v. Minnesota Power & Light Co., 258 Minn. 368, 104 N.W.2d 843 (1960); Pennsylvania, Goldman v. Mitchell-Fletcher Co., 292 Pa. 354, 141 Atl. 231 (1928); Tennessee, Huggins v. Graves, 210 F. Supp. 98 (E.D. Tenn. 1962); Wisconsin, Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962). Pennsylvania later adopted this position in statutory form. PA. STAT. ANN. tit. 12, §§ 2082-89 (Supp. 1964).

[13] Four jurisdictions allow an action for contribution from a joint tort-feasor, whether joined by plaintiff or not, and apportion damages among joint tort-feasors in accordance with their relative degrees of fault. Arkansas, ARK. STAT. ANN. §§ 34-1001 to -1009 (1962); Delaware, DEL. CODE ANN. tit. 10, §§ 6301-08 (1953); Hawaii, HAWAII REV. LAWS §§ 246-10 to -16 (1955); South Dakota, S.D. CODE §§ 33.04A01-33.04A10 (1960). Thirteen jurisdictions allow an action for contribution from joint tort-feasors, whether joined by the plaintiff or not, and require that such action result in equally divided damages: Kentucky, KY. REV. STAT. § 412.030 (1962) (if tort involves no moral turpitude); Louisiana, LA. REV. STAT. ANN. §§ 2103-05 (Supp. 1964); Maryland, MD. ANN. CODE art. 50, §§ 16-24 (1964); Massachusetts, MASS. GEN. LAWS ANN. ch. 231B, §§ 1-4 (Supp. 1964); Michigan, MICH. STAT. ANN. § 27A.2925 (1962); Missouri, MO. STAT. ANN. § 537.060 (1953); New Jersey, N.J. REV. STAT. §§ 2A:53A-1 to -5 (1952); New Mexico, N.M. STAT. ANN. §§ 24-1-11 to -18 (1954); North Dakota, N.D. CENT. CODE §§ 32-38-01 to -04 (1960); Pennsylvania, PA. STAT. ANN. tit. 12, §§ 2082-89 (Supp. 1964); Rhode Island, R.I. GEN. LAWS ANN. §§ 10-6-1 to -11 (1957); Texas, TEX. REV. CIV. STAT. ANN. art. 2212 (1964); Virginia, VA. CODE ANN. § 8-627 (1957) (if tort involves no moral turpitude). Five jurisdictions allow contribution only from joint tort-feasors joined by the plaintiff and equally divide damages. California, CAL. CIV. PROC. CODE §§ 875-880; Georgia, GA. CODE ANN. §§ 105-2011 to -2012 (1956); Mississippi, MISS. CODE ANN. § 335.5 (1957); New York, N.Y. CIV. PRAC. § 1401; West Virginia, W. VA. CODE ANN. §§ 5481-82

contribution rights of negligent tort-feasors are not controlled by statute still hold that the fact that the joint tort-feasor's injury-causing conduct was negligent rather than intentional furnishes no basis for freeing them of the burden of the general rule that there can be no contribution among tort-feasors.[14]

In 1929 North Carolina adopted a statute allowing contribution between joint tort-feasors and joint judgment debtors.[15] In 1936, however, the statute's effect was limited by *Lumbermen's Mut. Ins. Co. v. United States Fid. & Guar. Co.*[16] In *Lumbermen's* the North Carolina Supreme Court stated that "a most liberal construction of the statute will not permit the writing into it of the liability insurance

(1961). In a recent Kentucky decision the court chose not to award damages equally under the Kentucky statute. See Elpers v. Kimbel, 366 S.W.2d 157 (Ky. 1963).

[14] *E.g.*, Kellenberger v. Widener, 159 So. 2d 267 (Fla. 1963); Dobbins v. Beachler, 47 Ill. App. 2d 30, 197 N.E.2d 518 (1964); Reid v. Royal Ins. Co., 390 P.2d 45 (Nev. 1964); Wilson v. Herd, 1 Ohio App. 2d 195, 204 N.E.2d 389 (1965); Graves v. Shippey, 215 Ore. 616, 300 P.2d 442 (1956). See generally annot., 60 A.L.R.2d 1366 (1958). For arguments concerning the policy of allowing contribution between joint tort-feasors, see the opposing positions of Professors James and Gregory, *Contribution Among Joint Tort-feasors: A Pragmatic Criticism; A Defense*, 54 HARV. L. REV. 1156 (1941).

[15] N.C. GEN. STAT. § 1-240 (1953):

> In all cases in the courts of this state wherein judgment has been, or may hereafter be, rendered against two or more persons or corporations, who are jointly and severally liable for its payment either as joint obligors or joint tort-feasors, and the same has not been paid by all the judgment debtors by each paying his proportionate part thereof, if one of the judgment debtors shall pay the judgment creditor, either before or after execution has been issued, the amount due on said judgment, and shall, at the time of paying the same, demand that said judgment be transferred to a trustee for his benefit, it shall be the duty of the judgment creditor or his attorney to transfer without recourse such judgment to a trustee for the benefit of the judgment debtor paying the same; and a transfer of such judgment as herein contemplated shall have the effect of preserving the lien of the judgment and of keeping the same in full force as against any judgment debtor who does not pay his proportionate part thereof to the extent of his liability thereunder in law and in equity, and in the event the judgment was obtained in an action arising out of a joint tort, and only one, or not all of the joint tort-feasors, were made parties defendant, those tort-feasors made parties defendant may, upon motion, have the other joint tort-feasors . . . made parties defendant.
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> Any judgment creditor who refuses to transfer a judgment in his favor to a trustee for the benefit of a judgment debtor who shall tender payment and demand in writing a transfer thereof to a trustee to preserve his rights in the same action, as contemplated by this section, shall not thereafter be entitled to an execution against the judgment debtor so tendering payment.

[16] 211 N.C. 13, 188 S.E. 634 (1936).

carrier of tort-feasors when only tort-feasors and judgment debtors are mentioned therein."[17] In contrast, other jurisdictions have taken the position that, since the theory of contribution is equitable in nature, a contribution statute should be liberally construed to include the insurance companies of tort-feasors.[18] This is the position taken by the Uniform Contribution Among Tortfeasors Act.[19]

The *Lumbermen's* decision attained its real significance with the advent of compulsory liability insurance in North Carolina.[20] Exclusion of the insurance company from the right to contribution in a state where all motorists are required to have liability insurance certainly made the statute less meaningful.

An attempt to distinguish the *Lumbermen's* decision came in *Squires v. Sorahan*.[21] Counsel for plaintiff in *Squires* argued that

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[17] *Id.* at 17, 188 S.E. at 636.

[18] *E.g.*, Silver Fleet Motor Express Inc. v. Zody, 43 F. Supp. 459 (E.D. Ky. 1942); State v. McMillian, 349 S.W.2d 453 (Mo. 1961). This decision interpreted the Missouri statute on contribution as also giving insurance companies the right to enforce the judgment although only the word "defendant" appeared in the statute. American Employers' Ins. v. Maryland Cas. Co., 218 F.2d 335 (4th Cir. 1954). Here the court applied a Virginia statute on contribution and reasoned that liberality should be favored in the application of the doctrine of contribution, since the doctrine had its basis in the broad principles of equity, and since the Virginia statute did not specifically exclude the right to contribution from insurance companies, the right extended to them also. The court also disagreed with the interpretation of the North Carolina Supreme Court in the *Lumbermen's* decision and specifically rejected the court's argument.

[19] UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(e). The 1955 Revised Act was the first to contain this section. It provides that:

> A liability insurer who by payment has discharged in full or in part the liability of a tort-feasor and has thereby discharged in full its obligation as insurer is subrogated to the tort-feasor's right of contribution to the extent of the amount it has paid in excess of the tort-feasor's pro rata share of the common liability; and this provision does not limit or impair any right of subrogation arising from any other relationship.

The original Act was promulgated in 1939. It was adopted in Arkansas (1941), Delaware (1949), Hawaii (1941), Maryland (1941), New Mexico (1947), Pennsylvania (1951), Rhode Island (1940), and South Dakota (1948). As indicated this original act did not contain the insurance provision. Most of the states that adopted the 1939 act had made important changes in it which defeated the idea of uniformity. For that reason and because of unfavorable reports as to the progress and operation of the act, the commissioners withdrew it from further study and revision. Massachusetts and North Dakota have specifically adopted the 1955 revised act. See MASS. GEN. LAWS ANN. ch. 231B, §§ 1-4 (Supp. 1964); N.D. CENT. CODE §§ 32-38-01 to -04 (1960). See also CAL. CIV. PROC. CODE §§ 875-880.

[20] MOTOR VEHICLE SAFETY AND FINANCIAL RESPONSIBILITY ACT OF 1953, N.C. GEN. STAT. §§ 20-279.1 to -279.39 (Supp. 1963).

[21] 252 N.C. 589, 114 S.E.2d 277 (1960), 12 MERCER L. REV. 276 (1960). See also 41 N.C.L. REV. 882 (1963).

the earlier decision merely held that a liability insurance company upon paying more than a proportionate share of the judgment, could not go directly against the insurance company of the other joint tort-feasor and did not rule out an action against the joint tort-feasor himself.[22] The North Carolina Supreme Court, however, took the position that an insurance company that pays a joint tort-feasor's obligations to the injured party cannot force contribution from other tort-feasors. "G.S. § 1-240, as interpreted by the many decisions of this Court cannot be stretched to include subrogation, which arises by reason of contract, into contribution, which arises by reason of participation in the tort."[23]

Another attempt to circumvent the *Lumbermen's* decision came in *Herring v. Jackson.*[24] This case arose out of a prior action in which the injured party had sued Herring for injuries received in an automobile collision, but Herring made no attempt to bring in Jackson as a joint tort-feasor. Being convinced that he could not successfully defend the action against him, Herring settled with the injured party, and a consent judgment was entered against him. In an attempt to preserve Herring's contribution rights against Jackson, Herring's insurance company, Nationwide Mutual Insurance Company, executed a "loan receipt" to Herring and made full payment of the judgment against him.[25] When Jackson subsequently sued Herring for injuries received in the accident Herring counterclaimed for his own injuries. The court found for Herring on the counterclaim. Herring then brought suit against Jackson in an attempt to enforce contribution, under section 1-240, to the original consent judgment. The North Carolina Supreme Court felt the "loan receipt" was a subterfuge to subvert sections 1-57 (the real-party-in-interest statute)[26] and 1-240 and held the settlement repre-

[22] Brief for Appellant, p. 17.
[23] Squires v. Sorahan, 252 N.C. 589, 591, 114 S.E.2d 277, 279 (1960).
[24] 255 N.C. 537, 122 S.E.2d 366 (1961).
[25] The agreement stated that Herring, the insured, receive the sum required to pay the judgment against him from the insurance company as a loan to be repayable only in the event and only to the extent any recovery might be obtained by plaintiff from defendant as joint tort-feasor. Herring agreed to cooperate with the insurance company and to allow suit to be brought in his name if necessary to the extent that all rights of contribution which he had or might thereafter acquire be enforced. The expense of litigation was to be borne by the insurance company, and if action brought, it would be under sole control of the insurance company. *Id.* at 542, 122 S.E.2d at 370-71.
[26] N.C. GEN. STAT. § 1-57 (1953).

sented not a loan but payment under the policy. Thus the insurance company, not the insured, was the real party in interest,[27] and since the insurance company has no right to contribution under section 1-240, the judgment of dismissal was affirmed.[28]

It can be deduced from these prior decisions that if the insured brings an action for contribution under section 1-240 after his insurance company has paid the judgment he may not recover, since the insurance company, not the insured, is the real party in interest.[29] On the other hand, if the insurance company brings the action in its own name against the additional defendant after judgment has been rendered it cannot succeed, since the insurance company, as the statute is interpreted by the court, is neither a joint tort-feasor nor a joint judgment debtor.[30]

All these prior decisions involved secondary suits brought to obtain judgments under section 1-240 after payment of an original judgment by the insurance company. This situation elicited one writer to comment that

> as the law apparently now stands, an insurer must bear the entire burden if it satisfies a judgment before judgment is entered in favor of its insured for contribution against the joint tort-feasor; that is, the liability carrier can preserve its insured's right to contribution only by impleading the joint tort-feasor as an additional defendant. By this procedure, plaintiff's judgment against the insured and the latter's judgment against the additional defendant for contribution are entered at the same time thus preserving the right.[31]

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[27] For the position that under a "loan receipt" an insurance company is the real party in interest see Crocker v. New England Power Co., 347 Mass. 1313, 202 N.E.2d 793 (1964); Wold v. Grozalsky, 277 N.Y. 364, 14 N.E.2d 437 (1938); *Cf.* Cunningham v. Seaboard Airline Ry., 139 N.C. 427, 51 S.E. 1029 (1905).

[28] Generally, an insurance company that pays a claim in full becomes the real party in interest and must sue in its own name against a tort-feasor under N.C. GEN. STAT. § 1-57. Where an insurance company pays only part of the loss and the insured pays the balance over the policy limit, the insurance company is subrogated to the insured's right only to the extent of payment by the company. In such a case the insured remains the real party in interest, and the insurance company is a proper party but not a necessary party to the suit. See, *e.g.*, Jewell v. Price, 259 N.C. 345, 130 S.E.2d 668 (1963); Smith v. Pate, 246 N.C. 63, 97 S.E.2d 457 (1957).

[29] Squires v. Sorahan, 252 N.C. 589, 114 S.E.2d 277 (1960); Gaffney v. Lumbermen's Mut. Cas. Co., 209 N.C. 515, 184 S.E. 46 (1936).

[30] Lumbermen's Mut. Cas. Co. v. United States Fid. & Guar. Co., 211 N.C. 13, 188 S.E. 634 (1936), 15 N.C.L. REV. 289 (1937).

[31] 41 N.C.L. REV. 882, 887-88 (1963).

However, earlier in the 1965 Spring Term it appeared that the court had also closed this avenue of escape for insurance companies and indeed strengthened its noncontribution position. In *Parnell v. Nationwide Mut. Ins. Co.*,[32] Safeco's first attempt to secure contribution arising out of the Phillips action, as previously indicated the court had reiterated the *Herring* rule. In the negligence action by Phillips, the injured party, against Parnell, Blue and Elliot *were* brought in as additional defendants by Parnell, and counsel for Parnell argued that this distinguished the case from *Lumbermen's, Squires,* and *Herring*.[33] The North Carolina Supreme Court disagreed, reasoning that Parnell had made no payment nor otherwise suffered any loss for which he had a claim against defendant and therefore could not be the real party in interest.[34]

This ruling came as no surprise and in fact followed the reasoning of the court's prior decisions. But two months later in *Pittman v. Snedeker*[35] the court reached a totally anomalous result, which proved to be a harbinger of its decision in *Safeco*. In *Pittman* the plaintiff, a minor, was injured when an automobile operated by his mother and an automobile operated by Snedeker collided. Plaintiff brought suit against Snedeker to recover for injuries received in the accident. Snedeker denied liability and filed a cross-action against the mother as an alleged joint tort-feasor. The mother was made an additional defendant. The jury found plaintiff was injured by the concurring negligence of Snedeker and the mother. A judgment was entered in favor of plaintiff which provided that upon satisfaction of the judgment by Snedeker, he could recover one-half the amount from the mother. Snedeker's insurance company, United Services Automobile Association, made full payment of the judgment. Snedeker then caused execution to issue against the joint tort-feasor, plaintiff's mother. The mother then brought suit to enjoin this execution and, when an injunction was refused, appealed. To follow the reasoning of its prior decisions the North Carolina Supreme Court had only to state that Snedeker was not the real party in interest. Counsel for plaintiff pointed this out in his brief and relied upon *Lumbermen's, Squires,* and *Herring* to

[32] 263 N.C. 445, 139 S.E.2d 723 (1965).
[33] Brief for Appellee, pp. 3-4.
[34] Parnell v. Nationwide Mut. Ins. Co., 263 N.C. 445, 449, 139 S.E.2d 723, 726 (1965).
[35] 264 N.C. 55, 140 S.E.2d 740 (1965).

support his position.[36] This was the same argument advanced by counsel for the defendant in *Parnell*[37] and adopted by the court as the basis for its decision in that case.[38] But the court refused to accept the reasoning that it had arrived at two months earlier and affirmed the lower court's refusal to enjoin the execution. The court distinguished *Herring* in a perfunctory manner, saying "appellant ignores the factual differences .... The difference is vital."[39] This apparently meant that in *Herring* execution was returned unsatisfied and the original defendant was trying to *enforce* his contribution judgment by affirmative action, whereas in *Pittman* execution was issued on the contribution judgment and the additional defendant was trying to *enjoin* the execution. If this is the factual difference the court was alluding to, then one must conclude that the original defendant is not the real party in interest for affirmative action to enforce contribution but he is the real party in interest in an execution where the additional defendant is seeking an injunction. Since in both instances the insurance company made the settlement, the type of action should have no bearing on which party is the real party in interest. Since this reasoning is so inconsistent, it seems clear that the court was actually reevaluating its prior rulings when it stated *"no sound reason appears why the insurance carrier should be penalized for performing its contractual obligation."*[40] This statement is indeed an anomaly in light of the prior decisions, but it is a welcome one.

It is important to note that in all the decisions discussed above the injured party sued one defendant who then brought into the

[36] Brief for Appellant, pp. 5-6, Pittman v. Snedeker, 264 N.C. 55, 140 S.E.2d 740 (1965).

[37] Brief for Appellant, pp. 5-9, Parnell v. Nationwide Mut. Ins. Co., 263 N.C. 445, 139 S.E.2d 723 (1965).

[38] See note 34 *supra.*

[39] Pittman v. Snedeker, 264 N.C. 55, 57, 140 S.E.2d 740, 743 (1965).

[40] The court stated:

> There has been no cancellation of the judgment for which appellant is liable. She makes no claim that she has paid the debt which a court of competent jurisdiction has solemnly declared she owes. She seeks to escape her obligation because an insurance company made the payment as required by its contract with the original defendant. The insurance company was not a volunteer. If Snedeker had borrowed the money from someone under no obligation to make a loan, and, as security for the loan, assigned his judgment in favor of the additional defendant, no one would question the right of the assignee to enforce the judgment against the additional defendant.

Id. at 58, 140 S.E.2d at 743-44. (Emphasis added.)

action an additional defendant as a joint tort-feasor. This situation should be distinguished from the situation in *Greene v. Charlotte Chem. Labs., Inc.*[41] In *Greene* the court reached the "unfortunate"[42] decision that when the injured party chooses to sue all the tort-feasors jointly, a defendant in the action cannot cross-claim for contribution against any codefendants before judgment has been entered against all of them jointly. Therefore, if the plaintiff takes a voluntary nonsuit or suffers an involuntary nonsuit as to one defendant, his codefendants cannot act to retain him as a party in the action, but must pursue a separate action for contribution after their liability to plaintiff has been judicially determined. If in such a situation an insurance company had paid a codefendant's obligation to the plaintiff, whether it would be able to pursue this separate action to enforce contribution under *Safeco* has not yet been decided. However, to deny insurance companies this right would be in effect basing the decision on whether the plaintiff decides to sue all the tort-feasors instead of only one of them.

The *Safeco* decision, as previously indicated, was based on a standard provision of an automobile liability insurance policy. This provision was present even in the policy involved in the *Lumbermen's* decision in 1936, and, certainly, the court could have relied on it in a number of similar cases. Basically, the court in *Safeco* stated that plaintiff, having discharged Parnell's liability to Phillips, became by operation of law an equitable assignee and as such acquired Parnell's rights to enforce payment from Blue and Elliot.[43] The court then, in an apparent reference to its rule in *Pittman,* said that Safeco could by execution *or action* enforce the judgment against Blue and Elliot.[44] This in effect means that Safeco, an insurance company which had paid a judgment rendered against its insured as a joint tort-feasor, could by *affirmative* action enforce a contribution judgment against a joint tort-feasor who had been made an

[41] 254 N.C. 680, 120 S.E.2d 82 (1961). For a criticism of the decision see 40 N.C.L. REV. 633 (1962).

[42] See Brandis, *Civil Procedure (Pleading and Parties), Survey of North Carolina Case Law,* 43 N.C.L. REV. 873, 884-85 n. 44 (1965).

[43] The theory that the insurance company becomes by operation of law an equitable assignee to the insured's rights is not a new one. See, *e.g.,* Milwaukee Ins. Co. v. McLean Trucking Co., 256 N.C. 721, 125 S.E.2d 25 (1962); Smith v. Pate, 246 N.C. 63, 97 S.E.2d 457 (1957); Cunningham v. Seaboard Airline Ry., 139 N.C. 427, 51 S.E. 1029 (1905).

[44] Safeco Ins. Co. of America v. Nationwide Mut. Ins. Co., 264 N.C. 749, 751, 142 S.E.2d 694, 696 (1965).

additional defendant. This nullifies the reasoning of the court in *Pittman* that the case is distinguishable from *Herring* on the basis of the types of action involved. The cases are in complete disagreement.

The court then reasoned that all this imposes no obligation on Nationwide, but that an obligation does exist as a result of the insurance contract which was intended to protect Blue and Elliot from judgments imposing liability on them for the negligent operation of the automobile. Since Safeco acquired its insured's rights by making payment of his judgment liability, it could compel Nationwide to perform its contract.

Though the result in the decision is rather indirect, it is certainly in the right direction. It now appears that, although contribution per se does not exist between insurance companies, the insurance company which pays its insured's judgment can enforce by execution or action contribution from either the additional defendant under *Pittman,* or from his insurance company under *Safeco.* Whether insured can bring suit in his own name, however, seems doubtful without express reversal of the *Herring* decision.

Since the common-law rule of not permitting contribution between joint tort-feasors was abrogated by statute in North Carolina, it seems apparent that the legislature must have realized the obvious injustice of allowing one defendant to pay an entire loss when two defendants were responsible. Since automobile liability insurance is compulsory in North Carolina, if the efficacy of the statute is to be realized to any extent, there is no valid reason for denying insurance companies a right to participate. Most of our tort litigation today involves automobile collision situations and in a very real sense insurance companies are the only "real parties in interest."[45] *Safeco,* in effect, reflects this realistic approach to the problem.

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[45] Brief for Appellee, p. 4, Parnell v. Nationwide Mut. Ins. Co., 263 N.C. 445, 139 S.E.2d 723 (1965).