

# Supreme Court of Florida

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CASE NO. SC15-1555

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HOLMES REGIONAL MEDICAL CENTER INC. et al.,

Petitioners,

vs.

ALLSTATE INSURANCE COMPANY, et al.,

Respondents.

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ON PETITION FOR DISCRETIONARY REVIEW  
FROM THE FIFTH DISTRICT COURT OF APPEAL

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AMICUS CURIAE BRIEF OF THE FLORIDA  
JUSTICE ASSOCIATION IN SUPPORT OF PETITIONER DOUGLAS  
STALLEY AS GUARDIAN OF THE PROPERTY OF EDWARD HINTZ

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## **STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE**

The Amicus Curiae, the Florida Justice Association (“FJA”) is a statewide not-for-profit association of thousands of trial and appellate lawyers. We frequently appear in cases involving issues important to the rights of individuals and to the administration of justice. Our Objectives and Goals in our Charter are as follows:

Section I. The objectives of this corporation are to: (a) Uphold and defend the principles of the Constitutions of the United States and the State of Florida. (b) Advance the science of jurisprudence. (c) Train in all fields and phases of advocacy. (d) Promote the administration of justice for the public good. (e) Uphold the honor and dignity of the profession of law. (f) Encourage mutual support and cooperation among members of the Bar. (g) Diligently work to promote public safety and welfare while protecting individual liberties. (h) Encourage the public awareness and understanding of the adversary system and to uphold and improve the adversary system, assuring that the courts shall be kept open and accessible to every person for redress of any injury and that the right to trial by jury shall be secure to all and remain inviolate.

Article II, FJA Charter, approved October 26, 1973.

Consistent with the foregoing, the FJA has one of the State’s most active Amicus Curiae committees, whose members work on a pro bono basis to address important issues of substantive and procedural law of widespread importance to our members and our clients, as well as to all of the citizens of the State.<sup>1</sup>

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<sup>1</sup> The FJA, under its current name and prior name, Academy of Florida Trial Lawyers, has appeared in nearly 450 state and federal appeals as amicus curiae over the past forty-plus years.

This case is of interest to the FJA because the effect of the Fifth District's decision will be to make a dramatic change in the law that will result in unnecessary delays, expense, and consumption of judicial resources not in keeping with the efficient administration of justice. Florida law in the field of liability of successive tortfeasors, and their rights as between and among themselves, has been well-established over the decades since this Court's decisions in *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977) and *Underwriters at Lloyds v. City of Lauderdale Lakes*, 382 So. 2d 702 (Fla. 1980), and their progeny.

The intervention procedures authorized and required by the Fifth District's decision will greatly complicate trials, confuse juries, and operate to the unfair prejudice of all parties to malpractice cases, not only the plaintiffs. The FJA hopes by its presence in these proceedings to assist the Court in correcting the unfortunate circumstances visited upon the judicial system by the Fifth District's incorrect decision.

### **SUMMARY OF THE ARGUMENT**

The Fifth District's certified question, or the rephrased question suggested by Petitioner Stalley, should be answered in the negative. Cases from all over the United States require as an essential element of an equitable subrogation claim that the subrogee have paid all of the subrogor's damages caused by the primarily-liable third party, for which the subrogee is secondarily liable.

Until the Plaintiff's total damages have been paid by or on behalf of Boozer and/or Allstate, there is no injustice in denying them subrogation. However, for the court to divest the Plaintiff of his right to seek full compensation from the Medical Defendants for the sums unpaid by Boozer and Allstate would be wholly inequitable.

### **ARGUMENT**

**THIS COURT SHOULD FOLLOW THE LEAD OF COURTS FROM ACROSS AMERICA RECOGNIZING THAT AN ESSENTIAL ELEMENT OF AN EQUITABLE SUBROGATION CLAIM IS THAT THE SUBROGEE HAD PAID ALL THE DAMAGES SUSTAINED BY THE SUBROGOR, AND SHOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE**

The Florida Justice Association has, as a longtime Friend of this Court, researched the law far and wide looking for any authority supporting the Fifth District's decision to eliminate from the equitable subrogation doctrine the element that the prospective subrogee has satisfied all of the subrogor's damages. No case from any jurisdiction supports the proposition that a debtor such as Boozer or Allstate may substitute themselves for the creditor to make a subrogated claim against a third party simply upon entry of an uncollectible judgment against them, absent full payment of the debtor's debt to the creditor.

In addition to the authorities cited in his brief, another Florida case supporting the position of Petitioner Stalley is *Eastern Nat'l Bank v. Glendale Fed. Sav. & Loan Ass'n.*, 508 So. 2d 1323 (Fla. 3d DCA 1987). That court noted that equitable subrogation is a creature of equity which was developed to afford relief "when one

person has *satisfied the obligation of another* and equity compels that the person discharging the debt stands in the shoes of the person whose claim has been discharged, thereby succeeding to the rights and priorities of the original creditor.” *Id.* at 1324 (emphasis added). That case does not support the proposition that a mere partial satisfaction of a third party’s liability will give rise to an equitable subrogation claim.

The Supreme Court of New Jersey addressed the argument made in a successive tortfeasor case by the doctors whose malpractice caused further injuries to the plaintiff; in rejecting the argument that the plaintiff had no standing to sue the doctors because the plaintiff had settled with the initial tortfeasor, the court held as follows:

The only remaining matter which now requires mention is the defendants' contention that the plaintiff's release transferred to Dealer's whatever claim he had against them and that he therefore has 'no justiciable interest in this controversy.' They suggest rights in Dealer's by way of subrogation (*Retelle v. Sullivan*, 191 Wis. 576, 211 N.W. 756, 50 A.L.R. 1106 (Sup.Ct.1927)) or indemnity (*Popkin Bros., Inc., v. Volk's Tire Co.*, 20 N.J.Misc. 1, 23 A.2d 162 (Sup.Ct.1941)), and that the defendants are consequently 'confronted with a possibility of double liability.' We find no substantial merit in the defendants' contention. Subrogation is an equitable doctrine which is designed to further the interests of justice and which has generally been considered unavailable when the original debt or claim was not fully paid. *Standard Accident Ins. Co. v. Pellecchia*, 15 N.J. 162, 104 A.2d 288 (1954); *Receivers of New Jersey Midland Railway Co. v. Wortendyke*, 27 N.J.Eq. 658 (E. & A.1876). And indemnity amongst tortfeasors has generally been confined to those whose negligence 'is not morally culpable but is merely constructive, technical, imputed or vicarious.'

*Public Service Electric & Gas Co. v. Waldroup*, 38 N.J.Super. 419, 432, 119 A.2d 172, 179 (App.Div.1955).

Dealer's was charged with having engaged, through its agent, in conduct which resulted in causally related injuries for which it was allegedly entirely responsible and for part of which the doctors were also allegedly responsible because of their own wrongful conduct. *See Daily v. Dealer's Transport Company*, 16 F.R.D. 566 (D.C.S.D.N.Y.1954). When the claim against it was settled Dealer's was apparently eliminated from further relation to the entire matter and, under the principles of *Breen v. Peck, supra*, ***the plaintiff was left with his right to proceed against the doctors unless it appeared that the plaintiff had been fully compensated*** or that the release he executed was intended to absolve the doctors.

*Daily v. Somberg*, 146 A.2d 676, 684 (N.J. 1958) (emphasis added).

Likewise, case law from other jurisdictions recognizes that a tortfeasor must pay the obligation of a third party to become subrogated to the plaintiff's rights against that third party. Specifically in the context of a personal injury case the Supreme Court of Wisconsin in *Gaertner v. Holcka*, 580 N.W.2d 271 (Wis. 1998) dealt with the issue whether contribution or equitable subrogation was available to a primary tortfeasor against a third party whose negligence had enhanced the injuries of the Plaintiff. In her concurring opinion, Justice Ann Bradley addressed the Wisconsin jury instruction applicable to successive tortfeasor situations and quoted from the comments to that jury instruction which recognized that equitable subrogation is unavailable unless and until the initial tortfeasor has paid all of the damages, including those damages caused by the successive tortfeasor:

Accordingly, I agree with the comment to the standard jury instruction for enhanced injuries, Wis. JI-Civil 1723, "since successive

torts are involved, no joint liability occurs and thus contribution is not allowed.” However, the accident causing tortfeasor would be entitled to equitable subrogation to the extent he or she ***paid for those damages attributable by the jury to the enhancing tortfeasor.***” Wis. JI-Civil 1723 Cmt. Under existing law, because the tortfeasors are “successive tortfeasors,” not “joint tortfeasors,” Holcka’s claim for contribution must fail.

*Id.* at 282 (emphasis added).

Likewise, cases other than personal injury cases impose the requirement of full payment of another’s obligation to give rise to a right of equitable subrogation:

**Alabama:** *Ex Parte Theresa Lawson d/b/a The Design Co. v. Brian Homes, Inc.*, 6 So. 3d 7 (Ala. 2008)(“The elements of the doctrine of equitable subrogation are: . . . (3) the whole debt must be paid before subrogation can be enforced . . .”).

**Arizona:** *Sourcecorp., Inc. v. Norcutt*, 274 P.3d 1204, 1207 (Ariz. 2012)(citing with approval Restatement (Third) of Property § 7.6 test for equitable subrogation and noting that, “[u]nder this test, a person who ***fully performs an obligation of another*** . . . becomes by subrogation the owner of the obligation . . . .”)(emphasis added).

**Arkansas:** *Walls v. Walls*, 339 S.W.2d 430 (Ark. 1960)(affirming denial of subrogation claim based on finding that “it appears that the indebtedness has not yet been satisfied, and we have held on numerous occasions that subrogation cannot be claimed until ***the entire indebtedness is paid***”)(emphasis added).

**California:** *Chicago Title Ins. Co. v. AMZ Ins. Svcs, Inc.*, 188 Cal. App. 4th

401, 432 (4th Dist. 2010):

A party claiming to be equitably subrogated to the rights of a creditor must meet these requirements: (1) the subrogee made payment to protect the subrogee's own interest; (2) the subrogee must not have acted as a volunteer; (3) the debt paid must be one for which the subrogee was not primarily liable; (4) ***the entire debt must have been paid***; and (5) subrogation must not cause injustice to the rights of others.

*Id.* at 432 (emphasis added).

**Illinois:** In a federal case involving Illinois law, the seller of air conditioning service warranties that was held liable to a purchaser under a breach of warranty theory asserted claims for equitable subrogation against the manufacturer of the defective equipment. *See Equiguard v. Islandaire, Inc.*, No. 99 CV 0009; 1999 U.S. Dist. LEXIS 6218 (N.D. Ill. April 6, 1999). In *Equiguard* the court noted that Equiguard was entitled to equitable subrogation only because it had satisfied an injured customer's claims for damages caused by the defective equipment:

Equiguard's equitable subrogation claim may be summarized as follows: Islandaire sold defective air conditioning equipment to its customers. By selling the defective equipment, Islandaire breached the implied warranty of merchantability and the implied warranty of fitness for particular purposes. The customers then submitted claims to Equiguard related to the defective equipment, which Equiguard paid. ***As Equiguard has paid the claims arising from damages caused by Islandaire, Equiguard is entitled to equitable subrogation*** on the breach of warranty claims against Islandaire.

*Id.* at \*\* 5-6 (emphasis added). Only because Equiguard had fully paid sums which should have been paid by Islandaire was Equiguard entitled to pursue equitable subrogation.

**Indiana:** In *Puente v. Beneficial Mortgage Co.*, 9 N.E.3d 208 (Ind. App. 2014), the court recognized that “[t]he made-whole doctrine is an equitable principle whereby a subrogee is not entitled to subrogation unless and until the subrogor has been *compensated completely* for the covered loss.” *Id.* at 218 (emphasis added).

**Nebraska:** In *Turco v. Schuning*, 716 N.W.2d 415 (Neb. 2006), the court dealt with the equitable subrogation doctrine in the context of analyzing a statutory revision to the doctrine permitting employers to receive equitable subrogation from tortfeasors. *See* Neb. Rev. Stat. §48-18 (2004). In that case, an employee had been paid more than \$145,000 in workers’ compensation benefits and had reached a settlement with a tortfeasor for \$250,000. The trial court refused to permit the employer to pursue equitable subrogation against the third-party tortfeasor and awarded the employee the entire settlement. On appeal, the Nebraska Supreme Court reversed, noting the differences between the statutory subrogation provision enacted for the benefit of employers and the common law. The court cited its earlier decision in *Shelter Ins. Co. v. Frohlich*, 498 N.W.2d 74 (1993), noting that “[a]pplying basic equitable principles, we held in *Frohlich* that ‘in the absence of a valid contractual provision or statute to the contrary, an insurer may exercise its right

of subrogation only when the insured has obtained an amount that exceeds the insured's loss.' . . . in other words, *the insured had to be 'made whole'* before the insurer could subrogate." *Id.* at 418. (Emphasis added). Only because the Nebraska Legislature had modified that common law doctrine in the workers' compensation context was subrogation permitted by an employer who had not paid the full amount of the employee's damages.

**New York:** The courts of New York recognize the "made-whole" doctrine as an integral part of equitable subrogation: "Equitable subrogation principles include the 'made-whole rule,' under which an insurer's recovery against a tortfeasor in a subrogation lawsuit is limited to 'those funds and assets that remain after the insured has been fully compensated.' Equity deems an insured to be fully compensated (or 'made whole') for purposes of this rule *when it has recovered* its legally recoverable tort damages." *World Trade Ctr. Props., LLC v. QBE Int'l. Ins. Ltd.*, 627 Fed. Appx. 10, 13 (2d Cir. 2015)(internal citations omitted)(applying New York law).

**Oklahoma:** In *Fields v. Farmers Ins. Co.*, 18 F.3d 831, 835 (10th Cir. 1994) the court applied the law of Oklahoma citing cases from other jurisdictions including Arkansas, Nebraska, Tennessee, and Wisconsin, summarizing the general rule applicable to establish the elements of equitable subrogation in the absence of statutory or contractual language modifying the "made-whole" doctrine:

Neither party has cited, nor have we discovered, any Oklahoma cases addressing an insurer's right to contractual subrogation when the insured has not been fully compensated, or made whole, for his losses. Addressing a claim based on the doctrine of equitable subrogation--subrogation "not depending upon contract, but upon the equities of the parties," *Lawyers' Title Guar. Fund v. Sanders*, 571 P.2d 454, 456 (Okla. 1977)--the Oklahoma Supreme Court recently rejected an insurer's claim for reimbursement before the insured had been fully compensated. *Gentry (L.Z.), d/b/a Gentry Enters., Inc. v. American Motorist Ins. Co.*, 867 P.2d 468, 1994 WL 10238 (Okla. Jan. 18, 1994). In *Gentry*, a theft loss incurred by the insured exceeded the amount the thief paid in restitution. The court ruled that the insurer could not reduce the benefit it paid its insured by the amount of restitution paid by the thief. *Id.*, 1994 WL 10238 at \* 5.

*Thus, Oklahoma, like many jurisdictions, seems to follow the general principle that an insurer is not entitled to equitable subrogation until the insured has been fully compensated. See, e.g., Shelter Ins. Cos. v. Frohlich*, 243 Neb. 111, 498 N.W.2d 74, 78 (Neb. 1993)("Generally, subrogation is unavailable until the debt owed to a subrogor has been paid in full"); *Shelter Mut. Ins. Co. v. Bough*, 310 Ark. 21, 834 S.W.2d 637, 641 (Ark. 1992)(same); *Wimberly v. American Casualty Co.*, 584 S.W.2d 200, 204 (Tenn. 1979)(same); *Garrity v. Rural Mut. Ins. Co.*, 77 Wis. 2d 537, 253 N.W.2d 512, 514 (Wis. 1977)(same). . . .

*Id.* at 835 (emphasis added).

**Tennessee:** *York v. Sevier County Ambulance Auth.*, 8 S.W.3d 616 (Tenn. 1999) is illustrative of the fact that some jurisdictions value the "make-whole" principle so greatly that reimbursement provisions in insurance policies are ineffective unless and until the insured has been made whole:

In *Wimberly v. American Cas. Co.*, 584 S.W.2d 200 (Tenn. 1979), we held that an insurer was not entitled subrogation rights before an insured is made whole for his or her losses. We now likewise conclude that *an insurer may not receive reimbursement for medical expenses made on behalf of the insured when the insured has not*

*been made whole for his or her losses, even where a “right of reimbursement” is contained in the insurance policy.* A contrary holding would allow an insurer to circumvent the “made-whole” doctrine simply by using a reimbursement provision in lieu of subrogation.

*Id.* at 617 (emphasis added)

**Texas:** Under Texas law, the doctrine of equitable subrogation applies “in every instance in which one person, not acting voluntarily, has paid a debt for which another was primarily liable and which in equity should have been paid by the latter.” *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 774 (Tex. 2007).

**Washington:** The courts of Washington State also recognize the “made-whole” doctrine as an element of equitable subrogation. *See Thiringer v. American Motors Ins. Co.*, 588 P.2d 191 (Wash. 1978). Citing cases from other jurisdictions, the *Thiringer* court stated that “[t]he general rule is that, while an insurer is entitled to be reimbursed to the extent that its insured recovers payment for the same loss from a tortfeasor responsible for the damage, it can recover only the excess which the insured has received from the wrongdoer remaining *after the insured is fully compensated* for his loss.” *Id.* at 219 (emphasis added).

**Scholarly Treatises:** Many courts cite as authoritative scholarly treatises dealing with the equitable subrogation doctrine which universally require full compensation to the injured party, not just an unsatisfied judgment for the amount

of the injured party's damages. In *Moore v. CapitalCare, Inc.*, 461 F.3d 1 (D.C. Cir. 2006), the court cited such a scholarly treatise as follows:

The make whole doctrine is an equitable insurance law principle and can be summarized as follows:

[I]n the absence of contrary statutory law or valid contractual provisions to the contrary, the general rule under the doctrine of equitable subrogation is that where an insured is entitled to receive recovery for the same loss from more than one source, e.g., the insured and the tortfeasor, ***it is only after the insured has been fully compensated for all the loss that the insurer acquires a right to subrogation***, or is entitled to enforce its subrogation rights. The rule applies as well to instances to which the insured has recovered from the third party and the insurer attempts to exercise its subrogation right by way of reimbursement against the insured's recovery.

16 Lee R. Russ et al., *Couch on Insurance* §223:134 (3d ed. 2000).

461 F.3d at 13 (latter emphasis added). *Accord, Alves v. Silverado Foods, Inc.*, 6 Fed. Appx. 694, 702 (10<sup>th</sup> Cir. 2001)(citing 16 *Couch on Insurance* 3d §223:134 at 147-150).

The situation where a Plaintiff sues an initial tortfeasor and recovers a judgment which is not satisfied is distinguishable from the situation where the injured party settles with the initial tortfeasors without reserving his or her right to proceed against the third parties. "When a plaintiff settles his claim with an initial tortfeasor, the plaintiff is assumed to have been made whole for any resulting

injuries.”<sup>2</sup> *Pharma Supply, Inc. v. Stein*, No. 14-80374-civ-COHN; 2015 U.S. Dist. LEXIS 8497 at \*10 (S.D. Fla. Jan. 26, 2015)(citing *Broz v. Rodriguez*, 891 So. 2d 1205 (Fla. 4<sup>th</sup> DCA 2005). Allstate and Boozer are not entitled to equitable subrogation from the Medical Defendants because they have not paid the entire amount of damages caused by Boozer, much less any of the damages caused by the Medical Defendants. Therefore, the certified question should be answered in the negative.

### **CONCLUSION**

WHEREFORE, the Fifth District’s decision being bad law and bad policy (the proverbial “solution looking for a problem”); Boozer and Allstate having no right of equitable subrogation unless and until they fully satisfy the judgment against Boozer; there being no risk of double recovery by Plaintiff; and the equities being in favor of the Petitioners, the certified question should be answered in the negative.

Respectfully submitted,

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2 The FJA notes that the presumption that a release extinguishes claims against successive tortfeasors is inapplicable where the injured plaintiff expressly reserves the right to proceed against third-parties, including tortfeasors whose negligence enhanced the injuries caused by the settling defendant, or otherwise expresses that the settlement is not for the full amount of the plaintiff’s damages. *See, e.g., Pacific Ins. Co. v. Botelho*, 891 So. 2d 587 (Fla. 3d 2005).

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### **CERTIFICATE OF SERVICE**

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### **CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the foregoing brief has been computer generated in 14 point Times New Roman and complies with the requirements of Rule 9.210.

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