IN THE SUPREME COURT

OF FLORIDA

CASE NO. 76,953

UNION CENTRAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

DANIELLE CARLISLE, ETC., ET AL.

Respondent.

DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

Case Nos. 89-1370; 89-1879

PETITIONER'S INITIAL BRIEF ON THE MERITS AND APPENDIX

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STATEMENT OF THE CASE AND FACTS

Petitioner/Intervenor/Appellant[1], UNION CENTRAL LIFE INSURANCE COMPANY, files this Brief On The Merits to review the decision of the Fourth District Court Of Appeal[2] which certified the following question to the Supreme Court to be a matter of great public importance:

> DID THE TRIAL JUDGE ABUSE HIS DISCRETION WHEN HE REFUSED TO PERMIT THE INSURER TO INTERVENE IN THIS CASE?

Petitioner, UNION CENTRAL, also submits that the decision expressly and directly conflicts with the decision of Southland Life Ins. Co. v. Abelove, 556 So.2d 805 (Fla. 5th DCA 1990).

PLAINTIFFS' MALPRACTICE LAWSUIT

Plaintiffs, DANIELLE CARLISLE, through her guardians and parents, DEBORAH CARLISLE, individually, as Mother of DANIELLE CARLISLE and EDWARD CARLISLE, individually, as Father of DANIELLE CARLISLE (CARLISLE) filed a medical malpractice action against Defendants, LARRY A. HUNTSINGER, LAUDERDALE GYNECOLOGIC ASSOCIATES, P.A., LAUDERDALE GYNECOLOGIC ASSOCIATES, STERGHOS, GRENITZ, HUNTSINGER, RAZIANO, RODRIGUEZ, P.A., MARIANO RODRIGUEZ, MICHAEL

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[1]The parties will be referred to as they stood in the trial court. The symbol "R" signifies Record On Appeal, and "A", Appendix of Petitioner.

[2]The decision is reported as Union Cent. Life Ins. Co. v. Carlisle, 566 So.2d 1335 (Fla. 4th DCA 1990).

LEWIS and NORTH BROWARD HOSPITAL DISTRICT d/b/a BROWARD GENERAL MEDICAL CENTER to recover damages arising out of the labor and birth of DANIELLE CARLISLE on August 15 and August 16, 1986 (R.573-581).

UNION CENTRAL'S INTERVENOR COMPLAINT

UNION CENTRAL, the health insurer which at that time had paid out $514,000 in health benefits to CARLISLE under a group policy, filed a Motion to Intervene in the CARLISLE medical malpractice action based on the following: (R.620-658)

UNION CENTRAL'S policy provided for reimbursement of any medical benefits paid as a result of injuries when the covered person has a claim against another person. The policy provides as follows:

> RIGHT OF REFUND
>
> When This Provision Applies. The covered person may incur medical or dental charges due to injuries for which benefits are paid by the Policy. The injuries may be caused by the act or omission of another person. If so, the covered person may have a claim against that other person for payment of the medical or dental charges. If recovery under the claim is made, the covered person must repay to the Insurer the recovery made from: (a) the other person; or (b) the other person's insurer. (R.652)

Count I based upon this policy provision sought subrogation against any recovery by Plaintiffs against Defendants as well as

from a Florida legislative claim bill for said sums paid or to be paid as a result of the injuries and damages to Plaintiffs growing out of the gravamen of the malpractice litigation. UNION CENTRAL also demanded payment of the present value of all future payments to the Plaintiffs for damages and injuries resulting from the acts of the Defendants and their insurers.

Count II based on this policy provision alleged entitlement to claim a lien for payments made and to be made on any settlement or judgment reached in the lawsuit and payment of said lien.

Count III also based on this policy provision alleged that Plaintiffs occupied a fiduciary relationship with UNION CENTRAL and therefore owed to it the usual duties of diligence, competence and good faith owed by a trustee. It was alleged that any recovery Plaintiffs received from Defendants, their insurers or through a legislative claim bill is to be held in trust for UNION CENTRAL for sums paid or to be paid. UNION CENTRAL alleged that any distribution by Plaintiffs of any recovery without its knowledge and consent would constitute a breach of their fiduciary duty as trustee to UNION CENTRAL (R.632-658).

The trial court initially allowed UNION CENTRAL to intervene and ordered CARLISLE to file a response (R.659).

CARLISLE filed a Motion to Dismiss Intervenor Complaint which alleged:

(1) failure to state a cause of action; (2) failure to state with specificity the amounts claimed due by UNION CENTRAL; (3) UNION CENTRAL is required to maintain a separate cause of action

and said cause of action is barred by the Statute of Limitations; (4) UNION CENTRAL has sought payment on a legislative claim bill which is inappropriate and not provided by law; (5) UNION CENTRAL'S cause of action, if any, is an equitable cause of action and this suit does not properly sound in equity; (6) UNION CENTRAL has not assumed responsibility for attorney's fees and costs; (7) UNION CENTRAL'S recovery, if any, must sound in subrogation rather than lien; (8) UNION CENTRAL has sought reimbursement for medical care rendered to DEBORAH CARLISLE for which it has no cause of action and for which Intervenor/Defendants have not pled; (9) UNION CENTRAL has not specified special items of damage it is seeking as required (R.728-730).

NORTH BROWARD HOSPITAL DISTRICT also moved to dismiss Intervenor's Complaint on the ground that Intervenor had failed to comply with the pre-suit notice requirements set forth under Florida Statute Section 768 now renumbered Chapter 766; and NORTH BROWARD also adopted the Motion to Dismiss filed by CARLISLE (R.734-735).

The trial court without specifying the grounds and dismissed the UNION CENTRAL'S Intervenor Complaint with prejudice (R.743).

UNION CENTRAL timely appealed the Order of dismissal and the subsequent Order And Final Judgment Assessing Attorneys' Fees (R.754-755,765-766,777,778).

The District Court of Appeal, Fourth District, affirmed the order denying UNION CENTRAL'S Motion To Intervene in the medical malpractice action on the following grounds: (1) Florida Rule of

Civil Procedure 1.230 constitutes a very broad directive but also an equally broad discretion to the trial court to allow intervention; (2) the trial court did not abuse its discretion in refusing to allow intervention; (3) while UNION CENTRAL'S policy did not contain the magic word "subrogation" the policy contained a right of refund provision which requires the insured to repay the insurer out any recovery obtained. This grants to the insurer an interest in the subject litigation; (4) however, the entitlement to subrogation, equitable or otherwise, does not appear to mandate that a trial judge must allow intervention in every case and the court said it was a matter "best left to the discretion to the trial judge"; (5) the Court disagreed with Southland Life Ins. Co. v. Abelove, 556 So.2d 805 (Fla. 5th DCA 1990) that intervention was mandated in Abelove because the trial judge in that case appeared to have taken particular pains to safeguard the right of insurer.

After so holding the Court said:

> It is difficult to gauge the impact that this decision will have. Were we to hold to the contrary, would that open the flood gates and cause insurers to intervene in all cases of this type? Is the particular clause in this insurance policy unique? Does the existence of classic subrogation clauses, such as is set forth in the footnote to the First District's version of Blue Cross and Blue Shield of Florida, Inc. v. Matthews, 473 So.2d 831,832 (Fla. 1st DCA 1985) obviate the necessity to intervene because they are protection enough in and of themselves? We deem the answers to these questions to be matters of great public importance and we, therefore, certify the following question to the Supreme Court:
>
> DID THE TRIAL JUDGE ABUSE HIS DISCRETION WHEN HE REFUSED TO PERMIT THE INSURER TO INTERVENE IN THIS CASE? (A1-A6)

On Motion For Rehearing UNION CENTRAL pointed out that its right of reimbursement is in danger of dilution or elimination. (A7-A13) This is vividly demonstrated by Plaintiffs' Motion To Approve Partial Settlement in the amount of $910,000 with the obstetricians and gynecologists, LARRY A. HUNTSINGER, LAUDERDALE GYNECOLOGIC ASSOCIATES, P.A., LAUDERDALE GYNECOLOGICAL ASSOCIATES STERGHOS, GRENITZ, HUNTSINGER, RAZIANO AND RODRIGUEZ, P.A., MARIANO RODRIGUEZ and MICHAEL LEWIS leaving pending only the claim against NORTH BROWARD HOSPITAL DISTRICT d/b/a BROWARD GENERAL MEDICAL CENTER. Plaintiffs' Motion evinces an obvious attempt to prejudice or eliminate UNION CENTRAL'S right of subrogation or reimbursement by characterizing the settlement figure of $910,000 in the following manner:

> "... The overwhelming majority, if not all of the monies received in this settlement are for DANIELLE CARLISLE'S pain and suffering and future care after her insurance coverage with UNION CENTRAL LIFE INSURANCE COMPANY expires. This Court will later need to and determine what monies, if any, UNION CENTRAL LIFE INSURANCE COMPANY is entitled to recover through its equitable lien ..." (emphasis supplied) (A8)

The District Court of Appeal denied UNION CENTRAL'S Motion For Rehearing by Order dated October 19, 1990. (A14)

SUMMARY OF ARGUMENT

UNION CENTRAL contends that the certified question should be answered in the affirmative. UNION CENTRAL has a right of subrogation or reimbursement. This gives it the right to maintain and control its own cause of action. Plaintiffs' position is obviously adverse to or in conflict with UNION CENTRAL as evidenced by their characterization or attempted allocation of settlement proceeds for pain and suffering and future care rather than reimbursement to UNION CENTRAL for benefits paid.

UNION CENTRAL also submits that the decision expressly and directly conflicts with Southland Life Ins. Co. v. Abelove, supra. and that Abelove constitutes a preferable approach to handling an insurer's subrogation cause of action.

POINTS ON DISCRETIONARY REVIEW

CERTIFIED QUESTION

DID THE TRIAL JUDGE ABUSE HIS DISCRETION WHEN HE REFUSED TO PERMIT THE INSURER TO INTERVENE IN THIS CASE?

CONFLICT QUESTION

THE DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, EXPRESSLY AND DIRECTLY CONFLICTS WITH SOUTHLAND LIFE INS. CO. v. ABELOVE, SUPRA AND THE RATIONALE OF ABELOVE IS PREFERABLE BECAUSE ONLY BY INTERVENTION CAN AN INSURER TIMELY MAINTAIN AND CONTROL ITS OWN SUBROGATION CAUSE OF ACTION.

ARGUMENT

Petitioner, UNION CENTRAL, submits that the trial court abused his discretion when he refused to permit UNION CENTRAL to intervene in Plaintiffs' lawsuit. UNION CENTRAL also submits that the decision of the District Court of Appeal, Fourth District, expressly and directly conflicts with Southland Life Ins. Co. v. Abelove, and that the latter decision should prevail. UNION CENTRAL files a consolidated argument under both points in order to avoid duplication.

EVIDENCE AND LAW ESTABLISHING UNION CENTRAL'S RIGHT OF SUBROGATION

The trial court abused its discretion in denying UNION CENTRAL'S Motion For Intervention because its cause of action satisfies the test established in Morgareidge v. Howey, 75 Fla.

234, 78 So.14 (1918) which states:

> ... The interest which will entitle a person to intervene under this provision must be in the matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. In other words, the interest must be that created by a claim to the demand in suit or some part thereof, or a claim to, or lien upon, the property or some part thereof, which is the subject of litigation.

It cannot be denied that UNION CENTRAL has such a direct and immediate interest in the medical malpractice action that it will either gain or lose by the direct legal operation and effect of the judgment. Stated otherwise, UNION CENTRAL has an interest created by its claim to the demand in the lawsuit or lien upon the property or some part thereof which is the subject matter of the Carlisle litigation.

The requirements of Morgareidge have been satisfied. The payment of health benefits in the amount of $514,000.00 under a group policy with liability to pay additional benefits coupled with the right of refund provision in the policy satisfies the requirements.

UNION CENTRAL'S policy provides for a right of refund, reimbursement or repayment of medical benefits paid to its insured for injuries caused by the act of another person. Although the magic word "subrogation" was not used in the policy, this fact does not detract from UNION CENTRAL'S right to intervene. §768.76(4) Fla. Stat. (1986) utilizes the terms subrogation and reimbursement

almost interchangeably.

Subrogation is based upon the principle of natural justice or justice without regard to form and affords relief where one is required to pay a legal obligation which ought to have been paid either wholly or partially by another, Ulery v. Asphalt Paving, Inc., 119 So.2d 432 (Fla. 1st DCA 1960); Trueman Fertilizer Co. v. Allison, 81 So.2d 734 (Fla. 1955).

The District Court stated that even though the right of refund provision in UNION CENTRAL'S policy did not directly grant subrogation rights to UNION CENTRAL it entitled UNION CENTRAL to equitable subrogation.

The doctrine of equitable subrogation was set forth in Atlantic Coast Line R. Co. v. Campbell, 104 Fla. 274, 139 So. 886 (1932) where this Court held that an insurer after payment of a loss is subrogated to all the rights of the insured against the person or corporation whose tortious act has caused the loss. This is based on the equitable doctrine of subrogation by operation of law without the necessity of an assignment of the cause of action. An insurer's right to subrogation does not violate public policy. Schwab v. Town of Davie, 492 So. 2d 708 (Fla. 4th DCA 1986).

In equitable subrogation the distinction between subrogation and indemnification is sometimes obscured. As stated in Allstate Ins. Co. v. Metropolitan Dade County., 436 So.2d 976 (Fla. 3d DCA 1983) a court may emphasize either or both of the doctrines "when necessary to bring about equitable adjustment of a claim founded on right and natural justice," citing Rebozo v. Royal Indemnity

Co., 369 So.2d. 644, (Fla. 3d DCA 1979) cert. den., 379 So.2d 209 (Fla. 1979). In Rebozo the District Court quoted from Ulery v. Asphalt Paving, Inc., supra as follows:

> Subrogation, a creation of equity, is founded on the proposition of doing justice without regard to form, and was designed to afford relief where one is required to pay a legal obligation which ought to have been met, either wholly or partially, by another. Trueman Fertilizer Co. v. Allison, Fla., 81 So.2d 437. The right of subrogation has been sustained in almost every conceivable type of transaction where the party invoking it has been required to pay a debt for which another is primarily answerable, and which in equity and good conscience the other ought to pay.

The Court also held that Rebozo as equitable subrogee should be allowed to pursue his cross-claims and that:

> ...To hold, as did the trial judge, that the man who has paid the judgment is not the party who is "really interested" in getting his money back amounts to an exaltation of form over substance which we cannot approve.

The Fourth District recognized UNION CENTRAL'S right to equitable subrogation but stated that entitlement to subrogation, equitable or otherwise, does not appear to mandate that trial judge must allow intervention in every case. The Court stated that it is a "matter best left to the discretion of the trial judge." In so doing the Court disagreed with the Fifth District in Southland Life Insurance Co. v. Abelove, supra.

REASONS TO ANSWER CERTIFIED QUESTION IN THE AFFIRMATIVE

Petitioner states that the trial judge abused his discretion in denying UNION CENTRAL the right to intervene in the Carlisle medical malpractice action. The numerous reasons to allow UNION CENTRAL to intervene are stated below:

1. Fla.R.Civ.P. 1.230 provides:

> Anyone claiming an interest in pending litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion."

It is true, as the District Court aptly stated:

> Obviously this a very broad directive but, by the same token, it imparts equally broad discretion to the trial judge.

Judicial discretion was defined by this Honorable Court in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980) as follows:

> The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.

The test for the review of the judge's discretionary power was also set forth in Canakaris as follows:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

This Court also stated:

> The discretionary power that is exercised by a trial judge is not, however, without limitation, . . . The trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result. The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. . .

The Canakaris rule and test to review a judge's discretionary power have been recently cited with approval in Huff v. State, Case No. 74,201 (Fla. October 11, 1990) [15 FLW S550] and Commonwealth Federal Savings & Loan Assoc. v. Tubero, Case No. 75,370 (Fla. November 15, 1990) [15 FLW S595].

UNION CENTRAL submits that the facts in this case satisfy the test and the trial judge abused his discretion in not allowing it to intervene.

2. It is an abuse of discretion to deny intervention where the proposed intervenor has a direct interest in the outcome of the litigation and the interests of the proposed intervenor would not be fully protected by the original plaintiff. Bay Park Towers Condo. v. H.J. Ross & Assoc., 503 So.2d 1333 (Fla. 3d DCA 1987).

Bay Park Towers was discussed by the Fourth District in the present case as follows: The District Court recognized that the Fifth District in Abelove stated that a condition for intervention is that the intervenor must have some "fears" that its "interests will not be fully protected by the original plaintiff's suit ..."

citing Bay Park. The District Court said that they were unable to find any such condition expressed in Bay Park Towers, but "even if it had been, we feel the condition is fulfilled sub judice by the very fact of filing a complaint in intervention ...".

With all due respect, the Fourth District has overlooked the fact that a mere filing of a complaint in intervention without intervention being allowed will not result in one iota of protection to UNION CENTRAL. This is obvious by Plaintiffs' Motion To Approve Partial Settlement which ignored UNION CENTRAL'S payment of benefits of over $500,000.00 and attempted to allocate the settlement proceeds of $910,000.00 as payment for DANIELLE CARLISLE'S pain and suffering and future care after her insurance coverage with UNION CENTRAL LIFE INSURANCE COMPANY expired. This firmly establishes the fact that not only does UNION CENTRAL have a direct interest in the outcome of the litigation, but UNION CENTRAL'S interests will not be fully protected by the CARLISLES and that UNION CENTRAL will lose by any order authorizing settlement.

3. UNION CENTRAL has a direct interest in the litigation. This principle was followed in Atlantic Coast Line R. Co. v. Campbell, supra where this Court held that an insurer after payment of a loss is subrogated to all the rights of the insured against the person or corporation whose tortious act has caused the loss. This is based on the equitable doctrine of subrogation by operation of law without the necessity of an assignment of the cause of action. An insurer's right to subrogation does not violate public

policy. Schwab v. Town of Davie, supra.

This principle of law was applied in Blue Cross Of Florida, Inc. v. O'Donnell, 230 So.2d 706 (Fla. 3d DCA 1970) which held that a health insurer which paid benefits was entitled to intervene in the insured's negligence action based upon a subrogation clause in Blue Cross's policy.

In Blue Cross & Blue Shield of Fla. v. Matthews, 498 So.2d 421 (Fla. 1986) this Court held that §627.7372 did not bar the subrogation rights of a health insurer and reversed an order denying Blue Cross' motion to intervene in its insured's negligence action. This Court citing Atlantic Coast Line Railroad v. Campbell, supra, held that Florida has long recognized the subrogation rights of an insurer to recover payments made to an insured for injuries which were caused by a tortfeasor. This Court carefully distinguished the rights of a health insurer to recover from the tortfeasor the cost of benefits paid to its insured from the rights of a vehicle carrier which paid no fault benefits and is not entitled to subrogation based on the Florida Motor Vehicle No-Fault Law section 627.730.

4. The motion is timely as evidenced by the absence of any objection based upon the ground of untimeliness.

5. The requirement that the intervention must be in subordination to the main proceeding is also satisfied. UNION CENTRAL'S claim is not distinct from the claim of the original parties and there is no new issue to be raised by UNION CENTRAL'S Intervenor Complaint. Both the main lawsuit and the Intervenor Complaint seek

recovery of medical expenses from Defendants. Stated otherwise, the theories of recovery are identical.

6. The interest of UNION CENTRAL will not be adequately protected by any of the original parties to the action. This is vividly demonstrated by Plaintiffs' Motion To Approve Partial Settlement in the sum of $910,000.00 wherein Plaintiff characterized and attempted to allocate the majority of the settlement proceeds as representing DANIELLE CARLISLE'S pain and suffering and future care after her insurance coverage with UNION CENTRAL expired.

7. The requirement that Plaintiffs' interests are adverse to the interests of the UNION CENTRAL has been satisfied. This is evidenced by the Motion To Approve Partial Settlement referred to above. It is also quite apparent that there is an obvious risk that Plaintiffs may well agree with Defendants [the settling Defendants as well as the present non-settling Defendant] to accept a settlement in which all the monies are specifically earmarked for items other than medical expenses.

8. UNION CENTRAL has a direct interest in the litigation which seeks to recover part of the same damages Plaintiffs seek to recover i.e., medical expenses incurred by reason of the negligence of Defendants.

9. Intervention is required where the Intervenor has the contractual right to a portion of the proceeds recoverable by the original Plaintiff, Bay Park Towers Condo. v. H.J. Ross & Assoc., supra; Brickell Bay Condominium v. Forte, 410 So.2d 522 (Fla. 3d

DCA 1982); Citibank, N.A. v. Blackhawk Heating, Etc., 398 So.2d 984 (Fla. 4th DCA 1981). UNION CENTRAL'S right of refund satisfies this requirement.

10. A settlement or judgment might limit or negate UNION CENTRAL'S contractual rights to reimbursement. If UNION CENTRAL is not made a party to the lawsuit, it would not have a right to appeal or request a stay of any settlement or judgment. This could in effect constitute a taking of property without due process of law in violation of constitutional guarantees, St. Anne Airways, Inc. v. Webb, 142 So.2d 142 (Fla. 3d DCA 1962).

11. Without allowing UNION CENTRAL to intervene there is a possibility that an order would be entered which would not protect UNION CENTRAL'S rights of subrogation. Stated otherwise, if the trial court approves a settlement which specifically earmarks a large portion or all of the settlement funds for pain and suffering and not for paid medical expenses, as Plaintiffs seek to do, UNION CENTRAL as a non-party will not have the right to appeal, Consolidated Government of City of Jacksonville v. Adams, 213 So.2d 34 (Fla. 1st DCA 1968).

12. UNION CENTRAL should have the right to participate directly in the lawsuit to enhance its potential to recover the sums of money it has expended.

13. The District Court noted that it was difficult to gauge the impact of this decision and posed the question of whether a decision to the contrary would "open the flood gates and cause the insurers to intervene in all cases of this type?" UNION CENTRAL'S

answer to this is: Perhaps, when a small amount is involved an agreement could be worked out with a plaintiff regarding reimbursement of paid benefits. But, the insurers, regardless of the amount, should have the right to intervene in the lawsuit and to decide how active an intervention to pursue rather than being delegated to pursuing the insured after verdict or, if necessary, a separate lawsuit. Simply stated, UNION CENTRAL should have the right to control its own cause of action.

14. Intervention will allow UNION CENTRAL to recover the entire benefits paid and to be paid or to negotiate for a settlement as full parties to the action. Vogel v. Smith, 371 So.2d 719 (Fla. 3d DCA 1979).

15. It is well settled in Florida that the insured has the duty to protect an insurer's subrogation rights, DeCespedes v. Prudence Mut. Cas. Co. of Chicago, Ill., 193 So.2d 224 (Fla. 3d DCA 1966), approved, 202 So.2d 561 (Fla. 1967); Russak v. State Farm Mutual Automobile Ins. Co., 281 So.2d 541 (Fla. 3d DCA 1973) cert. den., 288 So.2d 257 (Fla. 1973); Travelers Ins. Co. v. Gray, 360 So.2d 16 (Fla. 3d DCA 1978); General Accident Insurance Company of America v. Taplis, 493 So.2d 32 (Fla. 5th DCA 1986); Watherwax v. Allstate Ins. Co., 538 So.2d 108 (Fla. 2d DCA 1989); New Hampshire Ins. Co. v. Knight, 506 So.2d 75 (Fla. 5th DCA 1987). Intervention will allow UNION CENTRAL to ensure that its insureds will fulfill their duty.

16. The following decisions from other jurisdictions have held that an insurer's right of subrogation must be protected:

In Ludwig v. Farm Bureau Mut. Ins. Co., 393 N.W.2d 143 (Iowa 1986) the medical expenses were made a specific item of settlement. The court held that an insured need not be paid in full for pain and suffering and disability before subrogation for medical expenses are allowed. The court also held that Farm Bureau was entitled to a portion of the third party settlement attributable to medical expenses even though other elements of insured's third party claim may not have been fully satisfied.

Vachon v. Halford, 484 A.2d 1127 (N.H. 1984) held that where a minor child is injured by the negligence of a third party, two causes of action arise. One by the child itself for personal injuries and the second by the parent for consequential damages such as loss of services and expenses caused by the injury. Any rights to which Blue Cross was entitled under its subrogation clause pertains solely to the parent's rights for consequential damages. The court held that if the parent institutes an action against a tortfeasor to recover medical expenses, and there is no agreement between Blue Cross and the parent that the company's interests will be protected, Blue Cross has the right to intervene in the suit to protect its interests.

Dimick By Dimick v. Lewis, 497 A.2d 1221 (N.H. 1985) involved the issue of whether Blue Cross was entitled to reimbursement for medical expenses paid on behalf of a minor based upon an alleged contract of health insurance with the father of the injured child. The court held that where there is a valid subrogation clause in a policy involving an injured minor and a parent, the health

insurer is subrogated to the parent's right to recover medical expenses.

Of importance is the following statement from the case:

> The plaintiffs in this case cannot jeopardize the insurer's position by making a unified claim for insured and uninsured losses and then unilaterally allocate only a small portion of the settlement to the parents in order to frustrate the insurer's rights ... Thus, the "top dollar" is awarded to the injured minor with a minimal amount awarded to the minor's parent ...

The court vacated the order denying Blue Cross' petition to intervene and remanded with instructions that the trial court determine the amount of the net proceeds to which Blue Cross was entitled on a pro-rata basis proportionate to the plaintiff-father's share of the total settlement.

Plaintiffs' Motion To Approve Partial Settlement violates the duties of an insured. Their motion has a direct effect on UNION CENTRAL'S cause of action in that it attempts to either reduce or eliminate UNION CENTRAL'S right of reimbursement from those settlement funds. Only by intervention can UNION CENTRAL protect its rights.

17. UNION CENTRAL should be allowed to intervene in order to have the opportunity to submit jury instructions and the form of itemization of jury verdict in accordance with §768.77, Fla.Stat. (1986).

18. In the event intervention is not allowed UNION CENTRAL will be unable to protect its rights regarding any settlement reached with the physicians and it could not appeal any order which

would affect its rights since it is not a party to the action.

The error would continue because if Plaintiffs proceed to trial against the non-settling defendant [Broward General Hospital] they might possibly be motivated to focus the jury's attention on future damages by way of opening and closing arguments and, evidence presented and by the verdict form. If UNION CENTRAL is allowed to intervene, it would be able to introduce all the evidence of past medical expenses already incurred by Plaintiffs and direct the jury's attention to that element of damages as well as to assist in preparation of the verdict.

19. Intervention would not add to the complexity of the cause of action nor result in confusion of the issues because the theory of recovery of Plaintiffs and UNION CENTRAL are identical.

20. Last but not least, Rule 1.230 (quoted on page 12 of this brief) is similar to Rule 24, Fed.R.Civ.P. An examination of Federal decisions under this rule is pertinent, Cotton States Mut. Ins. v. Turtle Reef Assoc., 444 So.2d 595 (Fla. 4th DCA 1984); Miami Transit Company v. Ford, 155 So.2d 360 (Fla. 1963) [objective in promulgating the Florida Rules of Civil Procedure has been to harmonize the Florida Rules with the Federal Rules to the extent possible.]

Therefore, the following Federal decisions are pertinent: Curtis v. Sears, Roebuck & Co., 754 F.2d 781 (8th Cir. 1985); dismissal of State Farm's claim against insured by intervention in the insured's action against the tortfeasor, Sears, which sought a lien against insured's settlement from Sears was an abuse

of discretion where State Farm's intervention was ancillary to insured's claim. The court pointed out that State Farm which had paid Curtis about $9,700.00 under its no-fault first-party medical-payments and disability coverage had a right of reimbursement and lien on Curtis' settlement recovery and therefore, had an interest in the money which was the subject of the lawsuit against Sears. The court pointed out that State Farm's interest may be impaired if the action is finally disposed of without its participation and that the lapse of time required to institute a new action and obtain service on Sears and its insured could give the latter time to leave the state, spend the money or take other steps to impede State Farm's collection effort.

McDonald v. E. J. Lavino Company, 430 F.2d 1065 (5th Cir. 1970). The court reversed an order denying the compensation carrier's motion to intervene filed one day after entry of a judgment for the employee. The court, in reversing, said inter alia:

> It goes without saying, of course, that a reversal for "abuse of discretion" does not imply that the district judge has been guilty of some egregious blunder. . . This is especially true in this case, for the record makes it abundantly clear that the district judge studied the issue of intervention with great care and patience. Thus we would not want it thought that our decision implies any criticism of the district judge's handling of this case. Our reversal simply means that this court, after studying the entire record in the light of all the relevant considerations, concludes that the reasons militating in favor of granting the motion to intervene substantially outweighed the reasons militating against it.

Glens Falls, Ins. Company v. Cook Brothers, Inc., S.D. Ind. 1959, 23 F.R.D. 269: Glens Falls as insurer-subrogee filed suit to recover the sum of $88,000.00, the amount it paid to Sigma Chi Fraternity Foundation as a result of the destruction of a building owned by the latter. The Foundation's loss totaled $160,000.00 and after receipt of the insurance proceeds, the Foundation still had a claim of $72,000.00 against the defendants which had not been assigned or paid. The main suit was brought by Glens Falls and Sigma Chi Fraternity Foundation sought to intervene as a party plaintiff. The court, after discussing Rule 24, concluded that Sigma Chi's interest in the controversy was inadequately represented. In fact it was not represented at all since plaintiff had limited its claim to the amount paid to Sigma Chi under the terms of the policy. The court noted that there was a possibility that Sigma Chi in any action instituted by it in the Indiana State Courts might be bound by the judgment in this action. Based upon all these reasons the court allowed intervention.

It is submitted that the above cited Federal decisions support UNION CENTRAL'S argument that it is entitled to intervention.

UNION CENTRAL submits that the answer to the certified question should be in the affirmative. It is only by intervention that UNION CENTRAL may fully protect its rights of refund, reimbursement or equitable subrogation.

DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH SOUTHLAND LIFE INS. CO. v. ABELOVE

The decision is in express and direct conflict with Southland Life Ins. Co. v. Abelove, supra. In Abelove, Southland had paid out $600,000.00 and expected to ultimately incur over $1,000,000.00 in medical expenses. Southland attempted to intervene in its insured's action against the putative tortfeasors allegedly responsible for the insured's injuries.

The trial court denied Southland's motion to intervene but it allowed Southland to fully monitor the case and attend the trial and all discovery depositions. The trial court also ordered that the parties were prohibited from settling without adequate notice to Southland and that Southland was entitled to "full opportunity to assert its rights before the Court, prior to any settlement being presented to the Court."

On appeal, the District Court held that Southland has a direct and immediate interest in the Abelove litigation and in reversing said inter alia:

> Clearly, Southland has a direct and immediate interest in the Abelove litigation. Its chances for recovering paid-out medical expenses stand or fall according to the success and character of Jennifer's suit. Accordingly, Southland will "either gain or lose by the direct legal operation and effect of the judgment." Morgareidge, supra.
>
> A further condition to intervention is set out in Bay Park Towers Condominium Association, Inc. v. H.J. Ross & Associates, 503 So.2d 1333 (Fla. 3d DCA 1987), namely, that the intervenor's interests will not be fully protected by the original plaintiff's suit in his own interest. In this instance Southland fears

> that Jennifer may concentrate her efforts on an award for future damages rather than dilute them by including past, insurance-paid, medical costs. As Southland notes, intervention was allowed for a party in Brickell Bay Condominium, Inc. v. Forte, 410 So.2d 522, 524 (Fla. 3d DCA 1982), so that it could assist in bringing about the full recovery which alone would adequately protect its interest.
>
> As further support for its motion to intervene, Southland cites to Blue Cross of Florida, Inc. v. O'Donnell, 230 So.2d 706 (Fla. 3d DCA 1970). Blue Cross sought to intervene in an action for damages because it had paid plaintiff's medical expenses. As in the present appeal, a subrogation clause in the insurance policy gave Blue Cross the right to collect against the defendant. When the trial court denied the Blue Cross motion to intervene, the district court reversed, concluding that "equitable disposition of the parties' rights" required intervention." Id. at 709.
>
> We agree with Southland. Despite the various measures taken by the trial court to protect Southland's subrogation rights, none of these measures equates with intervention, to which Southland was entitled based upon Morgareidge and the other cases cited herein.

UNION CENTRAL submits that the decision in Abelove should be followed and the present decision quashed.

CONCLUSION

For all the reasons and authorities set forth above, it is respectfully submitted that the Certified Question should be answered in the affirmative and UNION CENTRAL should be allowed to intervene to protect its own cause of action. UNION CENTRAL also submits that the present decision expressly and directly conflicts with Southland Life Ins. Co. v. Abelove, supra and that Abelove should be approved as controlling law in the State of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 21st day of December, 1990, to all counsel on attached mailing list.

Jeanne Heyward

JEANNE HEYWARD

CARLISLE v. HUNTSINGER, et al.
FLORIDA SUPREME COURT CASE NO. 76,953

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