

**SUPERIOR COURT  
OF THE  
STATE OF DELAWARE**

**T. HENLEY GRAVES**  
*RESIDENT JUDGE*

**SUSSEX COUNTY COURTHOUSE**  
ONE THE CIRCLE, SUITE 2  
GEORGE TOWN, DE 19947

December 7, 2005

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RE: Allstate Insurance Company v. Sylvia Salem, Individually and as  
Parent/Guardian of Christian Marcelo Salem, Sofia Belen Salem and Silvia  
Daniela Salem; Abraham Ismael Sanchez-Caza, Gigi L. Gross

Nationwide Mutual Insurance v. William C. Lloyd, Ann Schmittinger, as  
Personal Representative of the Estate of Susan Gordon Lloyd Whetstone,  
Sylvia Salem, as Personal Representative of the Estate of Luciano Salem,  
Gigi Gross Black, Abraham Ismael Sanchez-Caza, a minor by his Guardian,  
Rogelio Sanchez

C.A. No. 02C-11-019

Date Submitted: October 11, 2005

Dear Counsel:

This is the Court's ruling denying the application of St. Paul Travelers to intervene as a Party Plaintiff as subrogee of Sylvia Salem to enforce a workman's compensation subrogation lien.

### **BACKGROUND**

Luciano Salem died as a result of a head-on collision caused by Susan Lloyd Whetsone. Ms. Whetstone, while under the influence of alcohol, attempted to pass three cars on a curve of a two-lane road. Mr. Salem was survived by his wife, Sylvia Salem, and three small children. Mr. Salem was employed by Children and Families First and was acting within the course and scope of his employment at the time of the accident. Thus, workmen's compensation death benefits began to accrue in accordance with 19 *Del. C.* § 2330. Mrs. Salem has received these compensation payments for herself and indirectly for her children.

The tort feasers policy limits were interpled by the relevant liability insurers. The Salem children were later included in the interpleader case for their wrongful death claims. The interpled funds were agreed to be split by and among the individual plaintiffs. A portion of the funds will be paid to the Salem children under a Court Guardianship and Sylvia Salem will receive none of the interpled funds individually.

The workmen's compensation carrier, St. Paul Travelers (St. Paul), seeks to place a subrogation lien on the payments made to the Salem children. St. Paul complains that by having the interpled tort feaser funds go directly to the children, the Salem family is attempting to defeat St. Paul's subrogation lien. St. Paul is correct. This is exactly what the Salem's attorney has structured, but it is permissible under the law, as will be discussed below. Separately, St. Paul is also trying to attach its workman compensation subrogation lien to any money awarded Mrs. Salem from the Salem's underinsured motorist funds.

## Analysis

Delaware's Workmen's Compensation Act constructed a system for an employee to compensate him if he is injured, or to compensate his dependants if he is killed while working within the scope of his employment.<sup>1</sup> The act also creates a subrogation right for the employer to recover any money received by the employee or his dependants from a tort action against a third-party for an injury for which the employer paid workmen's compensation benefits.<sup>2</sup> Any recovery by the employee or his dependants against a third-party "after deducting expenses of recovery, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable under the Worker's Compensation Act".<sup>3</sup> The employer's right of subrogation prevents double recovery by the employee.<sup>4</sup>

### *I. Subrogation of Children's Recovery for Wrongful Death of Their Father*

An employer can only seek subrogation against recoveries or awards from the person who actually received the compensation benefits.<sup>5</sup> The Workmen's Compensation Act states that children of the deceased employee cannot receive direct payment unless there is no widow.<sup>6</sup> Even though compensation payments to a widow with children are higher than payments to a widow without children, the indirect benefit to the children does not trigger a subrogation claim against the children because the children never directly received the payments from workmen's compensation.<sup>7</sup>

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<sup>1</sup> 19 Del. C. § 2330.

<sup>2</sup> 19 Del. C. § 2363 (a).

<sup>3</sup> 19 Del. C. § 2363(e).

<sup>4</sup> *Moore v. General Foods*, 459 A.2d 126, 127-128 (Del. Super. 1983).

<sup>5</sup> *Welch v. State*, 598 A.2d 684, 687 (Del. Ch. 1991).

<sup>6</sup> 19 Del. C. § 2330.

<sup>7</sup> *Welch*, 598 A.2d at 686-687.

In *Welch*, an employee was killed while working within the scope of his employment when he was hit by a car.<sup>8</sup> The employee was employed by the State of Delaware at the time of his death.<sup>9</sup> The employee was survived by his widow and minor children.<sup>10</sup> In accordance with Delaware's Workmen's Compensation Act, the employer paid benefits to the widow, but not directly to the children.<sup>11</sup> Subsequently, the widow and the dependent children won a wrongful death claim action against a third-party.<sup>12</sup> The Court had to decide if any portion of the wrongful death award to the children was subject to subrogation.<sup>13</sup> The Court decided that there cannot be subrogation against the children's portion because they did not directly receive the workmen's compensation benefits, unlike the widow.<sup>14</sup>

Here, the facts are indistinguishable from the *Welch* case. Mr. Salem died as he was acting on behalf of his employer within the scope of his employment. The workmen's compensation carrier, as a result of Mr. Salem's death, began paying workmen's compensation benefits to his widow. Mr. Salem's dependent children did not receive directly any payments or benefits from the workmen's compensation carrier. The children did receive a wrongful death award. Therefore, their award is not subject to subrogation because they did not directly receive the workmen's compensation payments. There is no requirement to reimburse the workmen's compensation carrier for the award received by the children.

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<sup>8</sup> *Id.* at 684.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 684.

<sup>11</sup> *Id.* at 685.

<sup>12</sup> *Id.*

<sup>13</sup> *Welch*, 598 A.2d at 685.

<sup>14</sup> *Id.* at 686-687.

## *II. Subrogation of Underinsured Motorist recovery*

In Delaware, an employer has the right to impose a workmen's compensation statutory lien upon an employee or his dependants' recovery under the employer's underinsured motorist coverage.<sup>15</sup> However, when the employee has his own underinsured motorist coverage his employer does not have a right to place a workmen's compensation lien on a recovery by the employee or his dependants<sup>16</sup> because the employee has given separate consideration for his or her own this protection.<sup>17</sup> It is the public policy of the underinsured statute to allow people to contract for supplemental coverage to protect against injury caused by underinsured motorists.<sup>18</sup> Here, it is undisputed that the underinsured motorist policy in issue was a personal policy for the Salem family. Therefore, St. Paul cannot impose a subrogation lien on any recovery from the Salem's personal underinsured motorist policy.

### **Conclusion**

St. Paul cannot place a lien on the Salem children's wrongful death recovery or Mrs. Salem's recovery from the personal underinsured motorist policy for the above stated reasons.

Therefore, the application of St. Paul Travelers to intervene as a Party Plaintiff as subrogee of Sylvia Salem to enforce a workman's compensation subrogation lien is denied.

Very truly yours,

T. Henley Graves

THG/jfg  
oc: Prothonotary

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<sup>15</sup> *Harris v. New Castle County*, 513 A.2d 1307 (Del. 1986).

<sup>16</sup> *Adams v. Delmarva Power & Light Co.*, 575 A.2d 1103 (Del. 1990).

<sup>17</sup> *State v. Calhoun*, 634 A.2d 335, 337 (Del. 1993).

<sup>18</sup> *Adams*, 575 A.2d 1107-1108.