

IN THE COURT OF APPEALS 12/29/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00928 COA

RAMONA E. SIMMONS AND WILLIAM L. SIMMONS, JR.

APPELLANTS

v.

UNITED STATES FIDELITY AND GUARANTY

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JAMES E. GRAVES, JR.

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

WILLIAM P. FEATHERSTON, JR.

ATTORNEYS FOR APPELLEE:

CHARLES G. COPELAND

WILLIAM M. VINES

NATURE OF THE CASE: CIVIL-INSURANCE

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED IN FAVOR OF UNITED
STATES FIDELITY AND GUARANTY COMPANY

BEFORE FRAISER, C.J., KING, McMILLIN, AND SOUTHWICK, JJ.

McMILLIN, J., FOR THE COURT:

This case is before us on appeal from the grant of summary judgment in favor of the appellee, United States Fidelity and Guaranty Company (USF&G), and against the appellants, Ramona E. Simmons and William L. Simmons, Jr. (Mr. and Mrs. Simmons) in the Hinds County Circuit Court, First Judicial District.

We hereby affirm the judgment of the circuit court.

I.

FACTS

Mrs. Simmons is claiming damages for injuries received while a guest passenger in a vehicle insured by USF&G. Mr. Simmons claims damages for loss of consortium due to the injuries received by Mrs. Simmons. The USF&G policy on the vehicle included uninsured motorist coverage with substantial limits, and it is undisputed that liability for the accident lies with the driver of the other vehicle involved in the accident. There was a \$50,000 limit liability policy in effect covering that other vehicle, and Mr. and Mrs. Simmons settled their claim against the driver of that vehicle for the \$50,000 policy limits, executing in return a full and complete release of all claims against the driver. These settlement events occurred without the knowledge or consent of USF&G.

Subsequently, Mr. and Mrs. Simmons sought recovery against USF&G, claiming that their damages exceeded \$50,000 and that such additional damages were recoverable under the "underinsured" provisions of the policy's uninsured motorist coverage.

USF&G asserted the affirmative defense that, by executing the release of the tortfeasor, Mr. and Mrs. Simmons had waived uninsured motorist coverage under the policy. The trial court agreed and granted summary judgment in favor of USF&G. This appeal ensued.

Mr. and Mrs. Simmons advance two arguments for consideration on appeal:

(1) They urge adoption of a rule enforced in some other jurisdictions that, in order to assert the defense claimed by USF&G, it must be established that the company was prejudiced by the unauthorized settlement.

(2) Alternatively, Mr. and Mrs. Simmons advance the proposition that, since they were not the contracting parties in the issuance of the USF&G policy, they should not be bound by the provisions of the policy that provide for waiver of coverage in these circumstances.

II.

THE REQUIREMENT TO SHOW PREJUDICE FROM THE WAIVER

Mr. and Mrs. Simmons suggest that Mississippi adopt a rule similar to that applied in the Florida case

of *Gould v. Prudential Property & Casualty Ins. Co.*, 443 So. 2d 127 (Fla. Dist. Ct. App. 1983), *reh'g denied*, 451 So. 2d 848 (Fla. 1984) that the unauthorized release of the tortfeasor creates only a rebuttable presumption of prejudice and that the insured may yet recover if he or she can overcome the presumption by showing lack of prejudice. The Simmons point out that they received all of the available coverage from the tortfeasor's liability insurance policy. They then produced an affidavit from the tortfeasor indicating the unavailability of personal assets or income sufficient to satisfy any judgment that might be obtained against him in excess of policy limits, and suggesting an inclination to file bankruptcy if he were sued on the accident.

Mississippi has never required such a showing of lack of prejudice in order to assert the defense relied upon by USF&G in any reported cases dealing with the subject. *See, e.g., St. Paul Property & Liability Ins. Co. v. Nance*, 577 So. 2d 1238 (Miss. 1991). The right of subrogation accruing to USF&G is a statutory right created by Section 83-11-107 of the Mississippi Code of 1972. *See* Miss. Code Ann. § 83-11-107 (1972). That right of subrogation was effectively destroyed by the release executed by Mr. and Mrs. Simmons. As a practical matter, it would appear almost impossible to establish any meaningful standard to decide the issue of prejudice to the insurer in these circumstances, since, as USF&G points out, a judgment rendered in its favor on a subrogation claim would last a minimum of seven years, and, even then, is subject to being renewed. It would require an ability to predict the future not vouchsafed to any court to divine with any degree of assurance the financial fortunes of a judgment debtor for such an extended period of time. Neither do we think that threats or predictions of filing for a discharge under federal bankruptcy laws by the tortfeasor should be considered a legitimate factor in assessing any alleged prejudice to the insurer by virtue of its loss of subrogation rights. The certainty of such an event is essentially impossible to predict, and, beyond that, there would be the issues of what distribution might be available on the claim from the bankruptcy administration and whether the claim might fit any of the exceptions to discharge provided in the bankruptcy laws. In short, we determine that the present law of this State does not require an inquiry into the matter of prejudice, and this Court does not think it advisable to impose such a requirement.

The law provides an insurer who pays an uninsured motorist claim an unqualified right of subrogation to seek complete or partial recovery of its outlay from the tortfeasor. It is within the power of the insured to unilaterally destroy that right without the knowledge or authority of the insurer, but there is, rightfully, a consequence attached to such action. That consequence is the loss of the right to claim uninsured motorist benefits. The essence of the bargain between the insurer and the insured is this: For a certain consideration, the insurer will relieve its injured insured of the problems and uncertainties of pursuing a tort claim against an uninsured tortfeasor, and will, instead, pay such amounts as the insured would have been entitled to recover from the tortfeasor. However, as a part of the bargain, the insurer requires that it, standing in the stead of the insured, be permitted to assert the claim otherwise available to the insured against the tortfeasor. That right of recovery, though perhaps problematic in some cases, is an integral part of the bargain, and if the insured wrongfully destroys that right and prevents the insurer from exercising its rights under the bargain, then the law requires that the insured likewise be denied the benefit of its bargain and that coverage be denied.

III.

LACK OF PRIVACY

Mr. and Mrs. Simmons suggest that, due to the fact that they did not enter directly into contract with USF&G, they should not be bound by the provision that provides that uninsured motorist coverage will not apply to claims where the insured has released the uninsured tortfeasor without consent. They argue that, not being parties to the contract, they were not given the opportunity to bargain to exclude such a provision.

We reject out of hand the assertion by Mr. and Mrs. Simmons that, by virtue of the fact that they did not directly contract with USF&G, they are free to disregard such provisions of the contract as they find unpalatable and yet claim the benefits accruing to them under other provisions of the policy. It is fundamental law that one claiming to enjoy the benefits rightfully accruing to him or her under a contract must, by the same token, expect to be bound by the contract burdens. The New Jersey Superior Court, Appellate Division, held that a minor "additional insured" under her father's policy was bound by an arbitration clause in the policy, finding that the child was, in essence, a third-party beneficiary to the contract, and that "[a] third-party beneficiary may accept the benefits of the contract, but is also bound by any burdens or restrictions created by it." *Allgor v. Travelers Ins. Co.*, 654 A.2d 1375, 1379 (N.J. Super. Ct. App. Div. 1995). We consider this a correct statement of the principle involved in this case.

We further agree with the proposition advanced by USF&G that the right of subrogation is, in fact, statutory and not just contractual and that, under existing case law in this State, the

destruction of USF&G's statutory right of subrogation by the unilateral action of Mr. and Mrs. Simmons would have acted as a waiver of coverage without regard to the provisions of the policy.

**THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY IS AFFIRMED.
COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANTS.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, PAYNE,
AND SOUTHWICK, JJ., CONCUR. DIAZ, J., NOT PARTICIPATING.**