

1997

Josie Ann Gunderson v. The May Department Stores Company, Payless Shoe Source, Inc. : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

JOSIE ANN GUNDERSON,	:
	:
Appellant,	: Case No. 970178
	: Category 15
vs.	: No. 940901812
	:
THE MAY DEPARTMENT STORES COMPANY,	:
a New York Corporation and PAYLESS	:
SHOE SOURCE, INC., a Missouri	:
Corporation,	:
	:
Appellees.	:

BRIEF OF APPELLANT

APPEAL FROM FINAL JUDGMENT OF THE THIRD JUDICIAL DISTRICT
COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE LESLIE LEWIS PRESIDING

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The Appellant, Josie Ann Gunderson, pursuant to Rule 24 of the Utah Rules of Appellate Procedure, submits this Appeal Brief.

JURISDICTION

The Utah Court of Appeals has original jurisdiction to decide this appeal pursuant to Rule 3(a) of the Utah Rules of Appellate Procedure and Utah Code Ann. §78-2a-3(2)(i).

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in concluding that the plaintiff is barred from bringing an action for bad faith and for negligent infliction of emotional distress against her employer because the Utah Worker's Compensation statute, U.C.A. §35-1-60, et seq., provides the exclusive remedy for plaintiff?
2. Did the trial court err in concluding that the plaintiff cannot maintain a bad faith claim against the defendants?
3. Did the trial court err in concluding that the plaintiff's claim for negligent infliction of emotional distress was barred because the plaintiff did not suffer actual physical injury from the Defendants actions?

STANDARD OF REVIEW

The facts set forth in this brief, and as found by the Court below, are not in dispute.

The trial court's legal conclusions should be given no deference and should be reviewed for legal correctness.

General Glass Corp. V. Mast Construction Co., 754 P.2d 438 (Utah Ct. App. 1988).

DETERMINATIVE AUTHORITY

The following statutory provisions and case law are determinative of the issues on appeal:

U.C.A. §35-1-60 (1953), as amended;

U.C.A. §35-1-78 (1953), as amended;

U.C.A. §31A-26-301 (1953), as amended;

U.C.A. §31A-26-303 (1953), as amended

STATEMENT OF THE CASE

A. Nature of the Case.

This is a tort claim, alleging negligent infliction of emotional distress and violation of public policy as well as a claim alleging bad faith in the administration of a worker's compensation insurance claim and breach of contract.

This is an appeal from the Orders of the District Court, entered on May 8, 1996 and January 7, 1997, granting the Defendant's Summary Judgment and dismissing Appellant's claims. The Orders were entered in the Third Judicial District Court, Salt Lake County, Utah, the Honorable Leslie Lewis, presiding.

B. Course of Proceedings.

The plaintiff filed her complaint in March, 1994. After due discovery, defendants filed their first Motion for Summary Judgment on or about October 12, 1995, with oral argument held on April 9, 1996. The Court granted Appellees' Motion with regard to plaintiff's claims for bad faith, intentional infliction of emotional distress and violation of public policy, but not with regard to her claims of negligent infliction of emotional distress. The Court below reasoned that appellant had no privity of contract with the Appellees and, therefore, could not maintain a cause of action for bad faith. (R. 314-318)

On November 1, 1996, Appellees filed a Motion for Reconsideration of the remaining claim for negligent infliction of emotional distress. After hearing on January 7, 1997, the Court granted Appellees motion, holding that

appellant's claim for emotional disturbance could not stand because Utah law regarding a negligent infliction of emotional distress claim requires a party to be in a "zone of danger" or be threatened with physical injury, neither of which was alleged here. (R. 377-379)

C. Disposition in Trial Court

Honorable Leslie Lewis, Third District Court Judge, granted partial summary judgment to Appellees on Appellant's claims of bad faith, violation of public policy and intentional infliction of emotional distress on April 6, 1996 and granted summary judgment to Appellees on the Appellant's remaining claim of negligent infliction of emotional distress on January 7, 1997.

D. Facts

The following facts were not disputed below:

1. Appellees are self-insured for purposes of Worker's Compensation, pursuant to U.C.A. §35-1-1, et seq. (1953), as amended. (Plaintiff's Complaint ¶7; Record 1-8)
(Hereinafter, the Record on Appeal will be abbreviated as "R")

2. The Western Region Claims Office of Appellee May Department Stores, Inc., (hereinafter "May") located in Los

Angeles, California, administers the worker's compensation claims for, among other corporations owned by May, Payless ShoeSource, Inc. (hereinafter "Payless"), a wholly owned subsidiary of May. (Complaint, ¶10) (R. 1-8)

3. On or about January 20, 1991, Appellant was brutally assaulted while employed at a Payless ShoeSource store. (Complaint, ¶9) (R.1-8)

4. As a result of injuries sustained in that assault, Appellant filed a worker's compensation claim with Appellees. (Complaint, ¶10) (R. 1-8)

5. Subsequent to the assault, Appellant terminated her employment with the Appellees.

6. On October 2 and 4, 1991, Enoch Dangerfield, M.D., a psychiatrist hired by the Appellees, examined the Appellant. (R. 239-242)

7. In June, 1992, Ralph Gant, Ph.D., a psychologist treating the Appellant for mental stress and injury as a result of the assault, concluded that the Appellant had, in fact, suffered such injury from the assault. Dr. Gant relayed his conclusions to the Appellees. (Affidavit of Ralph Gant, Ph.D., R. 266-268)

8. The Appellees did not pay Dr. Gant's bills, which were submitted to the Appellees. (Affidavit of Ralph Gant, ¶8, R. 349)

9. In a letter to the Appellees, dated September 11, 1992, Dr. Dangerfield concluded that the Appellant suffered mental distress and injury as a result of the assault. (R. 239-242)

10. In March, 1993, David L. McCann, M.D., a second psychiatrist hired by the Appellee, examined the Appellant and reached the same conclusions as Dr. Dangerfield. (Paragraph 11 of Undisputed Facts of Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment; R. 349)

11. The Appellees did not pay Dr. Gant's bills as they were submitted and, in fact, did not pay those bills until March 30, 1994, after the complaint was filed by Appellant in the Third District Court. (R. 243)

12. On March 17, 1992, James L. Guinn, D.D.S., a dentist and Temporomandibular Joint (TMJ) expert, who had been hired by the Appellees, examined the Appellant. (R. 244-246)

13. In a letter to Appellees, dated March 23, 1992, Dr. Guinn states that the Appellant had suffered a TMJ injury as

a result of the assault and that she needed surgery to relieve her symptoms. In that letter, Dr. Guinn supported surgery as proposed by Crayton Walker, D.D.S., the Appellant's treating dentist. (R. 244-246)

14. On April 19, 1993, Dr. Walker, D.D.S., performed the surgery which Dr. Guinn, Appellees doctor, had stated needed to be performed on the Appellant. (R. 259)

15. The Appellee did not pay Dr. Walker's bill until March 30, 1994, after the complaint was filed by Appellant in the Third District Court. (R. 247)

16. On June 17, 1993, a medical panel appointed by the Utah Industrial Commission reviewed the treatment received by the Appellant and concluded that the Appellee should pay the Appellant's medical bills. (R. 248-255)

17. Appellees failed to pay the Appellant's medical bills after the report of the medical panel, even after demand by the Appellant. (¶18 of Undisputed Facts of Plaintiff's Memorandum in Response to Defendant's Motion for Summary Judgment; R. 224)

18. In January, 1994, a hearing was held before an Administrative Law Judge (ALJ) for the Utah Industrial Commission. The ALJ that the Appellee should pay the Appellant's medical bills and instructed the Appellees

attorney to write an order reflecting the ALJ's conclusions. (¶19 of Undisputed Facts of Plaintiff's Memorandum in Response to Defendant's Motion for Summary Judgment; R. 225)

19. Appellees failed to pay the Appellant's medical bills even after the ALJ's findings were issued. (¶20 of Undisputed Facts of Plaintiff's Memorandum in Response to Defendant's Motion for Summary Judgment; R. 225)

20. On January 13, 1994, the Order of the Utah Industrial Commission, which ordered the Appellee to pay the Appellant's medical bills, and which was written by attorneys for the Appellees, was signed by the ALJ. (R. 256-262)

21. Appellee's still failed to pay the medical bills of the Appellant's, even after their attorney's wrote the order which was signed by the ALJ. (¶22 of Undisputed Facts of Plaintiff's Memorandum in Response to Defendant's Motion for Summary Judgment; R. 225)

22. Appellees did pay the medical bills of the Appellant, after the Appellant filed a Complaint in the Third District Court. (R. 243-247)

23. Plaintiff testified in her deposition that she understood that her bills would be paid by worker's

compensation. (Deposition of plaintiff, pp. 70-71, Exhibit C to Defendant's Memorandum in Support of Motion for Summary Judgment; (R. 206-207)

24. Appellant's allegation that Appellees acted negligently with regard to Appellant's credit reputation was supported by a claim of one incident where she was told that she had a "blip" on her credit. Appellant was not aware of any time where she was actually denied credit. (Deposition of Plaintiff, pp. 21-23; R. 209-211)

25. Appellant did not return to the Utah Industrial Commission to seek enforcement of the ALJ's order against the Appellees. (¶13 of Undisputed Facts of Defendant's Memorandum in Support of Motion for Summary Judgment; R. 185)

26. On or about May 8, 1996, Judge Leslie A. Lewis of the Third District Court granted Appellees Motion for Summary Judgment with regards to Appellants claims for bad faith, intentional infliction of emotional distress and violation of public policy, but not with regard to Appellant's claim for negligent infliction of emotional distress. The District Court reasoned that Appellant had no privity of contract with the Appellees and, therefore, could not maintain a cause of action for bad faith. The District

Court also concluded that there was no cause of action for violation of public policy in Utah and that the facts did not support a claim for intentional infliction of emotional distress. (R. 314-318)

27. On or about January 7, 1997, Judge Lewis granted Appellees Motion for Reconsideration and ordered Summary Judgment against the Appellant, dismissing Appellant's claim for negligent infliction of emotional distress. The District Court held that Appellant's claim for emotional distress could not stand because Utah law requires that a claimant be in a "zone of danger" or be threatened with physical injury in order to maintain a cause of action for negligent infliction of emotional distress. (R. 377-379)

These facts were undisputed by the parties in the trial court.

SUMMARY OF ARGUMENT

While an employee is precluded from bringing a tort action against an employer, a former employee is not precluded from bringing such an action for torts which occurred after the period of employment.

An employee may bring an action against an employer who acts as the employer, the worker's compensation insured, the

worker's compensation insurer and the worker's compensation insurance administrator for bad faith and negligent infliction of emotional distress for the employer/insurer/insured/administrator's failure to pay worker's compensation claims on a timely and fair basis.

A plaintiff who makes a claim for negligent infliction of emotional distress based on psychological injury only need not be in the "zone of danger" or suffer an actual physical injury in order to prevail on the claim.

ARGUMENT

I

THE TRIAL COURT ERRED IN CONCLUDING THAT THE PLAINTIFF IS BARRED FROM BRINGING AN ACTION FOR BAD FAITH AND FOR NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS AGAINST HER EMPLOYER BECAUSE THE UTAH WORKER'S COMPENSATION STATUTE, U.C.A. §35-1-60, ET SEQ., PROVIDES THE EXCLUSIVE REMEDY FOR PLAINTIFF.

A. The Utah Code Does Not Preclude a Civil Action Against a Former Employer.

While the Industrial Commission of the State of Utah may have exclusive jurisdiction over worker's compensation claims, once an order of the Commission has been entered, the Appellant may seek enforcement of that order with the Utah Industrial Commission or through the District Courts.

The Appellee argues that U.C.A. §35-1-60 precludes an action by an employee against her employer. However, that section precludes actions only for injuries "incurred by the employee in the course of or because of or arising out of his employment". In this case, the injury arises out of the failure of the employer to comply with orders of the Industrial Commission after the employee was no longer employed by the Appellee. This is not an injury "incurred by the employee in the course of" her employment in this case.

While it is true that the original injury arose because the Appellant was attacked by an assailant while she was working as a clerk for the Appellee, the Appellant's subsequent mental injury (for which this action is maintained) arose after the Appellant no longer worked for the Appellees and was no longer employed by them. The Appellant's rationale has been recognized and accepted by Federal and state courts. In Tallman v. Hanssen, 427 N.W. 2d 868 (Iowa 1988), the Iowa Supreme Court wrote that:

It is axiomatic that an employee's rights and remedies arising from an injury suffered in the course of employment are exclusively provided under Iowa Code . . . A district court ordinarily would have no subject matter jurisdiction over a claim that an employee is entitled to worker's compensation benefits.

But the exclusivity principle is limited to matters surrounding a job-related injury and does not extend to subsequent dealings during which a tort may arise by reason of bad faith on the part of an employer's insurer.

Id. at 870 (Emphasis added)

See also Hollman v. Liberty Mutual Insurance Co., 712 F.2d 1259 (8th Cir. 1983) (statutory language of exclusivity did not apply to torts which "occur independent of the industrial injury"); Gibson v. National Ben Franklin Ins. Co., 387 A.2d 220 (Maine 1978); Kaluza v. Home Insurance Co., 403 N.W.2d 230 (Minn. 1987).

B. Failure of Appellee to Pay Appellant's Bills

The Appellees seemed to believe below that if they paid the Appellant's bills, at some time, then the Appellant would suffer no harm. There is more to the Appellant's claim than the street basketball term of "No harm, no foul."

In her complaint the Appellant states:

That by failing to pay the medical bills of the Appellant as required by the Industrial Commission of the State of Utah, Appellees knew or should have known that the Appellant would receive continued demands for payment of the bills by her medical providers and that, thereby, the Appellant would suffer emotional distress and would be harmed as to her credit reputation.

Complaint at paragraph 26. (R. 5)

In his Affidavit, Ralph Gant, Ph.D., the Appellant's treating psychologist, states that the Appellant told him that she was experiencing stress and anxiety because she was anxious about medical bills not being paid and that she was being "hounded" by medical creditors. (Gant Affidavit at §6; R. 267)

Additionally, the report from Dr. Dangerfield, dated September 11, 1992 states that:

She claims that bill collectors have been calling her -- that there are two unpaid anesthesiology bills, radiology charges, etc. She said that one or two of the providers turned her over to a collector, though others didn't. She complained bitterly that she has had to call the credit bureau to clear her credit reports, etc. (R. 240)

While the Appellant may have understood that her bills would be, eventually, paid by the Appellee, it does not take a great leap of the imagination to understand that being "hounded" by creditors would be mentally stressful and cause anxiety, even if the bills were, eventually, paid by the Appellees.

C. Appellees Failed to Comply with Orders of the Industrial Commission

The Appellees below argued that the Appellant's recourse upon the Appellees failure to comply with orders of

the Utah Industrial Commission, was to go back to the Commission for an order penalizing the Appellee. The Appellees claim that Utah law provides for a fifteen percent penalty for failure to pay the bills, which should have been an adequate remedy for the Appellant. Fortunately for abused workers, many courts in the United States disagree with the Appellees.

In Coleman v. American Universal Insurance Co., 273 N.W. 2d 220 (Wisc. 1979), the Wisconsin Supreme Court rejected that same argument made by the Appellees and held that a bad faith claim could be made against the employer. The court in Coleman reasoned that the penalty provision would be applicable to an unexcused delay in payment even if no bad faith was shown. See also Aranda v. Insurance Co. of North America, 748 S.W. 2d 550 (Tex. 1988), Hayes v. Aetna Fire Underwriters, 609 P.2d 257 (Mont. 1980). In Izaguirre v. Texas Employer's Insurance Association, 749 S.W.2d 550 (Texas. Ct. App. 1988), the court stated that:

. . . a special relationship arises out of the parties' unequal bargaining power and the nature of the insurance contracts which would allow unscrupulous insurers to take advantage of their insured's misfortunes in bargaining for settlement or resolution of claims.

Id. at 554.

The Izaguirre court went on to state that the statutory regulation and existing statutory penalties were not adequate to equalize bargaining power between workers and insurers in settling claims and that bad faith claims could be made against the insurer. Id. at 555.

Even though the above cases deal with bad faith claims against insurers, which the Utah Supreme Court has apparently rejected in Savage v. Educator's Insurance Co., 874 P.2d 130 (Utah App. 1994), Section II of this Memorandum makes clear that the Appellant in this case had a special contractual relationship with the Appellees as an employee of the Appellees.

If the Appellees are going to disobey the order of the Industrial Commission that their very attorney wrote, there is certainly no guarantee that the Appellees would comply if faced with only a small fifteen percent increase in the award to Appellant that Appellees may, someday, pay. There must be an effective way for an injured worker to force her employer to comply with an order of the Industrial Commission. One such way is a bad faith action against the employer, when that employer wears all of the hats of employer, insurer, insured and administrator, as in this case.

**D. No Utah Statute Precludes District Court Action by
the Appellant**

The Appellees claim that, because U.C.A. §35-1-78 provides for continuing jurisdiction of the Industrial Commission over Worker's Compensation matters, that statute somehow precludes the Appellant from bringing a District Court action for bad faith against the employer.

However, there is no statute nor any rule of the Industrial Commission which precludes District Court action.

The Appellees have argued that there is a "simple solution" of having the Appellant go back to the Industrial Commission for further orders to pay the Appellant. That course of action, however, assumes good faith on the part of the Appellees, which was clearly not shown by their course of dealings with the Appellant below.

In any event, U.C.A. §31A-26-103 (1953), as amended, provides that:

In addition to being subject to this and other chapters of this title, insurers writing worker's compensation insurance in this state, including the Worker's Compensation Fund of Utah, are subject to the Industrial Commission with respect to claims for and payment of compensation and benefits. (Emphasis added).

U.C.A §31A-26-301 (1953), as amended, states:

(1) Unless otherwise provided by law, an

insurer shall timely pay every valid insurance claim made by an insured . . .

(3) This section applies only to claims made by claimants in direct privity of contract with the insurer. (Emphasis added)

U.C.A. §31A-26-303 (1953), as amended, states:

(1) No insurer or person representing an insurer may engage in any unfair claim settlement practice . . . (Emphasis added)

Through the provisions of U.C.A. §§31A-26-301 and 31A-26-303 (1953), as amended, worker's compensation insurers (or self-insurers, such as the Appellees) are subject to bad faith claims for unfair claim settlement practices.

II

THE TRIAL COURT ERRED IN CONCLUDING THAT THE PLAINTIFF CANNOT MAINTAIN A BAD FAITH CLAIM AGAINST THE DEFENDANTS.

In the District Court below, the Appellees relied upon Savage v. Educator's Insurance Company, 874 P.2d 130 (Utah Ct. App. 1994). However that reliance is misplaced and is based on a misreading of this Courts holding in Savage.

In Savage, the employer, the Jordan School District, was self-insured for its worker's compensation insurance. The District contracted with Educator's Mutual to administer the District's worker's compensation insurance policy. Id. at 130.

In Savage, the Appellant was injured while on the job with the school district. Because of an alleged failure by Educator's to pay medical bills incurred as a result of that injury, Savage filed a complaint against Educator's alleging lack of good faith and fair dealing, later amending the complaint to include breach of contract, intentional infliction of emotional distress, etc. Those claims fairly mirror the claims made by the Appellant in this instant case.

Educator's filed a motion to dismiss Savage's claim, basing their argument on the premise that Savage was not in privity of contract with Educator's. The Court of Appeals agreed that Savage was not in privity of contract with Educator's (the insurance administrator) and dismissed her claims.

The Appellee here argues that an injured party has no right to bring an action against an insurance company for lack of good faith and fair dealing where is no contractual relationship between the injured party and the insurance company. Pixton v. State Farm Mutual Automobile Insurance Company, 800 P.2d 746 (Utah Ct. App. 1991).

However, this case differs significantly from both Savage and Pixton in that, in this case, the Appellant is in privity of contract with the Appellee.

Appellee admits below in their statement of facts in their Memorandum in Support of Partial Summary Judgment. (§3 of Defendant's Memorandum in Support of Motion for Partial Summary Judgment; R. 184)

Additionally, the Appellee here acts as its own insurance administrator. Unlike the Appellee insurance administrator in Savage, which was a third-party entity, the Appellee here is the insured, the insurer, the insurance administrator and the employer of the Appellant. As an employee of the Appellee, the Appellant has privity of contract through that relationship.

In apparently placing its reliance on footnote 1 of Savage, Appellee misreads that footnote. That footnote states:

As Educators correctly points out, the District is self-insured. Educator's contract with the District is to administer the District's worker's compensation claims rather than to provide the insurance. This departure from the typical employer/insurer relationship does not affect our holding today because in either situation the subject contract is between the employer and the insurance company. Id. at 131. (Emphasis added)

First, there is no "contract" between the Appellee and itself in this case. The only contract in this case is an implied employment contract between the Appellant and the Appellees.

Second, unlike Educator's and the school district in Savage, nowhere does either Appellee in this case argue that it is merely an administrator of the other's self-insured worker's compensation plan. In fact, in paragraph 8 of its Answer to the Appellant's Complaint, the Appellees state that they:

. . . admit that these answering Appellees provided their own worker's compensation claims coverage and claims processing . . . (Emphasis added). (R. 18)

The Appellees in this case admit that they:

- 1) Are self-insured for worker's compensation purposes;
- 2) Provide their own claims processing;
- 3) That Appellee Payless is a subsidiary of Appellee May.
- 4) That Appellant is an employee of the Appellee.

In this case the employer (May Department Stores and Payless Shoe Stores), the insurance company (also May Department Stores and Payless Shoe Stores) and the insurance administrator (also May Department Stores and Payless Shoe

Stores) are the same entity.

Unlike the defendant's in Savage, in this case the Appellant's wear all of the hats of employer, insurer, insured and administrator.

Savage and Pixton are distinguishable from the facts present in this case.

III

THE TRIAL COURT ERRED IN CONCLUDING THAT THE PLAINTIFF'S CLAIM FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IS BARRED BECAUSE THE PLAINTIFF DID NOT SUFFER ACTUAL PHYSICAL INJURY FROM THE DEFENDANTS ACTIONS.

The Utah Supreme Court in Hansen v. Mountain Fuel Supply Co. 858 P.2d 970, 218 Utah Adv. Rep. 54 (Utah 1993), examined the issue of whether or not a claim for negligent infliction of emotional distress could be claimed absent a physical injury. After reviewing its decision in Johnson v. Rogers, 763 P.2d 771 (Utah 1988), the court held that a claim for negligent infliction of emotional distress may be maintained for mental injury only.

Although many courts agree that a Appellant must establish some accompanying physical manifestation in order to recover for NIED [negligent infliction of emotional distress], they differ widely regarding the nature of evidence sufficient to establish such harm. See, e.g., DeStorres v. City of Phoenix, 744 P.2d 705, 710 (Ariz. Ct. App. 1987)

(defining standard for injury as "physical harm or medically identifiable effect"); Cathcart v. Keene Indus. Insulation, 324 Pa. Super. 123, 471 A.2d 493, 508 (Pa. Super. Ct. 1984) (same); Laxton v. Orkin Exterminating Co., 639 S.W.2d 431, 434 (Tenn. 1982) (recognizing ingestion of frightening or noxious substance as sufficient physical injury). The language used in section 313 of the Restatement provides some guidance. Subsection (1) allows recovery for "illness or bodily harm." Restatement (Second) of Torts § 313(1) (1965) (emphasis added). The drafters' use of "or" rather than "and" shows an intention to allow a Appellant to recover not only where bodily harm results from emotional trauma, but where "illness" results as well. "Illness" is "an unhealthy condition of body or mind." Webster's New Collegiate Dictionary 566 (1981). From this we conclude that either physical or mental illness may support the NIED cause of action.

A rule allowing recovery for mental illness as well as physical injury serves a major purpose of the injury requirement -- ensuring genuineness of claims. Given recent medical advances in the fields of psychiatry and psychology, it is now possible to establish emotional illness with some degree of certainty. See Terry M. Dworkin, Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box? 53 Fordham L. Rev. 527, 532-33 (1984). A Appellant who can establish through appropriate expert testimony that he or she suffers from mental illness as a result of a Appellees negligent conduct may maintain an action for NIED.

We emphasize, however, that the emotional distress suffered must be severe; it must be such that "a reasonable [person,] normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." Rodrigues v. State, 472 P.2d 509, 520 (Haw. 1970)

Id. at 973. (Emphasis added)

Under the rule outlined in Hansen, it is not necessary for the Appellant to be a "zone of danger" for physical harm in order to maintain a claim for negligent infliction of emotional distress based purely on mental injury. It is enough for the Appellant to suffer purely from mental injury. As the affidavit of Ralph Gant, Ph.D., the Appellant's treating psychologist states, the Appellant has certainly suffered mental injury at the hands of these Appellees. (R. 266-268).

In the earlier case of Hansen v. Sea Ray Boats, 830 P.2d 236 (Utah 1992), the Utah Supreme Court examined a case where four people received an electrical shock while boating at Lake Powell. The plaintiff claimed to have sustained psychological injury from fear when she witnessed harm to her son who had, along with three others, received an electrical shock. The plaintiff had, herself, not been in the water nor had she received an electrical shock or other physical injury. The defendants moved for summary judgment on the grounds that the plaintiff had not been in danger of drowning or receiving an electrical shock nor did she fear at the time that she would drown or receive an electrical shock. Plaintiff claimed that the facts of the case, and

her claim of negligent infliction of emotional distress, brought her within the ambit of section 313 of the Restatement of Torts 2d.

In Hansen v. Sea Ray Boats, supra, the Utah Supreme Court again discussed Judge Durham's opinion in Johnson v. Rogers, supra, the seminal case discussing the theory of "zone of danger" and negligent infliction of emotional distress. The Court also discussed the application of section 313 of the Restatement of Torts 2d.

The Court in Hansen v. Sea Ray Boats stated:

Negligent infliction of injury occurs when a person breaches a duty of care that he or she owes to other persons. Those persons within the scope or "zone" of the defendant's duty are classed as "victims" of an accident, whether or not they incur injuries themselves. "Bystanders" are those persons outside the scope of the defendant's duty of care who may witness or be affected by the accident which as resulted from the breach. In Johnson, a majority of this court adopted the "zone of danger" theory of recovery for negligent infliction of emotional distress. This theory, found in section 313 of the Restatement, allows recovery only for those who are "victims" of another's breach of duty. (Emphasis added)

Id. at 239.

The Court went on to discuss how section 313 and the "zone of danger" theory plays out with regard to a plaintiff who is not physically injured during an occurrence.

Subsection (1) of section 313 imposes liability on a defendant who causes emotional distress if the defendant knows that his or her conduct involved

an unreasonable risk of emotional distress "otherwise than by knowledge of the harm or peril of a third person."

. . .

Subsection (2) of section 313 is clear in its requirement that those seeking to recover for emotional distress caused by witnessing injury to others much be within the zone of danger created by the defendant's breach of duty.

. . .

A reading of the two subsections in section 313 shows that the subsections contain the requirement that a plaintiff be within the zone of danger to recover for emotional distress caused by an accident if the plaintiff is not physically injured in the accident. (Emphasis added)

Id. At 240.

So, in this case, the question to be answered is:

1) Did the Appellees owe a duty of care to the Appellant?

If the Appellees owed a duty of care to the Appellant in this case, then she was within the "zone of danger", and was a "victim" of the Appellee's negligence (as it may be proved to the trier of fact), as outlined by the Utah Supreme Court in Hansen v. Sea Ray Boats and no physical harm is required.

Apparently a fear is safety is not required either. Comment on Subsection (2) of section 313 of the Restatement of Torts states:

In any event, the plaintiff has manifested physical symptoms of her injury in the form of panic attacks and the continued need for psychiatric care and the administration of psychotropic medication.

Also, the Appellees argument below ignores the very real injury that occurs to one who has incurred emotional distress. The Appellees would have the court ignore real injury that occurs with emotional distress and require that a physical injury be present - even when the physical injury would be, of itself, inconsequential. In other words, the Appellees argument would allow a defendant to negligently treat individuals in any fashion that they wanted to as long as the defendant did not actually physically injure the individual.

To deny the Appellant the right to bring a claim for negligent infliction of emotional distress for a mental injury on the grounds that she did not suffer a concurrent physical injury would allow a defendant to inflict a wide

d. The rule stated in Subsection (1) applies only where the negligent conduct of the actor threatens the other with emotional distress likely to result in bodily harm because of the other's fright, shock, or other emotional disturbance, arising out of fear for his own safety, or the invasion of his own interests. (Emphasis added)

Here, the defendants have invaded an interest of the plaintiff, other than putting her in fear of her own safety.

range of very real injury on plaintiffs without allowing the injured party any recourse.

To make such a ruling would deny the existence of very real psychological and emotional abuses which occur daily in our society.

CONCLUSION

The Worker's Compensation act does not provide an exclusive remedy for injuries suffered by a worker outside of the employment relationship, or injuries which occur as a result of bad faith on the part of the employer in administering worker's compensation insurance.

Appellant, through her employment relationship with the Appellees, had the necessary privity of contract in order to bring a bad faith action. In this case, the Appellees wore all of the hats of employer/insurer/insured/administrator.

All of the necessary elements of negligent infliction of emotional distress exist in this case, and the Utah Supreme Court has recognized such an action for mental injury alone in Hansen.

DATED this 15~~th~~ day of July, 1997.

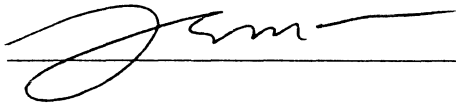
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By: 
LEONARD E. MCGEE

CERTIFICATE OF HAND-DELIVERY

I hereby certify that APPELLANT'S MEMORANDUM OF POINTS
AND AUTHORITIES, was hand-delivered, this 15~~th~~ day of July,
1997, to the following counsel of record:

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No addendum necessary

